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THE
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ANNOTATED

OF CASES DECIDED IN

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ALL DIVISIONS OF THE SUPREME COURT
AND
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CORRIGENDA

- P. 1. *BERRIMAN v. LONDON & NORTH EASTERN RY. CO.* Date of hearing: for "May 23" read "May 2, 3."
- P. 72. *Re SAMUEL.* At end of "Cases referred to" add "(6) *Rogers v. Lambert*, [1891] 1 Q.B. 313; 3 Digest 101, 285; 60 L.J.Q.B. 187; 64 L.T. 406."
- P. 116. *WESTMINSTER BANK, LTD. v. RICHES.* In l. E.1 for "or" read "on."
- P. 295. *BADHAM v. LAMBS, LTD.* For the references in the catchwords and headnote to 1937 Regulations read "S.R. & O., 1941, No. 398."
- P. 378. *I.R.C. v. COOK.* In "Cases referred to," No. 7 should read "*North British Ry. Co. v. Scott*, [1923] A.C. 37; 28 Digest 88, 514; 92 L.J.P.C. 16; 128 L.T. 394; 8 Tax Cas. 332."
- P. 430. *MORRISON v. JACOBS.* In last line of catchwords for "(c. 17)" read "(c. 71)."
- P. 499. *CANADIAN EAGLE OIL CO. v. R.* Dates of hearing: add "July 30."
- P. 611. *PEEK v. TOWLE.* In catchwords, for "Motor Traffic Act" read "Road Traffic Act."
- P. 656. *BLACKWELL v. MILLS.* *Ricketts v. Colquhoun* Tax Cas. reference should read "10 Tax Cas. 118."
- P. 681. *DAVIES v. PREMIER INVESTMENT CO.* L. 7 of editorial note: for "construction" read "consideration."
- P. 686. *Re GRIMWOOD.* L. 6 of editorial note: before "T.L.R." insert "26."
- P. 687. *Re GRIMWOOD.* Solicitors: add *Howard, Kennedy, Genese & Co.*

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

BERRIMAN *v.* LONDON & NORTH EASTERN RY. CO.

[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), **May 23, 1945.**]

D *Railways—Death of signal fitter on line—Statutory duty of railway to appoint look-out—Signal fitter engaged on routine oiling of signal apparatus on permanent way—Whether signal fitter “permanent way man”—Whether oiling “repairing the permanent way”—Railway Employment (Prevention of Accidents) Act, 1900 (c. 27), s. 1 (1), Sched., cl. 12—Prevention of Accidents Rules, 1902 (S.R. & O., 1902, No. 616), s. 9.*

E The respondent railway company employed a gang of signal fitters whose main business was to repair the connections between the signal-boxes and the signals or points. When not needed for such repairs it was the usual practice for the men to engage in routine oiling of the various connections of the signal apparatus on the permanent way. On Dec. 27, 1943, two of the signal fitters were at the work of routine oiling when a train ran over them and they were both killed. There was no look-out man to warn them of danger from approaching trains. The Prevention of Accidents Rules, 1902, r. 9, provides that: “With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out.” The appellant, a widow of one of the deceased workmen, brought an action under Lord Campbell’s Act for damages against the respondents for breach of statutory duty. It was contended for the appellant that under the 1902 Rules, r. 9, (1) the expression “permanent way” meant anything attached to the soil necessary for the running of a railway system; (ii) the word “repairing” by reference to its context meant maintaining and keeping the permanent way in a state of efficiency and, therefore, included routine oiling. It was contended for the respondents that (i) the words “permanent way” were, like the expression in the schedule to the 1900 Act, technical and should not be construed in their ordinary meaning; (ii) the signal apparatus on which the appellant’s husband was working was not part of the permanent way; (iii) notwithstanding that he was working on the permanent way

F

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H

he was not employed as a permanent way man ; (iv) the work of " routine oiling " was not " repairing " :—

HELD : (i) " permanent way men " in their ordinary meaning referred to persons engaged in work in a place which everybody would say was part of the permanent way of a railway line.

(ii) having regard to its context the word " repairing " included " routine oiling."

(iii) the appellant's husband, therefore, was at the material time engaged in work upon the permanent way within the meaning of the Prevention of Accidents Rules, 1902, r. 9. A

[EDITORIAL NOTE. The Prevention of Accidents Rules, 1902, provide for the protection of men engaged in repairing the permanent way, in pursuance of powers given by the Railway Employment (Prevention of Accidents) Act, 1900, which refers to " Protection to permanent way men." It is held here that the normal classification of staff in use on the railways into permanent way men and other classes is not to be applied so as to bring signal fitters killed during a routine oiling of the track into " other classes." The court adopts the broad construction of " permanent way men " accepted by AVORY, J., in the *Vincent* case (1) as including any man engaged in doing anything which makes the rails safe for traffic.

The further question of whether routine oiling can be said to be " repairing " is also decided in favour of the workman ; the word " repairing " in this context includes anything directed to maintaining or preserving the line in full working order.

AS TO PREVENTION OF ACCIDENTS ON RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 281-283, paras. 606, 607 ; and FOR CASES, see DIGEST, Supp. Railways, No. 598a.] B

Cases referred to :

* (1) *Vincent v. Southern Ry. Co.*, [1927] A.C. 430 ; Digest Supp. ; 96 L.J.K.B. 597 ; 136 L.T. 513.

* (2) *Dredge v. Conway, Jones & Co.*, [1901] 2 K.B. 42 ; 24 Digest 924, 166 ; 70 L.J.K.B. 494 ; 84 L.T. 345. C

APPEAL by the plaintiff from a decision of STABLE, J., dated Feb. 21, 1945. The facts are fully set out in the judgments of MACKINNON and MORTON, L.JJ. *N. L. Macaskie, K.C.*, and *John Charlesworth* for the appellant. *F. W. Beney, K.C.*, and *Felix C. Denny* for the respondents. D

MACKINNON, L.J. : This is an appeal by the widow of a man named Berri-man, claiming under Lord Campbell's Act in respect of his death. He was in the employ of the respondents, and on Dec. 27, 1943, he and another man named Rowe were at work upon the line of the respondent railway company, between the rails of the running line, when three trains, two in one direction and one in another, passed at about the same time. E

The engine-driver of one of those trains gave evidence. The tender was in front of the engine. The engine-driver, therefore, could not keep as good a lookout on the line ahead as he would if the tender had been in the normal position. When the engine reached a certain point in this region of the line near the West Parade Junction, he saw these two men at work, or rather bending down and just raising themselves from a bending position, in front of his engine. His engine was far too near to them for him to take any possible steps to check his speed of some 20 miles an hour, and unfortunately they were both run over and both killed. F

The appellant brought her action against the respondents, alleging that her husband's death was caused by the breach by the respondents of a statutory rule and order having the force of a statutory enactment, issued by the President of the Board of Trade pursuant to the provisions of the Railway Employment (Prevention of Accidents) Act, 1900. Sect. 1 (1) of that Act provides : G

The Board of Trade may, subject to the provisions of this Act, make such rules as they think fit with respect to any of the subjects mentioned in the schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway service. H

The schedule specifies twelve different sorts of railway operations, and the last of the twelve is :

Protection to permanent way men when relaying or repairing permanent way.

In pursuance of the powers so delegated, the President of the Board of Trade, on Aug. 8, 1902, issued an order headed : " The Prevention of Accidents Rules,

1902," and r. 9 of that provides this :

With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out.

The appellant alleges that her husband was a man in need of protection pursuant to that rule, that the obligation to provide a person or persons or apparatus for maintaining a good look-out for warning to be given against any train or engine approaching was not fulfilled, and that his death ensued by reason of the breach of that direction.

If the rule did apply to Rowe and Berriman, as to the breach of the duty to provide a look-out there really is no dispute. There was no definite evidence one way or the other whether anybody was so appointed. There is no suggestion that there was, and indeed the respondent company avow that they do not regard people occupied in the duty in which Rowe and Berriman were engaged on this occasion as within the scope of this rule, and they frankly admit that no person or apparatus for the purpose of maintaining a good look-out have been or on this occasion were in fact provided.

The only remaining question, therefore, is whether Rowe and Berriman on this occasion were within the category of "men working singly or in gangs on or near lines of railway," within the meaning of this rule, as authorised by the Act of 1900. Rowe was the senior man and Berriman was the second man in a small gang of four people : Rowe, Berriman, a woman named Mrs. Green and a youth, who were a little gang of signal fitters permanently employed in and about the lines around this region of the West Parade Junction. Their business was to look after the signalling apparatus, not in the signal-boxes but in the connections between the signal-boxes and the signals, wires and rods and other means of communication between the levers in the signal-box and the working of the signals, and, secondly, the working, which was also operated from the signal-box, of the rods and other connecting methods which changed the points of the various lines in this rather complicated junction. There is no doubt that these men on this occasion were working on one of the lines of the railway. The whole question is whether they were, when so working, within the scope of this rule, as people for whose protection persons or apparatus for look-out and giving warning of approaching trains ought to have been provided by the railway company.

I should have added, in further explanation of the sort of duties of the gang of four people whom I have described, that primarily their duty was, when any report had been made as to the defectiveness or ill-working of any part of the apparatus connecting the levers in the signal-boxes with the signals or the points, to go to the spot where any such defect or bad working had been reported and set it right. But in addition to that they had, when not so called upon for specially needed repairs or adjustments, to go through the process of periodically oiling the various connections, the wires and the rods and other metal attachments, presumably where they moved through other metal surrounding. The usual practice was that they went through this routine of oiling things on a Saturday morning, unless on that Saturday morning there were more pressing duties of repair or readjustment in consequence of reports which had been made to them. With regard to this occasion, which was Dec. 27, a bank holiday, the men had, I think, not been at work on the Saturday. On the Monday there was no pressing repair or readjustment reported as needing attention. There was only half the gang there at work, Rowe and Berriman. Mrs. Green and the youth were given a holiday. There being no pressing need of their services at any point which was reported, Rowe and Berriman occupied the morning on this system of what has been described as routine oiling. They were seen by various people carrying their apparatus, an oil-can, a brush and a feeder, working at various points, and after the disaster the oil-can and the brush, I think, were found where they had been working, and Mrs. Green, who gave evidence, and who went up the line after the accident, said that she was

able to see where they had oiled various points in their progress along the line, and she found a large patch of oil at the scene of this unhappy disaster.

Those being the material facts in the case, the plaintiff alleged that the death of her husband had been brought about by reason of the breach by the defendants of this rule, issued under the Act of 1900. The answer of the defendants was in the main two-fold.

In the first place, the Act, in its schedule, speaks of "Protection to permanent way men when relaying or repairing permanent way," and r. 9, in its opening words, says: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines," and it is said that those opening words must be taken to have the same meaning as the passage in the schedule, that it is a rule for the protection of permanent way men, and it was argued that these men, or this gang, if all the gang had been there, were not within the category of permanent way men contemplated by the Act and by the rule. To establish that, chief reliance was placed upon the evidence of the chief engineer of the respondent railway company and the chief engineer of another great line, the London, Midland & Scottish Railway. The effect of that evidence was that in the arrangement of the staff of both those railways—and it can be said of all the English railways—there is a uniform distinction between permanent way men and other classes, and of those other classes the material one in this case is that of signal fitters. Permanent way men, it is said, are all part of the engineering staff, and they and also the signal fitters are subject to the supreme control of the engineer of the company, but there is a regular class of permanent way men and a regular class of signal fitters, and those included in the class of signal fitters are not permanent way men; the permanent way men are those who do the tasks of what I suppose are more often called platelayers, men who look after the actual rails, the ballast underneath the sleepers, and the sleepers and chairs, and are either originally laying those component parts of the permanent way or, in the course of time, are repairing them or keeping them in order. The signal fitters, on the other hand, are a different class of engineers who are concerned with all signalling and point working and other kinds of apparatus of that sort, and it is said that though signal fitters may on occasion, and indeed frequently, be called upon to work at a place which anybody would call the permanent way, those men of that class are not to be included in the description of "permanent way men." That is the first and main contention on behalf of the respondents for saying that this rule does not apply to these two men, Rowe and Berriman, who were engaged in the work that I have described this morning.

The second contention is:

Even if that is answered against us, and these men are to be considered as within the object of the protection of this rule, yet the rule is expressly limited by the words "for the purpose of relaying or repairing the permanent way of such lines."

In the circumstances I have stated, nobody would suggest that they were relaying the permanent way; but it is said that this process that they were carrying out, what is called routine oiling, cannot properly be held to be within the words "repairing the permanent way."

I think that the respondents are wrong in both those contentions. As regards the first, I think it would be quite wrong to suppose that "permanent way men" in the schedule to the Act of 1900, or the phrase, which may even be taken as meaning the same thing, in the rule, "men working . . . for the purpose of relaying or repairing the permanent way"—I think it would be quite wrong to suppose that that referred to any particular class of workman. I think it means people who are, as a matter of the ordinary meaning of the English language, engaged in work in a place which everybody would say was part of the permanent way of a railway line. I do not suppose for a moment that when Parliament passed the Act and the schedule and referred to "permanent way men" they had in contemplation in the least any technical division made by the railway company between the various classes of their workmen. I regard it merely as an ordinary phrase of the English language either to say "permanent way men" or "men working in certain tasks on the permanent way," and I think that Rowe and Berriman were, in the language of the schedule,

on this occasion permanent way men, and were, within the language of the rule, working on the permanent way of the respondents' line. As to that, I have felt very little doubt.

A I might perhaps mention that this point has been previously raised and discussed, though not in this court or in the House of Lords, in a preceeding case. There was a case of *Vincent v. Southern Railway Co.* (1), which was a somewhat similar claim by a widow under Lord Campbell's Act against the Southern Railway Co., which also arose out of this rule. Part of the defence raised then, as appears from counsel's argument on p. 105 of the Record in the House of Lords, with which we have been supplied, was this. Counsel for the defendants is saying that you would have to go to a railway dictionary in order to determine what a permanent way man is, as they understand it, and he goes on to say :

B The men themselves know it ; it is a term used in the working of railways, and their evidence is that they are not permanent way men and would not class themselves as such ; they class themselves as signal fitters, second installers, and so on, but not permanent way men.

C That argument was met by counsel for the plaintiff, at p. 111. This was in the course of a submission to the judge, I may say in the presence of the jury, that there was no case to go to the jury. It was a point of law taken at the end of the plaintiff's case by counsel for the defendants. In the material sentence of his argument, counsel for the plaintiff says :

A permanent way man means a man employed upon the permanent way, and I venture to suggest it would be impossible to say that a man who is employed in doing anything which makes the rails safe for the use of traffic is not a man who is employed on the permanent way.

Upon that submission by counsel for the defendants, AVORY, J., at p. 117, says :

D I think there is evidence here which must be left to the jury as to whether the death was caused by the negligence of the railway company in not providing a look-out man, and upon the construction of the rule, I am as at present advised, against you ; I think that those men were men within the meaning of the rule who were permanent way men engaged in repairing.

E The jury found in favour of the defendants, if I remember aright, on the ground that the company had appointed a look-out and that the death of the man was due to the failure of that man to do his duty, and was not due to any failure of the company to appoint a look-out. It went to the Court of Appeal and the House of Lords on the question of whether that verdict absolved the defendants from liability, and this particular issue, raising the construction of the rule, was not a matter of debate either in this court or in the House of Lords.

F But, so far as it goes, that expression of opinion by AVORY, J., does provide some authority which supports me in the conclusion that I have arrived at, namely, that these men on this occasion were within the meaning of the Rule ; that, to use the language of AVORY, J., these men were men within the meaning of the rule who were permanent way men engaged at their work.

G The remaining and, as I think, the more doubtful and perhaps more difficult question is whether the limitation in the rule of the work of men on the permanent way, or of permanent way men, as being for the purpose of relaying or repairing the permanent way is sufficient to exclude these men on this occasion from the benefit of the rule and its advantages in having a look-out to protect them. There is no question of relaying ; they certainly were not relaying the permanent way. The question remains whether they were repairing it. I think it is a nice point, but, on the whole, I think that they were repairing it within the meaning of the rule. It is said that "repair" means making good something which has gone wrong or is broken. On the other hand, it is said that in effect repairing means maintaining in a state of efficiency. I think H junior counsel for the appellant was justified in saying that you must read the word "repairing" with and having regard to its context. Its context is "relaying or repairing." Relaying, of course, is reconstruction ; "repairing," he suggests, really means maintenance ; and I think it was I who suggested to him that it is similar to the contrasts one would draw between rebuilding and repairing. Upon the whole, I have come to the conclusion that the appellant is right in saying that her husband and Rowe, who I hold at the material time were engaged in work upon the permanent way, were, within the meaning of the rule, repairing the permanent way.

In the result, I think that the appeal succeeds, and there must be judgment in favour of the appellant.

LAWRENCE, L.J. : I agree. I only wish to add that AVORY, J., in summing up the case to the jury in *Vincent v. Southern Ry. Co.* (1), to which my Lord has referred, said this, as appears from p. 247 of the note of his summing up in the record before the House of Lords :

It appears to me to be tolerably clear, at all events, that Vincent and Stockwell [those were the two signal fitters] were men working on the permanent way and for the purpose of repairing the same, because the work that they were doing was necessary to put the line in proper working order.

Those words seem to me to afford the true definition of what "repairing" in this rule means. I would also refer to *Dredge v. Conway Jones & Co.* (2), where it was held that whitewashing of a ceiling came within the definition "construction, repair or demolition" of a building, in the Workmen's Compensation Act. The court there, under the principles laid down by the House of Lords, took the view that the words "construction, repair or demolition" were intended to cover everything in the life of a building ; and in the same way I think that case supports the contention of junior counsel for the appellant, to which my Lord has referred, that the words "relaying or repairing the permanent way of such lines" here are words which are intended to cover the whole of the work which is done in connection with apparatus on the permanent way of a line, "relaying" referring to reconstruction, and "repairing" referring to the work of maintenance, which includes all the routine repairs which have to be done, as AVORY, J., put it, to put the line in proper working order. For those reasons I agree with the judgment proposed.

MORTON, L.J. : Counsel for the respondents arranged his able argument under three heads. First of all, he said that what Berriman was working upon at the time when he met his death was not part of the permanent way, within the meaning of r. 9. Secondly, even assuming that it was part of the permanent way, Berriman was not a "permanent way man," notwithstanding that at the time he was engaged in working on the permanent way. Thirdly, assuming he was wrong on both of these points, that which Berriman was doing was not "repair" within the meaning of the rule. My Lord has put the first two arguments together in his judgment, and they are, of course, very closely connected, but, as counsel divided them in the way I have stated, I should like to say a few words on each head separately.

In the first place, I have come to the conclusion that it would be far too narrow a construction of the words "permanent way" to say that they included, as the judge has held, only the ballast and sleepers, the chairs, the rails and fastenings which carry the trains. I think that this definition of "permanent way" really takes its origin from the division of the workers in the railway for administrative purposes ; and for my part I cannot see why, for instance, a rod which is worked from the signal-box but operates upon the points to shift them to the required position should not be a part of the permanent way. No one doubts that the points themselves are part of the permanent way.

The second point, if indeed it is a separate point, is this. Counsel for the respondents says that although the words "permanent way men" do not appear in r. 9, the court ought to construe r. 9 as applying only to "permanent way men," within the meaning of the twelfth heading in the schedule to the Act of 1900. He draws attention to the wording of sect. 1 (1) of that Act, which is as follows :

The Board of Trade may, subject to the provisions of this Act, make such rules as they think fit with respect to any of the subjects mentioned in the schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway service.

If one turns to the schedule, the twelfth heading, which is the material one, is :

Protection to permanent way men when relaying or repairing permanent way.

Counsel for the respondents suggests that, looking at the schedule, "permanent way men" cannot merely mean men who are engaged on relaying or repairing the permanent way, because if that were their meaning the words would be wholly otiose ; it would be quite enough to say : "Protection to men when

relaying or repairing permanent way." He further submits that one ought so to construe the rule that it is within the powers which were conferred upon the Board of Trade by the 1900 Act. I feel that there is considerable force in that contention, but to my mind the words "permanent way men" do not bear the meaning which counsel for the respondents asks us to attach to them. Assuming that r. 9 should be read as only applying to permanent way men within the meaning of the schedule to the 1900 Act, I should not be prepared to construe cl. 12 of that schedule in such a way that it would depend upon the classification of their employees by railway companies whether they were or were not permanent way men. I do not think it was intended that the question whether a man was a permanent way man and protected by the rule or by the Act should depend merely upon such a classification. I think that the phrase "permanent way men" in cl. 12 of the schedule to the Act means "men whose duty is or includes working on the permanent way, when such men are engaged on relaying or repairing the permanent way." On that construction, it may be that the qualification "permanent way" might have been omitted from the schedule. But for my part I do not think that is a sufficient reason for confining the words to men who are classified as permanent way men by the officials of the railway. It is perhaps not without significance, though it has not affected my judgment either way, that those who framed the rules did not think fit to reproduce the words "permanent way men" in r. 9. I think that Berriman was a man whose duty it was to work on the permanent way, that the apparatus on which he was working at the time of his death was part of the permanent way, and that the first and second arguments put forward by counsel for the respondents must fail.

As regards the question whether oiling is included within the word "repairing" as used in r. 9, I recognise that in the absence of any context indicating a wider meaning it might not be right to construe the word "repairing" as including oiling. As an example of the common use of the word "repairing," I take the case of a man who is oiling his bicycle, either by inserting oil from an oil-can into the concealed parts in order to preserve them and make them work more smoothly, or by applying oil to the visible parts in order to preserve them from rust. If such a man were asked: "Are you repairing your bicycle?" I think he would reply: "No; I am oiling it." There are however contexts in which the word "repairing" can and should be construed so as to include oiling. In the present case STABLE, J., recognised this, for he said:

I do not say that the operation of oiling does not sometimes fall into the category of repair; it might be that a particular rod was reported as not functioning properly and repair or remedy would be required, and the men told off to do that job, on arrival at the defect, might find that the defect in functioning was attributable simply to the fact that a certain amount of oil was required, and it may be that that operation would properly fall into the category of repair, but in this case there is no evidence at all that anything was not functioning properly; in fact the evidence is that everything was functioning properly. There has been no complaint from anybody, and in my view these men conscientiously and properly were filling in an otherwise slack afternoon by carrying out the routine duty of applying oil to the moving parts of the gear where that is required to keep the thing in good working order, and I have come to the conclusion that that cannot properly be brought within the rule, which is confined to men working for the purpose of relaying or repairing, even if the gear from the signal box to the points and so on can properly be described—as I think it cannot—as forming part of the permanent way.

For my part, having regard not only to the context but to the purpose for which the Act of 1900 was passed and the Rules of 1902 were made, I cannot construe "repairing" so narrowly as to exclude oiling altogether or to include it only to such a limited extent.

In my view, "repairing" here means or includes "maintaining in good working order," and I agree that support to that view is given by the decision of this court in *Dredge v. Conway, Jones & Co.* (2). It is true that in that case this court was directing its attention to the word "repair" as used in another Act, and no doubt there are dangers in applying observations made under those circumstances to the construction of the Act before us; but there are certain general observations which I think are of assistance. At p. 46, A. L. SMITH, M.R., said:

The conclusion to be arrived at is that painting, as one of the operations to which a building is exposed, comes under the head of repairs, and, if painting does so, then equally whitewashing. As regards one thing I should, for my part, make an exception, and that is that I should not be disposed to consider that the doing of ornamental work was repairing within the meaning of the Act.

ROMER, L.J., said in the same case, at p. 47 :

The work that was being done was of a substantial character, and was required for the protection and maintenance of the building. The case, therefore, comes within the principle laid down by the House of Lords, and what was being done amounted to repairing within the meaning of the statute.

I think these observations show clearly that in the view of the court work which is directed to maintaining and preserving a particular object may properly be considered as falling within the word "repairing" in a suitable context.

I agree with the order proposed.

Appeal allowed with costs ; judgment for the plaintiff for £1,500 and costs below. Leave to appeal to the House of Lords.

Solicitors : *Pattinson & Brewer* (for the appellant) ; *Miles Beever* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOLAN v. RILEY (COVENTRY), LTD.

WEIGHAM v. RILEY (COVENTRY), LTD.

[COURT OF APPEAL (Scott, Lawrence and Morton, L.JJ.), **March 19, 20, May 4, 1945.**]

Emergency Legislation—Master and servant—Scheduled undertaking closed for stocktaking—Claim for wages—"Holiday"—Holiday "recognised as such"—Essential Work (General Provisions) (No. 2) Order, 1942 (S.R. & O., 1942, No. 1594), arts. 1 (2), 4 (1) (d), (4).

The respondents, an engineering firm, carried on a scheduled undertaking to which the Essential Work Orders applied, and the first appellant, a capstan lathe hand, was employed by them from Jan. 1940. It was the practice of the respondents to close their factory for 3 or 4 days each year for the purpose of stocktaking ; they fixed the actual date each year by putting up a notice some days in advance. On Jan. 1 and 3, 1944, the respondents' factory was closed for this annual stocktaking ; ordinary work was suspended and the appellant received no wages for those two days. The appellant brought an action in the county court on the ground that the respondents' failure to pay him wages for the two days in question was a breach of the Essential Work (General Provisions) (No. 2) Order, 1942. The county court judge found on the evidence that stocktaking was an established practice in the respondent's factory when the appellant started his employment there and that the workers (including the appellant) were employed on the footing that no wages would be paid during the stock-taking period except to those engaged in taking stock. He held that the days in question were holidays within art. 4 (4) of the Order and that they were recognised as such at the respondents' works, as required by art. 1 (2) ; and the appellant's claim, therefore, failed. On appeal, it was contended by the appellant that the county court judge was wrong in holding that the days in question were holidays recognised as such at the respondents' works, within the meaning of the Order, because (a) there were no regular days fixed for the stocktaking, and (b) stocktaking days were not recognised as holidays in the engineering industry :—

HELD : (i) the practice of the respondents in fixing the actual dates for stocktaking each year by putting up a notice some days in advance enabled the days to be identified year by year.

(ii) the Essential Work (General Provisions) (No. 2) Order, 1942, was not limited to any particular industry ; the fact that it was the respondents' practice to suspend work and pay during stocktaking and that the workmen were employed on that footing was conclusive that stocktaking days were "recognised" as holidays in that particular undertaking, within the definition of art. 1 (2) of the Order.

(iii) art. 4 (4) of the Order, therefore, applied and the respondents were not liable for payment of the appellant's wages for the days in question.
Cummins v. Holloway Brothers (London), Ltd. (1) distinguished.

[EDITORIAL NOTE. This case turns upon the meaning to be ascribed to "holiday" in the Essential Work Order. SCOTT, L.J., takes the meaning to be "a time when the employer cannot justly be expected to provide work nor the workman to perform work," and holds that a period of annual stocktaking falls within this definition. *Cummins v. Holloway Bros. (London), Ltd. (1)* is distinguished on the ground that in that case there was an unilateral decision by the employer that a particular day should be a holiday, while in the case here reported there was a recognised practice to close the factory annually for stocktaking which was imported into the pre-existing contract between the employers and the workman.

FOR THE ESSENTIAL WORK (GENERAL PROVISIONS) (No. 2) ORDER, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION, [14] 129.]

Case referred to :

** (1) Cummins v. Holloway Brothers (London), Ltd., [1944] 1 K.B. 323; [1944] 1 All E.R. 296; 113 L.J.K.B. 289; 170 L.T. 153.*

APPEALS by the plaintiffs from orders of His Honour JUDGE FORBES, made at Coventry County Court, and dated Jan. 16, 1945. The defendants carried on a "scheduled undertaking" to which the Essential Work Orders applied. The facts are fully set out in the judgment of SCOTT, L.J.

John Morris, K.C., and N. R. Fox-Andrews for the appellants.

Roland Burrows, K.C., and P. Colin Duncan for the respondents.

Morris, K.C.: There was no regular date fixed for the stocktaking. The two days on which no work was given were not a "recognised holiday" within the true meaning of the Order. There was not sufficient evidence before the judge that they were "recognised as such" in the particular undertaking. The appellants were entitled to be paid for the working hours of a full week as usual.

Burrows, K.C.: [Counsel dealt with the judge's findings of fact] It is submitted that the county court judge did not misconstrue the Order and the findings of fact were unassailable. "Holiday" in this connection means a cessation from work.

SCOTT, L.J.: These two appeals were heard together below as the facts and law on which the main issue turned were common to both, and they were so heard before us.

The respondent company (to whom I will refer as the company) was formed in Jan., 1938. It is an engineering concern, and one of the Nuffield Group. The appellant is a capstan lathe hand and has been employed by the company since Jan., 1940. The question we have to decide is whether he was entitled to wages for the day shifts of Saturday and Monday, Jan. 1 and 3, 1944, when the works were closed for the annual stocktaking, and ordinary work was suspended. To answer that question it is proper and desirable first to ascertain the terms of the pre-existing contract of employment between the parties; but the appeal necessarily involves interpretation of the Essential Work (General Provisions) (No. 2) Order, 1942, made by the Minister of Labour and National Service under the Defence (General) Regulations, 1939, reg. 58A, which was grafted upon, and in important ways remodelled, the common law contract. I shall refer to this Order as "the Order."

From 1938 onwards it was the annual practice of the company to take stock at the end of the company's year, which coincided with the calendar year, and for that purpose to post a notice in advance, and then at the end of December and beginning of January to close the works for three or four days—from a Saturday to Wednesday, or a Friday to Monday or Tuesday. This practice was followed each year except at the end of 1940, when war conditions made it impracticable. Stocktaking was obviously a commercial necessity, and the process of stocktaking could not be carried through without closing down the works; the only persons engaged for the stocktaking being foremen and a certain number of labourers. The company's chief accountant gave evidence in cross-examination "that there was a general custom in the engineering industry entitling workmen to leave on an hour's notice"; and this term no doubt was reciprocal. That evidence was uncontradicted. The judge made certain important findings of fact in regard to the contract of employment

as it obtained before the Order came into operation : (i) that stocktaking is a normal incident of such a business as the company's ; (ii) that it necessitates stoppage of work ; (iii) that stocktaking was an established practice in the company's works at the time when the appellant started his employment with them, and that he was then aware of the practice and of the factory being closed during it ; and, (iv) that the workers in the factory were employed upon the footing (a) that that practice would be followed, and, (b), that no wages would be paid in respect of the stocktaking period, except to those who were engaged in taking stock. It follows that at common law the appellant had bound himself by a term of his contract that during stocktaking he as a lathe hand would be off duty and not entitled to wages.

By his particulars of claim the appellant alleged that the company's failure to pay him his wages during the two stocktaking days was a breach of his contract of employment as well as of the Order ; but that contention is obviously untenable since the practice at the works was undoubtedly a term of the oral contract. Counsel for the appellant consequently argued his claim solely on the footing of a contention that the Order alone created the right the appellant claimed, and that the appeal depended, therefore, entirely on the interpretation of that instrument of delegated legislation. Before discussing its particular provisions it is necessary to consider its legal relationship to the pre-existing common law contract. The Order gives full statutory force to all its terms ; but the legislative method adopted for giving effect to it was to graft its provisions on to the existing contract by way of various alterations in the contractual terms, leaving to the parties their common law rights of action upon the remodelled contract, but adding certain non-contractual rights and duties, together with statutory powers of enforcement and penalties for non-observance. It follows as a logical consequence of this legislative method that, if and in so far as the terms of the previous contract were not cancelled or so amended as to cease to be applicable, the company would have, for the reasons I have already given, a good defence to the claim.

The Order contains no express provision which treats the common law contract as the rough-hewn marble upon which the lineaments of the statutory sculpture are carved by the Order ; but that relationship between the two is, I think, implicit. The incorporation of statutory terms in consensual contracts is a frequent feature of modern legislation. The extreme case is that of statutes which codify branches of the law of contract, such as sale of goods and marine insurance ; but, apart from codification, it is the practice of Parliament when it intends to limit freedom of contract in some particular field, or to impose conditions on the contracting parties, to achieve its end by incorporating the desired terms in the bargain of the parties. The Carriage of Goods by Sea Act, 1924, is an extreme instance of the grafting of compulsory terms upon future contracts. The Rent Restriction Acts are instances of such grafting upon existing contracts. In the present Order, art. 3 clearly presupposes that "the terms and conditions of employment of persons employed in the undertaking" will continue to have the contractual force agreed on by the parties so long as they are not less favourable to the workmen than what the draftsman of the Order seems to have regarded as the model clauses of the Conditions of Employment and National Arbitration Order, 1940. Art. 4 equally presupposes the continuance in operative force of existing conditions of employment ; for it is on that supposition that it inserts in them a series of modifications—which might have been effected consensually, but are imposed by statutory force as terms of the continuing contracts. To the extent that these statutory amendments are inconsistent with the pre-existing contractual terms, the former abrogate and take the place of the latter, wholly or partially as the case may be.

It is on art. 4 and chiefly on para. (1) (d), that the appellant's claim rests. His argument runs thus : (i) Freedom to either party to terminate the contract of employment is narrowly restricted, and subjected to official leave. A week's notice is required from either side, and even so permission of the national service officer is requisite, subject to an appeal under art. 5. (ii) So far as material to the present appeal, each workman is employed by the week. (iii) He is entitled in respect of that week "if capable of and available for work" (as the appellant was) to be paid his agreed wages, for all "the normal working hours" in that

week; and this expression is defined for the purpose of the article as meaning "in relation to . . . a week, the number of hours exclusive of overtime ordinarily worked in the undertaking . . . in that week by the grade or class of persons to which the person concerned belongs." Consequently, it is argued, even if a workman is not given work to do, he is still entitled to be paid, provided only that he is "capable of and available for work," as the appellant in fact was during Jan. 1 and 3, 1944. (iv) The only relevant exception to the employer's positive obligation to pay (other than that contained in provisos (i) and (ii) to art. 4 (1) (d) is the case of "holidays." That is contained in art. 4 (4) in these words:

Where any holiday occurs . . . during any week, the normal working hours of . . . that week shall be treated as reduced by the extent of the holiday and the normal working hours attributable to that holiday.

The first question which arises on this argument is whether the term of the pre-existing contract, that all work should cease during the days of stock-taking with the consequential corollary of no wages, is abrogated by the combined effect of paras. (1) (d) and (4) of art. 4, read together. It is a pure matter of interpretation; but unless the language is too clear for discussion, that would be so unreasonable a provision and so unnecessary for the attainment of the "essential" objects of the Essential Work (General Provisions) (No. 2) Order, 1942, that it would not be right to read it into the Order. I recognise that the obligation to pay is so widely expressed as to make the construction submitted by counsel for the appellant at least grammatically possible, but I doubt whether the language is so plainly unambiguous in his sense as to override so reasonable a term of the old contract. However, we are not compelled in this appeal to decide that question of interpretation; and I will pass to another defence to the claim, on which I am satisfied that the judge's decision in favour of the company was right. For this purpose I assume that the Order does impose an express obligation upon the employer to pay wages whenever a workman is capable of and available for work, unless the employer can bring the case within one of the specific exceptions to art. 4 (1) (d) introduced by one or other of the four paragraphs of art. 4, numbered (2) to (5). The only material one in the present appeal is that of holidays under para. (4). The judge held in terms that the normal stocktaking days are holidays within that paragraph; and, further, that they were recognised as such at the respondents' works, as required by art. 1 (2). The latter is a finding of fact; the former is a conclusion of law, and I agree with it.

The scheme of art. 4 is this. Para. (1) imposes compulsory terms as to service, length and conditions of notice on either side to terminate, and as to the employer's duty to pay wages as long as the contract of service continues operative. Paras. (2), (3), (4) and (5) contain exceptions to the continuous running of the rights and obligations of para. (1). Para. (2) deals with sickness; para. (3) with disciplinary suspension; para. (5) with the employer's inability to provide work when caused by certain strikes. The common characteristic of those three exceptions is supervening inability, without fault on one side or the other, to discharge the mutual obligation of work and pay. Para. (4) about holidays thus seems to fit appropriately into that general conception if, but only if, "holiday" means a time when the employer cannot justly be expected to provide work nor the workman to perform work. And this meaning falls clearly within the ordinary definition of the English word as established by the dictionaries. "Holiday" is defined in the large OXFORD DICTIONARY thus: "A day on which ordinary occupations (of an individual or a community) are suspended; a day of exemption or cessation from work;" in the SHORTER OXFORD DICTIONARY thus: "A day on which work is suspended, a day of recreation or amusement;" in the CENTURY DICTIONARY thus: "A day of exemption from labour, or of recreation and amusement: a day . . . during which ordinary occupations are suspended, either by an individual or by a community." I can see no reason in the terms of the Order why the meaning stated in these authoritative definitions should be rejected; on the contrary I think it appropriate to the context of the Order. Counsel for the appellant argued that the history of agreements in the engineering industry about holidays showed that it was not used in that sense; but the Essential Work (General Provisions) (No. 2) Order, 1942, is not limited to any one industry, and I see

no justification for importing into it any special sense which may or may not have been attached to it in the engineering or any other particular industry. The fact found by the judge that the practice before the war of the company's factory to suspend work and pay during stocktaking is conclusive in my mind that the stocktaking "holiday" was "recognised" within the definition of art. 1 of the Order. I, therefore, conclude that para. (4) applies and requires the deduction of the hours of the stocktaking days: with the result that the judge was right in holding that on that ground the claim failed.

It may be that there is still another answer to the claim. The definition of "normal working hours" is related to "the number of hours . . . ordinarily worked in the undertaking . . . in that week by the grade or class of persons to which" the appellant belonged. In "that" week—the week containing the stocktaking day or days—no hours were "ordinarily worked" in the respondents' factory by persons in the appellants' grade. On the whole I incline to think this answer, too, is good in law; but it was not argued, and I express no final opinion.

The appeal must be dismissed with costs.

LAWRENCE, L.J.: The only question we have to decide in this case is whether the county court judge was right on the facts found by him in holding that Jan. 1 and 3, 1944, were holidays recognised as such in the undertaking of Riley, Ltd., within the meaning of the Essential Work (General Provisions) (No. 2) Order, 1942. In my opinion, the judge's judgment was clearly right, and there is little to add to it.

The appellant's argument was, first, that these days were not holidays but periods of enforced idleness. In my opinion, this argument makes the test of what is a holiday depend upon the point of view of particular workmen which cannot, in my view, be right. To some people holidays are always periods of enforced idleness and minorities have generally to recognise the force of the majority. Secondly, it was said that the stocktaking days in Riley, Ltd., had not occurred at the same time in each year, and, therefore, could not be recognised as holidays; but as this argument would exclude Easter I cannot think that there is anything in it. Thirdly, it was said that there had been no agreement or consultation with the workmen. This argument seems to contradict the judge's findings of fact, and in any event the Order does not provide that the holidays must be agreed upon, or that the workmen must be consulted. Lastly, it was said that an express provision might have been inserted in the Order to provide that stocktaking days should be holidays. Such an argument is obviously inconclusive. It is not necessary to attempt to give an exhaustive definition of what may be holidays recognised as such in the various undertakings affected by the Order. It is sufficient, in my view, to say that the county court judge did not misinterpret the Order, and that there was ample evidence in this case that the days in question were recognised as holidays in the undertaking of Riley, Ltd., and I, therefore, concur in the judgment proposed.

MORTON, L.J.: In my view it is clearly established in the cases before us that the days of stocktaking were days recognised as holidays in the respondents' undertaking, as regards "a class or description of persons," and were, therefore, "holidays" within the meaning of the Essential Work (General Provisions) (No. 2) Order, 1942.

In *Cummins v. Holloway Bros. (London), Ltd.* (1), there was merely a unilateral decision by the employers that a particular day should be a holiday. In the present cases the county court judge has held that there was a practice in the respondents' factory that it should be closed at approximately regular intervals and for approximately regular periods for the purpose of stocktaking. I think there is no doubt, on the evidence, that it was a part of the practice that the employers should fix the actual dates of stocktaking each year by putting up a notice some days in advance. This was done at least from 1938 to 1943 inclusive. The county court judge has also held that the workers in the factory (including the appellants) were employed upon the footing that this practice would be followed, and that no wages would be paid in respect of stocktaking days except to those who were engaged in taking stock. Thus there is here both an agreement between the employers and workmen and a practice. The agreement recognises that on certain days in each year there shall be no work and no pay for a class or description of persons in the respondents' undertaking;

namely, those employees who are not engaged in taking stock. The practice enables the days to be identified year by year, not because they always come, like Christmas Day, on the same date, but because the employers identify them by deciding upon them in advance. The practice and the agreement, taken together, seem to me to amount to recognition in the respondents' undertaking that the stocktaking days are holidays as regards all employees other than those engaged in taking stock. The appellants were not amongst the employees who were engaged in taking stock; therefore, so far as regards a class or description of persons which included the appellants, Jan. 1 and 3, 1944, were "holidays" within the meaning of art. 4 (4) and art. 1 (2) of the Order of 1942.

I agree that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *W. H. Thompson* (for the appellants); *Preston, Lane-Claypon & O'Kelly*, agents for *Herbert & Gowers & Co.*, Oxford (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

HALIFAX AND OTHERS v. THE COAL COMMISSION

[CHANCERY DIVISION (Romer, J.), **February 15, 1945.**]

Mines—Coal mine—Interests vesting in Coal Commission—Lease—Lessees to make annual payments for surface damage—Prior sales of surface by lessors with reservation of right to let down surface without compensation—Right of Coal Commission to receive surface damage payments—Rents and royalties or payments under collateral agreement—Coal Act, 1938 (c. 52), ss. 3, 4, Sched. II, Pt. I, para. 1 and Pt. II, para. 5.

On Apr. 5, 1935, the trustees of an educational foundation granted a lease of certain seams of coal to a colliery company. By cl. 21 of the lease the lessees were to make to the lessors certain payments each year for damage by subsidence to the surface of areas from under which they had removed coal, and the lessors undertook to keep the lessees indemnified against all claims, etc., with regard to any surface damage to these areas. "The lessors" were defined in the lease as including the "persons for the time being entitled to the reversion" and "the lessees" included the persons in whom for the time being the term was vested. The lease further contained a covenant by the lessees to pay "the several rents royalties and sums of money hereinbefore reserved or made payable" (cl. 36), and right of re-entry by the lessors "if the rents royalties or sums of money hereby made payable or any of them or any part thereof respectively" should be in arrears for 30 days (cl. 59). Prior to the date of this lease, the trustees had sold the surface of the areas in question by a number of separate conveyances, reserving in each case the right to work the minerals below the surface so as to let down the surface without paying any compensation. By the Coal Act, 1938, the fee simple in all coal and mines of coal vested in the Coal Commission from July 1, 1942. The company removed coal from two of the areas demised by the lease, and the sum of £53 19s. 10d. was due from the company under cl. 21 of the lease for the year ending June 30, 1943. The question at issue was whether the trustees of the educational foundation were entitled to the sum or whether it was payable to the Coal Commission. It was contended for the Coal Commission that (i) as the fee simple in the minerals demised by the lease had become vested in them by the Coal Act, 1938, the position was the same as though the lessors had assigned the reversion to them subject to and with the benefit of the lease, and, therefore, they were entitled to all the rights and subject to all the liabilities of the original lessors; (ii) the payments in question were a species of rent and, therefore, the Commission were entitled to them in the same way that they were entitled to the minimum rents and royalties payable under the lease. The trustees contended that (i) the general law did not apply in this matter and there was no provision in the Coal Act, 1938, vesting this particular right in the Coal Commission; (ii) the bargain contained in cl. 21 was a personal agreement, collateral to the lease and not incidental to it, and the benefit and burden

of it would not, therefore, pass on an assignment of the reversion but would remain a matter of personal contract between the colliery company and the trustees:—

HELD: (i) upon the true construction of the lease, cl. 21 did not operate merely as a collateral agreement, personal to the contracting parties, but created a liability to make payments just as incidental to the lease as rents and royalties, and these payments were either rents or additional royalties.

Fitzwilliam's (Earl) Collieries Co. v. Phillips (1) applied.

(ii) although the Coal Act, 1938, did not expressly mention payments such as those in question, the right to receive the payments had passed by operation of law to the Coal Commission inasmuch as the statutory vesting in them of the fee simple to the mining lease operated as an assignment to them of the reversion with all the incidents of such an assignment.

Sunderland Orphan Asylum v. River Wear Comrs. (4) followed.

[EDITORIAL NOTE.] The question of whether annual payments to be made by a mining lessee in respect of surface damage are rents and royalties or payments under collateral agreement is primarily one of construction of the lease. The decision in *Fitzwilliam's (Earl) Collieries Co. v. Phillips* (1), where it was held that such payments were "rent" for the purpose of the Finance Act, 1934, s. 21, is not necessarily of general application but LORD ROMER there remarked that "the essential nature of the payments . . . is plainly that of additional royalties" and the court here decides that the payments are clearly related solely to the working of the demised minerals. The right to receive them, therefore, passed to the Coal Commission as one of the incidents of the assignment of the reversion.

AS TO RIGHTS OF SUCCESSORS TO REVERSION, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 369-372, paras. 447, 448; and FOR CASES, see DIGEST, Vol. 31, pp. 423-426, Nos. 5685-5717.]

Cases referred to:

* (1) *Fitzwilliam's (Earl) Collieries Co. v. Phillips*, [1943] A.C. 570; [1943] 2 All E.R. 346; 112 L.J.K.B. 554; 169 L.T. 242.

(2) *Capel v. Buszard* (1829), 6 Bing. 150; 19 Digest 12, 19; affg. *S.C. sub nom. Buszard v. Capel* (1828), 8 B. & C. 141; 6 L.J.O.S.K.B. 267.

(3) *Coltness Iron Co. v. Black* (1881), 6 App.Cas. 315; 28 Digest 6, 13; 51 L.J.Q.B. 626; 45 L.T. 145.

* (4) *Sunderland Orphan Asylum v. River Wear Comrs.*, [1912] 1 Ch. 191; 31 Digest 423, 5684; 81 L.J.Ch. 269; 106 L.T. 288.

ADJOURNED SUMMONS by the present trustees of the Educational Foundation of George Ellis for the determination of the question whether the sum of £53 19s. 10d. which became due from the Cartonwood Collieries Co., Ltd., in respect of the year ending June, 30, 1943, under the provisions of cl. 21 of a consolidated lease dated Apr. 5, 1935, and made between the Official Trustee of Charity Lands of the first part, the then trustees of the said Educational Foundation of the second part, and the said company of the third part, is payable to the plaintiffs or to the Coal Commission. The facts and the relevant clauses of the lease are set out in the judgment.

J. B. Herbert for the plaintiffs, the trustees of the Educational Foundation of George Ellis.

R. F. Roxburgh, K.C., and *Wilfrid Hunt* for the defendants, the Coal Commission.

ROMER, J.: The lease, which was granted pursuant to the provisions of the Charitable Trusts (Amendment) Act, 1855, s. 16, and the Settled Land Act, 1925, s. 29 (2) and (5), and by and with the authority of the Board of Education, comprised certain seams of coal under lands in the parish of Wath-upon-Deerne in the county of York. Cl. 21 of the lease is in the following terms:

The lessees shall also pay to the lessors on July 1 in every year the sum of £10 in respect of damage by subsidence to the surface overlying every acre (and so in proportion for fractions of an acre) from under which the lessees shall have worked gotten and removed the Parkgate seam of coal hereby demised during the preceding year and the sum of £5 in respect of damage by subsidence to the surface overlying every acre (and so in proportion for fractions of an acre) from under which the lessees shall have worked gotten and removed any seam or seams of coal hereby demised (other than the Parkgate seam) during the preceding year (the area to be computed exclusively

of surface lands occupied by the lessees hereunder and exclusively of lands vested in railway or canal companies or other statutory undertakers) and in consideration of the payment of such respective acreage sums of £10 for the Parkgate seam and £5 for each additional seam the lessors will be answerable for and keep the lessees indemnified against all actions claims and demands in respect of loss or damage which may be occasioned or result to the surface of the described lands in respect of which the last mentioned sums shall be payable or to any crops herbage horses cattle or other animals or other things whatsoever thereon or any drains or watercourses intersecting or adjoining the same by reason or in consequence of any damage by subsidence (exclusive of damage to buildings or works) caused by the working getting and removal of the mines and minerals hereby authorised to be worked gotten and removed Provided nevertheless that the said respective acreage sums of £10 in respect of the Parkgate seam and £5 in respect of each additional seam shall be paid once only in respect of one and the same piece of land and one and the self same seam of coal.

A As appears from a letter dated May 4, 1944, written to the colliery company on behalf of the defendants, the company worked got and removed coal in the Silkstone seam and in the Swallowwood seam (being coal demised by the lease) under areas of 8 and nearly 3 acres respectively, and the sums due from the colliery company under cl. 21 of the lease in respect of their working amounted to £53 19s. 10d.

C At various dates prior to the granting of this lease (and, therefore, prior also to Jan. 1, 1939, which was the valuation date for the purpose of the Coal Act, 1938) the trustees of the Foundation had sold and conveyed the surface of these areas, and by each of the conveyances they had reserved full right to work the minerals below the surface of the hereditaments thereby conveyed so as to let down the surface without payment of any compensation to the owners or lessees of such surface. The position accordingly was, on Jan. 1, 1939 (as it was also on the vesting date for the purposes of the Coal Act, i.e., July 1, 1942) that the surface of the areas was vested in separate ownership from the subjacent mines and minerals, which were still owned by the trustees of the Foundation subject to the rights granted to the colliery company by the lease of Apr. 5, 1935.

D I must now refer to some of the other provisions of this lease. Cl. 1 contains a description of the coal demised. Cl. 2 grants :

E . . . liberty and power (subject as hereinafter mentioned) for the lessees and their contractors agents servants and workmen for the lessees' benefit but without entering upon the surface except as hereby authorised to win work get remove convert utilise carry away sell and dispose of the coal hereby demised . . .

Then there is a grant of wayleaves for colliery purposes and to sink shafts and construct works. Cl. 13 deals with the term, which is for 99 years from July 1, 1917 :

F . . . determinable nevertheless and subject as hereinafter mentioned and the period for which this lease is in operation is hereinafter referred to as "the term."

By cl. 35 there is a qualified liberty to withdraw support, in the following terms :

G Subject as herein mentioned and so far as the lessors have power to grant this liberty the lessees may work the coal hereby demised and coal under any adjoining and neighbouring lands without leaving or providing any vertical or lateral support for any of the described lands or any part or parts thereof or any buildings works erections or other things now being or which may hereafter be upon the same or any of them other than and except such support (if any) as may be required to be left under the covenants or provisions herein contained.

Cl. 31 provides :

H It shall be lawful for the lessees to leave without payment therefor such part or parts of the coal hereby demised (if any) as may be reasonably necessary for the support of any part of the described lands or any adjoining or neighbouring lands or any buildings or works for the time being standing thereon respectively as to which overlying adjoining or neighbouring lands buildings or works the lessees shall be liable to pay compensation to persons other than the lessors for liberty to let down or for subsidence damage any dispute as to the extent or sufficiency of or the necessity for or the propriety of leaving the coal for such support to be settled by arbitration but the lessees shall in any event keep the lessors indemnified against all actions claims and demands in respect of any damage which may be occasioned by their workings to such overlying or adjoining or neighbouring lands buildings or works or any other thing thereon

Provided always that this clause shall not authorise the lessees to leave for the protection of any lands buildings or works forming part of statutory undertakings any greater measure of support than may be required by the statutes regulating such undertaking and shall not apply to any lands buildings or works from which the lessees shall at the time of working be exempt from liability for subsidence damage and nothing in this clause shall restrict the lessors right of indemnity under cl. 53 hereof whether any such coal shall or shall not be left unworked.

By cl. 38, which is one of the lessees' covenants, the lessees covenant that they :

... will pay from time to time full compensation for all damage to the surface of the described lands (except damage as to which the lessees may be exempted from liability by reason of the surface damage payment made payable by cl. 21 of this deed and of the exemption in cl. 29 hereof) in the possession of the lessors or their tenants or lessees or to any horses cattle or other animals trees crops or herbage for the time being thereon arising from or caused by any works of the lessees.

Cl. 29 provides :

Before or when the workings of the lessees shall as regards each seam approach within 100 yards or in cases after the date of this lease such distance of 100 yards or a distance equal to one half of the depth of such seam (whichever shall be the greater) of the site of any building which shall for the time being be standing on any part of the described lands (except any part whereof the surface does not now belong to the lessors) the lessees shall give written notice of the fact to the lessors and if within one calendar month after receiving such notice the lessors or their agents shall give written directions to the lessees stating what coal (whether included in this demise or not) shall be left unworked for the support of such buildings the lessees shall comply with such directions and such compliance shall exonerate the lessees from all liability for any damage that may arise to such buildings from the working of any part of the demised coal or of any adjacent coal not so required to be left unworked and any coal hereby demised left unworked in compliance with such directions shall not be paid for by the lessees and if no directions are given within one calendar month after the receipt of such notice the lessees shall be at liberty to work out the coal under and adjacent to the building or buildings specified in such notice without leaving or providing any vertical or lateral support for such buildings and shall be free from and indemnified by the lessors against any liability for any damage that may arise thereto from such workings Provided always that if the lessees neglect to give such notice or shall fail to comply with any directions given by the lessors they shall make or pay compensation for any damage which may be caused to any buildings for the time being standing on the described lands now belonging to the lessors.

It is clear that if nothing further had supervened, all moneys payable by the colliery company under cl. 21 of the lease, including the sums in question in these proceedings, would be payable to and receivable by the plaintiffs, the trustees of the Foundation, the lessors under the lease. The Coal Commission claim, however, that by reason of the operation and provisions of the Coal Act, 1938, the right to receive these moneys has become vested in themselves, since July 1, 1942, to the exclusion of the plaintiffs, and that the plaintiffs are entitled, in substitution for their pre-existing right, to compensation under the relevant provisions of the statute. It is, I think, quite plain that if a right which formerly belonged to the plaintiffs has, without the consent of the plaintiffs, been divested from them and become vested in the defendants instead, this transference must either have been effected by the express provisions of the Coal Act, by reasonable implication from the provisions of the Act or by operation of law. I will accordingly refer now to those parts of the Act which seem to be relevant to the question in issue. Sect. 1 establishes the Coal Commission "to exercise and perform the powers and duties set out in" the Act. Sects. 3 and 4 provide :

3 (1) The Commission shall acquire in accordance with the provisions of this Part of this Act the fee simple in all coal and mines of coal, together with such property and rights annexed thereto and such rights to withdraw support as are hereinafter mentioned, subject to such servitudes, restrictive covenants and other matters adversely affecting any of the said coal or mines as are hereinafter mentioned, and subject to the provisions of this Part of this Act with respect to the retention of interests arising under coal-mining leases and of certain other interests. (2) During the period between Jan. 1, 1939 (in this Act referred to as the "valuation date") and July 1, 1942 (in this Act referred to as the "vesting date") all coal and mines of coal shall be held as if all the existing owners thereof had, in respect of all their interests therein other than retained interests and with full capacity so to do, entered into a contract on the valua-

tion date for the sale thereof to the Commission, at a price to be ascertained by valuation, with provision for completion of the contract on the vesting date. (3) On the vesting date all coal and mines of coal as existing at that date shall vest in the Commission for a title comprising all interests then subsisting in any such coal or mine other than retained interests. [By subsect. (4) there is a definition of "coal."]

A 4 (1) The premises comprised in the contract relating to any coal or mine referred to in subsect. (2) of the last preceding section shall be deemed to include all property and rights, other than rights to withdraw support or rights created by working facilities orders, that would pass with that coal or mine under a conveyance thereof such as is specified in Pt. I of Sched. II to this Act taking effect on the valuation date, and all such property and rights (in this Act referred to as "acquired property and rights") shall be held during the interim period accordingly. (2) The said contract shall be deemed to have been for a sale subject to all matters subject to which the premises comprised therein would pass on such a conveyance as aforesaid. (3) On the vesting date there shall vest in the Commission with any coal or mine of coal (a) all property and rights, other than rights to withdraw support or rights created by working facilities B orders, that would pass with that coal or mine under a conveyance thereof such as is specified in Pt. II of Sched. II to this Act taking effect on the vesting date; and (b) such right, if any, to withdraw support as is under the provisions of Pt. II of Sched. II to this Act to vest therewith. (4) The vesting of any coal, mine of coal, property or rights in the Commission shall take effect subject to all matters subject to which those premises would pass on such a conveyance as is mentioned in the last preceding subsection.

C Sched. II, Pt. 1, para. 1, provides :

The conveyance of any coal or mine of coal to be assumed for the purposes of sect. 4 of this Act shall be a conveyance, to which all persons having any interest other than a retained interest in that coal or mine are conveying parties, to a purchaser for money or money's worth with notice of all matters whereof notice is material, containing, in the cases mentioned in para. 2 of this Schedule, provisions to the effect therein mentioned, but subject as aforesaid not containing any such term or provision as might D have limited the application of the Law of Property Act, 1925, s. 62 or 63, to the conveyance.

Pt. II deals with the vesting of rights to withdraw support :

5. In a case in which the fee simple in the coal or mine, or the term of years under a coal-mining lease thereof, was vested on the valuation date in a person other than the person in whom the fee simple in land supported thereby was then vested, and any E right to withdraw support from that land, other than a right granted by a working facilities order, was then annexed to the coal or mine, there shall vest in the Commission therewith a right to withdraw support from that land similar in all respects, whether as regards terms, conditions, extent, duration (save as in this paragraph provided) or otherwise, to the said right that was then annexed to the coal or mine : Provided that, where the fee simple in the coal or mine and the fee simple in land supported thereby was vested in the same person but the term of years under a coal-mining lease was subsisting in the coal or mine and a right to withdraw support was annexed thereto, F the duration of the right that vests in the Commission shall extend to the whole of the period during which any coal to which the first-mentioned right was annexed remains ungoten.

G Counsel for the defendants contended that as the fee simple in the minerals demised by the lease has admittedly become vested in the Coal Commission by reason of the Act, it follows that the Commission are for all material purposes entitled to all the rights and subject to all the liabilities which attached to the original lessors, and that the position is just the same as though the lessors had assigned the reversion to them subject to and with the benefit of the lease, and that as the payments in question are a species of rent, the Commission are now entitled to them in the same way that they are entitled to the minimum rents and royalties which are payable under the lease. This result, he says, follows as a matter of general law from the vesting of coal which is effected by H the Act. Alternatively he says that the Commission are entitled to the payments by virtue of Sched. II, Pt. II, para. 5 of the Act. Counsel for the plaintiffs on the other hand, says that the general law has nothing to do with the matter ; that the parties' respective rights are governed solely by the Act, and that as there is nothing in the Act which either expressly or by implication vests this particular right in the Commission, it remains and will continue to remain in the property of the plaintiffs. His contention is that the bargain contained in cl. 21 of the lease is a personal agreement, collateral to the lease and not incidental to it, and that accordingly the benefit and burden thereof would not pass on

an assignment of the reversion but would remain a matter of personal contract between the colliery company and the trustees; and that they do so remain notwithstanding the vesting of the coal and mines in the Commission.

This contention is of primary importance from whatever aspect the problem is regarded, whether from that of the general law or from that of Sched. II, Pt. II, para. 5, upon the true construction of which counsel for the plaintiffs argues, the right in question has not passed to the defendants but remains vested in the plaintiffs. If the contention is sound, the result would be curious, for (i) the liability to pay the moneys in question would not pass to an assignee of the term, and (ii) the plaintiffs would continue to be able to enforce the covenant against the colliery company, notwithstanding that they (the plaintiffs) no longer have any interest either in the surface of the lands in question or in the minerals subjacent thereto. The question, however, whether the payments under cl. 21 are or are not "rents," or in the nature of "rents," or "royalties," and as such are incidental to the lease, is primarily a question of the construction and effect of the lease itself. Before further considering its provisions, however, I think it would be convenient to refer to the decision of the House of Lords, in *Fitzwilliam's (Earl) Collieries Co. v. Phillips* (1), in which the quality of moneys similar to those payable under cl. 21 was considered in relation to a taxing statute, *i.e.*, the Finance Act, 1934, s. 21.

The headnote first sets out the material parts of the Finance Act, 1934, s. 21, and then says:

Under a lease executed in 1935 certain mines were demised to the appellants in consideration of rents and payments thereby reserved for a term of 99 years. By cl. 2 the appellants were granted the liberty, in working the minerals, to withdraw support from the surface overlying the area, without making any compensation for damage except as thereafter provided. Under cl. 5, in addition to certain rentals and royalties, the appellants were bound to pay half-yearly certain sums for every acre of so much of the seams of coal as had been worked in the preceding half year, "as liquidated damages in respect of the overlying surface . . . let down": Held, that the payments were "rent" within the definition of sect. 21 (4) (c) of the Act. Held, further (LORD ROMER dissenting), that the leave conferred upon the lessees was an "easement" within the definition of sect. 21 (4) (b) of the Act, and that, accordingly, the rent paid in respect of it could not be deducted from the appellants' profits for the purposes of assessment to income tax.

At p. 577 ([1943] 2 All E.R., at p. 348) LORD RUSSELL OF KILLOWEN said:

Counsel for the appellants argued in the first place that the payments under cl. 5 (3) (F) of the lease did not come within the section's definition of rent. As to this I feel no doubt. In my opinion, while they might well be said to be periodical payments in the nature of rent, they certainly fall within the word "royalty." The fact that in various parts of the lease distinctions are drawn such as "rent or payment" (cl. 6), "rent or sum of money" (cl. 8) and "rents and surface damage payment" (cl. 11), seems irrelevant. If the payment is within the section's definition, the fact that the document calls it something else, or even states that it is not rent, would seem to be immaterial.

At pp. 581, 582 ([1943] 2 All E.R., at p. 350) LORD WRIGHT, said:

There remains the further question whether the payments under cl. 5 (3) (F) are "rent" within the definition of the Act. That definition is very wide. It includes (*inter alia*) a "royalty or annual or periodical payment in the nature of rent": sect. 21 (4) (c). In my opinion, the payments in question come within the definition as being periodical payments in consideration of the enjoyment by the appellant company of the "easement" which, in my opinion, was conferred by the lease. That is my opinion when I look at the substance of the matter and disregard the mere language of cl. 5 (3) (F). The description of these payments as liquidated damages cannot, in my opinion, prevent the respondent from insisting on their true character, if they come, as in my opinion they do, within the definition of rent given in the subsection. The Crown's right to tax cannot be affected by the mere words which the parties have chosen to use. The word "rent" is itself a word of very wide import, not always correctly employed in ordinary current use, particularly in taxing provisions. "Rent" at common law, in its strict sense, could not properly be applied to denote a rent reserved in a lease of incorporeal hereditaments because rent would not issue out of the premises: *Buszard v. Capel* (2), but such payments would ordinarily be called rent. In *Coltress Iron Co. v. Black* (3), LORD BLACKBURN observes on the use which he says is perhaps not quite accurate of the term "rent reserved in a mineral lease" to describe what in one sense is payment by instalments of the price of minerals forming the land. In sect. 21 "rent" is so defined as to include the periodical payments to be

made in respect of any easement within the meaning given in the section. "Royalty" is also included as an alternative category. I think that the periodical payment in this case comes within the statutory definition. It follows that it cannot be deducted by the appellants in computing their annual profits or gains because by sect. 21 (1) of the Act of 1934 it is to "be treated for the purpose of so much of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty."

At p. 582 ([1943] 2 All E.R., at p. 351), LORD ROMER said :

A My Lords, in my opinion, the Court of Appeal were unquestionably right in holding that the payments specified in cl. 5 (3) (F) of the lease of Jan. 31, 1935, are rents within the meaning of the Finance Act, 1934, s. 21. The fact that they are expressed to be payable "as liquidated damages" and "in lieu of paying compensation for damage or injury which may be occasioned by subsidence" seems to me to be quite immaterial. It cannot alter the essential nature of the payments, which is plainly that of additional royalties. A horse may be accepted in discharge of a claim to damages. Nevertheless, it remains a horse.

B That case admittedly did not decide that the payments were "rent" for all purposes. It decided that they were "rent" or "royalties", within the meaning of the Finance Act, 1934, s. 21. I fancy, nevertheless, that LORD ROMER's statement that "the essential nature of the payments . . . is plainly that of additional royalties," indicated that in his view the payments were stamped with that character as between lessor and lessee, and not only that they were of that nature for the purpose of the legislation which was then before the House.

C I will now refer to the further clauses in the lease which are relevant to the point now under consideration. At the beginning of the consolidated lease the trustees of the Educational Foundation of George Ellis are described as

D . . . hereinafter called "the lessors" which expression shall include the persons for the time being entitled to the reversion expectant on the determination of the lease forming the subject of this deed where the context so requires or admits . . . The Cortonwood Collieries Co. are described as :

. . . "the lessees" which expression shall include their assigns where the context so requires or admits.

Cl. 2 provides :

E The lessees for themselves and their assigns hereby covenant with the lessors and as a separate covenant with the Official Trustee that the lessees will henceforth during the residue of the period specified in the consolidated lease pay the rents royalties and sums of money expressed to be reserved and made payable by and perform and observe the covenants and conditions on the part of the lessees in the consolidated lease Provided always that the lessees shall not in any event or combination of circumstances be liable to pay rents or royalties twice over for one and the same subject matter, that is to say, once under the antecedent lease and again under the consolidated lease.

F I have already read cl. 13 which defines the term. Cl. 14 provides :

The following rents shall be paid by the lessees to the lessors by equal half-yearly payments (except the subsidence damage payment reserved by cl. 21) on Jan. 1, and July 1 in every year the first payments whereof shall subject as hereinafter mentioned be considered to have become due and payable on Jan. 1, 1918.

G Cl. 36 is one of the lessees' covenants, and is as follows :

. . . will during the term pay the several rents royalties and sums of money herein-before reserved or made payable on the days hereinbefore appointed for the payment thereof respectively clear of all deductions whatsoever except as mentioned in the next following clause.

Cl. 59 is the power of re-entry, and is as follows :

H If the rents royalties or sums of money hereby made payable or any of them or any part thereof respectively shall be in arrears and unpaid for 30 days after the same respectively shall be payable (whether legally demanded or not) or if (whether any rent shall or shall not be in arrears) the lessees shall be wound up either voluntarily or otherwise (except for the *bona fide* purpose of reconstruction or amalgamation or of assignment or transfer to a company possessed of requisite capital and able properly to carry on the colliery by means of which the coal hereby demised is to be worked) or if the lessees shall make any default in performing or observing any of the covenants provisions or conditions herein contained and on the part of the lessees to be performed and observed then and in any such case it shall be lawful for the lessors although they may not have taken advantage of some previous default of a like nature to re-enter

upon the demised premises or any part thereof in the name of the whole and thereupon this present lease shall absolutely determine but without prejudice to any right of action or remedy which shall have accrued in respect of any branch of any of the covenants and provisions herein contained.

Cl. 61 provides :

When the whole of the coal hereby demised and to be paid for hereunder has been paid for in manner aforesaid it shall be lawful for the lessees to determine this lease at any time by giving not less than 6 calendar months previous notice in writing in that behalf to the lessors or their agents for the time being.

Cl. 66, which is the definition clause, says :

Where the context allows the words "the lessors" include not only the parties hereto of the first part but also the survivors or survivor of them and their or his successors or other the person or persons for the time being entitled to the reversion of the premises hereby demised expectant on the determination of the term hereby granted as the case may be and the words "the lessees" include the person or persons corporate or not corporate in whom for the time being the term is vested.

Having regard to these provisions, it seems to me difficult, if not impossible, to arrive at the conclusion that cl. 21 operates merely as a collateral agreement, a bargain personal to the contracting parties. In my judgment the clause is essentially linked up with the demised coal, and the right to get it and the liability to make the payments reserved is just as incidental to the lease as is the liability to pay the rents and royalties. The definition of the lessors and lessees, the duration of the liability, the right to re-enter on default, and the general framework of the lease all negative the view, in my opinion, that these payments do not touch or concern the thing demised. The question whether such payments fall to be made at all depends solely upon the working of the demised minerals, as also does the ascertainment of the amounts and times of such payments, if any such in fact have to be made. The payments are related solely to the abstraction of coal from the demised seams ; and it is for the protection of those working the coal under the lease that the corresponding indemnity by the lessors is given. In my judgment these payments are either rents or additional royalties. If that be so, *prima facie* the right to receive them has passed, by operation of law, to the Coal Commission, inasmuch as the statutory vesting in them of the fee simple to the mining lease operates as an assignment to them of the reversion, with all the incidents of such an assignment : (see *Sunderland Orphan Asylum v. River Wear Comrs.* (4)). It is true that the Act makes no express mention of payments such as those now in question, but there was, I think, no necessity for it to do so. It is to be observed that the Act does not deal directly with the right to receive royalties in the ordinary sense, but it could scarcely be contended that, by reason of this reticence, that right has not passed to the Commission. In my judgment that right has passed, as also has the right now in issue, under the general law applicable to the position which has been created by the Act.

The conclusion at which I have arrived renders it unnecessary for me to decide the questions which were argued in the alternative, as to the effect, in the present case, of sect. 4 and para. 5 of Pt. II of Sched. II to the Act—the provisions which specifically vest in the Commission certain rights of withdrawing support. These provisions are, in some respects, obscurely framed, and as questions upon them may hereafter arise necessitating an express decision, it would be inadvisable for me to state views upon them which are not, as I think, necessary for the decision of the present case.

For the above reasons I propose to make a declaration that on the true construction of the consolidated lease, and by virtue of the Coal Act, 1938, the moneys mentioned in the summons are payable to the defendants. With regard to costs, unless any special arrangement has been made, the plaintiffs will pay the defendants' costs.

Declaration accordingly.

Solicitors : Warren, Murlon Foster & Swan, agents for Newman & Bond, Barnsley (for the plaintiffs) ; B. S. Jaquet (for the defendants).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

SRINI VASAN (otherwise CLAYTON) v. SRINI VASAN.
[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), May 17,
1945.]

Divorce—Nullity—Petitioner going through a form of marriage with Hindu temporarily resident in England—Respondent already married to Hindu woman in India—Hindu law permitting polygamy—Hindu law recognised in England—Hindu marriage valid—English ceremony of marriage a nullity.

A The petitioner, an Englishwoman, went through a form of marriage with the respondent on Dec. 26, 1936, at a register office in Blackburn, the respondent being by birth a native of Madras, British India, then temporarily resident in this country for medical studies. The respondent was described in the marriage certificate as a bachelor. In June, 1937, the respondent left England to visit his mother who was ill in India. The parties corresponded with each other until Jan., 1938. Subsequently the petitioner caused inquiries to be made in India and it was ascertained by the evidence of witnesses taken on affidavit in India, that the respondent, who was a Hindu by religion, went through a Hindu ceremony of marriage on Mar. 17, 1933, with a Hindu woman at Trivandrum, Travancore State, South India, and that his Hindu wife was alive at the time of the respondent's marriage with the petitioner, such Hindu marriage being potentially polygamous in character. It was also established that the respondent's Hindu marriage was valid according to Hindu law and, as such, would be recognised by the courts in British India. The petitioner sought the dissolution of her marriage with the respondent on the ground of nullity :—

D HELD : the Hindu marriage, though potentially polygamous in character, was to be recognised as valid in English law. Since that marriage was subsisting at the time the respondent went through a ceremony of marriage with the petitioner in England, and since the only kind of marriage which the English law recognises is essentially the voluntary union for life of one man with one woman, the ceremony was a nullity. The petitioner was entitled, therefore, to a decree *nisi*.

[EDITORIAL NOTE. The English matrimonial courts, being ecclesiastical in origin, necessarily regarded marriage from the Christian standpoint, as the voluntary union for life of one man and one woman, to the exclusion of all others. This does not, however, prevent recognition of polygamous marriages between persons domiciled out of England (*Brook v. Brook* (1861), 9 H.L. Cas. 193). The first marriage here took place between Hindus in India, and the second in England between the Hindu husband and a woman domiciled in England, and the court holds that it has jurisdiction to grant a decree of nullity in the case of the second marriage. The decision, therefore, does not appear to have the effect of modifying the well recognised rule applicable to Christian marriages given above.]

F AS TO MARRIAGES RECOGNISED BY ENGLISH LAW, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-285, para. 340 ; and FOR CASES, see DIGEST, Vol. 11, pp. 413-415, Nos. 800-811.]

Cases referred to :

* (1) *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 ; 11 Digest 413, 800 ; 35 L.J.P. & M. 57 ; 14 L.T. 188.

* (2) *Sinha (Peerage) Case* (1939), 171 Lords Journals, 350.

G PETITION for nullity on the ground that at the time when the petitioner went through a form of ceremony of marriage with the respondent, he was already lawfully married to a Hindu woman according to Hindu law. The facts are fully set out in the judgment.

William Latey for the petitioner.

H BARNARD, J. : In this case the petitioner is Grace Srini Vasan, otherwise Grace Clayton, a spinster, and she is praying this court for a decree that the marriage celebrated between herself and Narayana Srini Vasan, the respondent, described in the marriage certificate as a bachelor, be declared null and void.

The ceremony took place on Dec. 26, 1936, at the register office in the district of Blackburn. The petitioner at that time was domiciled in England. After the ceremony the parties lived together at 127, Elgin Avenue, Maida Vale, London, and there is no issue of the marriage. Early in 1937 the respondent, who was by birth a native of Madras City, British India, and whose parents were resident there, informed the petitioner that his mother was ill, and in June,

1937, he left England in order to visit her. The parties corresponded until Jan. 1938, since when the petitioner has had no communication from him. Later the petitioner caused enquiries to be made in India and, as a result of those enquiries, commenced these proceedings.

I am satisfied, by the evidence of witnesses taken on affidavit in India, that the respondent, who was a Hindu by religion, went through a Hindu ceremony of marriage on Mar. 17, 1933, with a Hindu woman at Trivandrum, Travancore State, South India, and thereafter lived with her in the Presidency of Madras. I am also satisfied that this Hindu woman was alive at the time the respondent went through the ceremony of marriage with the petitioner.

At all times the respondent was domiciled in the Presidency of Madras, British India. He was only temporarily resident in this country in order to study medicine.

I am further satisfied, by the evidence of Mr. Nissim, an expert on the law of British India, that the Hindu marriage was a valid marriage and would be recognised as such by the courts of British India, and that, both parties to it being Hindus, their marriage is regulated by Hindu law. That law permits polygamy. The respondent's Hindu marriage was, therefore, a potentially polygamous marriage.

The question which I have to decide is whether this Hindu marriage, notwithstanding its polygamous character, is recognised by this court when exercising its matrimonial jurisdiction invoked in this case. It would be strange if English law were to afford no recognition of polygamous marriages when one realises that England is the centre of a great Empire whose Mohammedan and Hindu subjects number many millions; and, as Mr. W. E. Beckett points out, in his admirable article on "The Recognition of Polygamous Marriages under English Law," in 48 LAW QUARTERLY REVIEW, at p. 345:

Polygamous marriages are, of course, recognised as lawful, and regulated by the law . . . of many countries, parts of His Majesty's dominions . . ., which are governed under laws depending ultimately upon statutes of the Parliament of the United Kingdom . . .; and the Privy Council, exercising its appellate jurisdiction over the courts of these countries, has frequently . . . recognised the legal validity of polygamous marriages . . .

But, none the less, the standard text books suggest that the only kind of marriage which English law recognises is one which is essentially the voluntary union, for life, of one man with one woman, to the exclusion of all others. The Divorce Court, for obvious reasons, would not entertain a matrimonial cause, for the purposes of granting relief or enforcing rights, in respect of a marriage which lacks the characteristics of monogamy; this was the decision of LORD PENZANCE in *Hyde v. Hyde and Woodmansee* (1), but he was most careful to conclude his judgment with the following words, at p. 138:

All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

There are, however, certain passages in the authorities, though only *obiter dicta*, which go far beyond this and support the text book view. I do not propose to refer to these passages, because I have little doubt that they are the *dicta* referred to by LORD MAUGHAM, L.C., in the course of his speech in the *Sinha Peerage Claim* (2). There LORD MAUGHAM says:

On the other hand, it cannot, I think, be doubted now (notwithstanding some earlier *dicta* by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our courts, that the issue are regarded as legitimate, and that such issue can succeed to property in this country with a possible exception which will be referred to later.

Further on in his speech he says:

Having regard to the domicile of the parties to the marriage at the date when it was solemnised, the marriage would properly be treated as valid in this country for all purposes, except it may be the inheritance of real estate before the Law of Property Act, 1925, or the devolution of entailed interests as equitable interests before or since that date, and some other exceptional cases.

The parties referred to by LORD MAUGHAM were the petitioner's parents, who were at all times domiciled in the Presidency of Bengal, British India, and whose marriage took place in Bengal according to the formalities prescribed by

Hindu law and usages, and was, therefore, polygamous; and it was six years later, but before the birth of the petitioner and long before the date of the Patent, that the petitioner's parents joined a religious sect, one of whose main tenets was monogamy, and thus, the petitioner's father not having married a second wife in the interval, converted a polygamous marriage into a monogamous one.

A I have come to the conclusion that the text book view is wrong and, relying as I do on the above passages from LORD MAUGHAM's speech, I ought, therefore, to recognise this Hindu marriage as a valid marriage. To refuse recognition would mean that the respondent would be lawfully married to his Hindu wife in India, and to his English wife in England, but if he brought his Hindu wife to this country and lived with her here, he would be living in adultery with her. It would mean that if the respondent were to live with his Hindu wife in India for a part of the year and for the remainder of the year live with his English B wife in England, he would be living with his lawful wife in each country. It would, therefore, mean that English law would be encouraging polygamy and not frowning upon it. Again, a Hindu marriage is indissoluble; but, according to MULLA'S PRINCIPLES OF HINDU LAW (9th Edn., p. 513) a Hindu wife, deserted by her husband, can sue him for restitution of conjugal rights in the civil courts of British India. If, therefore, the respondent deserted both his Hindu wife C and his English wife, he could be sued for restitution of conjugal rights by both wives, in the courts of their respective countries, and he might be ordered by those courts to return to two different wives in two different parts of the world.

To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based; and, as I decide, to deny D such recognition would be bad law. I, therefore, recognise as a fact the respondent's Hindu marriage, which was subsisting at the time he went through the ceremony of marriage with the petitioner, and therefore this ceremony is a nullity and the petitioner is entitled to a decree *nisi* with costs.

Decree nisi with costs.

Solicitors: *Burton, Yeates & Hart* (for the petitioner).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

E

THE TRUSTEES OF THE WILL OF FLORENCE CUNARD

(deceased) v. INLAND REVENUE COMMISSIONERS.

ELLA MCPHEETERS v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), April 16, 1945.]

F *Income Tax—Annual payments—Capital or income—Direction in will to make up deficiency of income out of capital—Addition taxable income in the hands of the beneficiary—Part of payments received by beneficiary prior to ascertainment of residue—Sums paid out of capital before ascertainment of residue not assessable to income tax—Whether payments out of capital during administration period sums paid “in respect of” a limited interest in the residue of the estate—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21—Finance Act, 1927 (c. 10), s. 26—Finance Act, 1938 (c. 46), s. 30 (1), (2).*

G

H

By her will, dated May 16, 1931, the testatrix devised her freehold property to the appellants trustees in fee simple upon trust to permit her sister to reside therein rent free during the remainder of her life. By cl. 10 of the will the trustees were directed to pay all rates, taxes and other outgoings, including all repairs and insurance, out of the income of the residuary estate, and apply the whole of the remainder of the income for the benefit of the sister of the testatrix. Cl. 10 provided further that, if in any year the income of the residuary estate should not be sufficient to enable the sister of the testatrix to live in the customary degree of comfort, the trustees were empowered to apply such portion of the capital of the residuary estate by way of addition to income as they thought fit; any capital so applied was not to be replaced out of income of a subsequent year but was to be treated as an additional bequest. The testatrix died on Jan. 25, 1935. During each of the years 1938-1939, and 1939-1940

the appellants paid the sister of the testatrix sums out of the *corpus* of the trust fund in addition to the income of the fund. Assessments to income tax for the gross equivalent of the net amounts paid out of capital were made on the appellants under the All Schedules Rules, r. 21. The administration of the estate of the testatrix taking a considerable time and the residue not being ascertained until Feb. 7, 1940, the appellants, while admitting that the proportion of the amount which was paid to the sister of the testatrix out of capital between Feb. 7, and Apr. 5, 1940, was correctly assessed upon them, contended that any part of the capital paid to her prior to Feb. 7, 1940, was not assessable under r. 21. It was contended on behalf of the Crown that the sums paid to the sister of the testatrix prior to Feb. 7, 1940, were assessable under the provisions of the Finance Act, 1938, s. 30, as sums paid during the administration period in respect of her life interest in the estate of the testatrix :—

HELD : (i) where money was directed to be paid out of capital in addition to an income bequeathed by the will, the addition was taxable income in the hands of the beneficiary, and the trustees who paid a net sum were assessable for the tax which should have been deducted.

Brodie v. Inland Revenue Comrs. (1) and *Lindus and Hortin v. Inland Revenue Comrs.* (2) followed.

(ii) the sums of money paid to the sister of the testatrix out of capital before the residue had been ascertained were not assessable to income tax. A sum by way of addition to the income bequeathed by the will was not a sum paid "in respect of" that income within the meaning of those words as used in the Finance Act, 1938, s. 30 (2).

Corbett v. Inland Revenue Comrs. (3) applied.

[EDITORIAL NOTE.] It is well settled that sums paid under the direction of a testator, by the trustees of a will out of capital as an addition to the income of a beneficiary are liable to assessment to income tax. On this point, therefore, the court upholds the decision of the Special Commissioners. Where such payments are made before the residue is ascertained it was held in *Corbett's* case (3) that they are not liable to tax, but the Special Commissioners here attempted to distinguish that decision on the ground that the beneficiary in the case here reported, having a life interest under the will, received such sums "in respect of" her limited interest within the Finance Act, 1938, s. 30 (2). That section, passed in consequence of the decision in *Corbett's* case (3), makes sums paid during the administration period in respect of a limited interest taxable income of the payee, but the court, reversing the decision of the Special Commissioners, holds that it is a forced construction of the Act to regard sums paid by way of addition to income to a beneficiary who happens to have a life interest as paid "in respect of" that interest.

AS TO DEFICIENCY OF INCOME TO BE MADE UP OUT OF CAPITAL, see HALSBURY Hailsham Edn., Vol. 17, pp. 248, 249, paras. 502, 503; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 348a-349b.

FOR THE FINANCE ACT, 1938, see HALSBURY'S STATUTES, Vol. 31, p. 328.]

Cases referred to :

* (1) *Brodie v. Inland Revenue Comrs.* (1933), 17 Tax Cas. 432; Digest Supp.

* (2) *Lindus & Hortin v. Inland Revenue Comrs.* (1933), 17 Tax Cas. 442; Digest Supp.

* (3) *Corbett v. Inland Revenue Comrs.*, [1938] 1 K.B. 567; [1937] 4 All E.R. 700; Digest Supp.; 107 L.J.K.B. 276; 158 L.T. 98; 21 Tax Cas. 449.

(4) *Barnardo's Homes v. Income Tax Special Comrs.*, [1921] 2 A.C. 1; 28 Digest 84, 483; 90 L.J.K.B. 545; 125 L.T. 250; *sub nom. R. v. Income Tax Acts Special Purposes Comrs.*, *Ex p. Dr. Barnardo's Homes National Incorporated Assocn.*, 7 Tax Cas. 646.

CASE STATED under the Income Tax Act, 1918, s. 149, and the Finance Act, 1927, s. 26, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. On an appeal by the trustees of the will of Mrs. Florence Cunard against two assessments to income tax in the sums of £2,826 12s. 3d., and £2,923 6s. 8d., made upon them for the years ending Apr. 5, 1939 and 1940 respectively under the provisions of the Income Tax Act, 1918, All Schedules Rules, r. 21, as amended by the Finance Act, 1927, s. 26, the following facts were found by the commissioners :

Mrs. Florence Cunard died on Jan. 24, 1935. By her will, dated May 16, 1931, she devised under cl. 3 the property known as the Grove to her trustees in fee simple upon trust to permit her sister, Miss Ella McPheeters (who already lived there with her)

to reside therein rent free, during the remainder of her life, the trustees keeping the same in good repair and fully insured and paying all outgoings as in the will provided : in the event of the Grove becoming unfit for habitation through fire or other cause of which fact they—the trustees—were to be the sole judges, the trustees were to provide a suitable house at the expense of the estate of the testatrix.

By cl. 10 of the will the trustees were directed, during Miss McPheeters' lifetime to hold the residuary estate upon trust as follows :

A (a) my trustees shall pay all rates, taxes and other outgoings of every kind and description whatsoever for the maintenance and upkeep of The Grove and the cottages, and outbuildings connected therewith, including all repairs of every kind and insurance out of the income of my residuary estate and subject thereto and to the payment of any other outgoing properly chargeable to the income of my residuary estate they shall pay or apply the whole of the remainder of the income to or for the benefit of my sister during her life.

B (b) if in any year the income of my residuary estate shall not be sufficient to enable my sister to live at The Grove in the same degree of comfort as she now lives there with me then I empower my trustees to apply such portion of the capital of my residuary estate by way of addition to the income as they in their absolute and uncontrolled discretion may think fit moreover any capital so applied shall not be replaced out of the income of the subsequent year but shall be treated as an additional bequest to my sister.

By cl. 11 of the will the trustees were directed after the death of Miss Ella McPheeters to stand possessed of the residuary estate both as to capital and income for such purposes as the testatrix might by codicil direct.

C By cl. 6 of the second codicil to her will, the testatrix, subject to the bequests as contained in the will and the first and second codicils thereto and to the payment of any duties, devised and bequeathed the remainder of her estate including the Grove (if not sold or otherwise disposed of by her) unto the Queen's Institute of District Nursing . . .

The administration of the estate took a considerable time and the residue was not ascertained until Feb. 7, 1940. During the period of administration the income of the estate was not sufficient to enable Miss Ella McPheeters to live at The Grove in the same degree of comfort as she had lived there with the testatrix. The executors of the said will, therefore, in exercise of the discretion conferred upon them thereunder realised certain capital investments and the moneys resulting therefrom were paid to Miss Ella McPheeters to enable her to maintain her position at The Grove.

The following payments were made . . .

				£	s.	d.
E	Year ended Apr. 5, 1937	..	..	2,502	1	11
	Year ended Apr. 5, 1938	..	..	2,910	10	6
	Year ended Apr. 5, 1939	..	..	3,107	15	7
	Year ended Apr. 5, 1940	..	..	2,946	9	0

In order to make the above payments the following amounts were transferred from capital account, the money being raised by sale of investments from time to time, viz :

				£	s.	d.
F	Year ended Apr. 5, 1937	..	..	303	1	2
	Year ended Apr. 5, 1938	..	..	1,501	18	4
	Year ended Apr. 5, 1939	..	..	2,049	5	11
	Year ended Apr. 5, 1940	..	..	1,900	3	4

The sums of £2,826 12s. 3d., and £2,923 6s. 8d., being the amounts of the said assessments, are the gross equivalents of the net amounts of £2,049 5s. 11d., and £1,900 3s. 4d. respectively.

G . . . it was admitted on behalf of the appellants that Miss Ella McPheeters had during the administration period a limited interest in the residue of the said estate within the meaning of the Finance Act, 1938, s. 30.

It was further admitted on behalf of the appellants :—

(i) that all payments made to Miss Ella McPheeters during the years ended Apr. 5, 1938, 1939 and 1940 (other than those made out of capital . . .) fell within the provisions of the Finance Act, 1938, Part III.

H (ii) that if it were found that the said payments . . . made during the year ended Apr. 5, 1939, and the period Apr. 6, 1939, to Feb. 7, 1940, fell within the provisions of the said Part III, then the said assessments were correctly made in the respective gross figures of £2,826 12s. 3d., and £2,923 6s. 8d.

(iii) that, as the law now stood, all payments [made out of capital] between Feb. 7, 1940 (the date of the ascertainment of the residue) and Apr. 5, 1940, were correctly assessed upon the appellants.

It was contended on behalf of the appellants :—

(a) that the payments [made out of capital] were not payments made in respect of the limited interest of Miss Ella McPheeters ;

(b) that . . . the Finance Act, 1938, s. 30, did not apply to the present case ;

(c) that the sums paid were not annual sums.

It was contended for the respondents :—

(a) that the payments out of capital during the years ended Apr. 5, 1938 (for the purpose of charging sur-tax only), Apr. 5, 1939, and Apr. 5, 1940, must be deemed for all the purposes of the Income Tax Acts to have been paid to Miss Ella McPheeters as income for the said years respectively in accordance with the provisions of the Finance Act, 1938, Part III.

(b) that the said payments were annuities or other annual payments within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 21; and

(c) accordingly the assessments made upon the appellants under the said r. 21, as amended by the Finance Act, 1927, s. 26, were properly and correctly made;

(d) alternatively, . . . that the decision in *Corbett v. Inland Revenue Comrs.* (3) had no application to the facts hereinbefore mentioned, and that the sums [paid out of capital] were income in the hands of Miss Ella McPheeters.

The decision of the commissioners was as follows:—

. . . under the provisions of the Finance Act, 1938, s. 30, any sums paid, during the administration period, to a person who has a limited interest in the residue of an estate must be deemed to have been paid to that person as income for the years of assessment in which the sums were paid . . . Miss Ella McPheeters was a person who, during the administration period, had a limited interest in the residue of the said estate and [the] sums were paid to her out of realisation of capital during this period . . . the sums so paid were annual payments . . .

The commissioners held, therefore, that the appeal failed and confirmed the assessments.

Cyril King, K.C., and *A. C. Nesbitt* for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

MACNAGHTEN, J.: By her will, dated May 16, 1931, the late Mrs. Florence Cunard appointed the appellants in the first of these two appeals to be the executors and trustees thereof. By cl. 3 of the will she devised her freehold property known as The Grove, at Stanmore, in Middlesex, to her trustees upon trust to permit her sister, Miss Ella McPheeters (the appellant in the second appeal) who lived with her there, to reside therein free of rent during the remainder of her life, they, during that time, keeping the place in good repair and fully insured and paying all outgoings as thereafter provided.

Cl. 10, paras. (a) and (b) provided as follows:

(a) My trustees shall pay all rates, taxes and other outgoings of every kind and description whatsoever for the maintenance and upkeep of the Grove and the cottages and outbuildings connected therewith including all repairs of every kind and insurance out of the income of my residuary estate and subject thereto and to the payment of any other outgoings properly chargeable to the income of my residuary estate they shall pay or apply the whole of the remainder of the income to or for the benefit of my sister during her life. (b) If in any year the income of my residuary estate shall not be sufficient to enable my sister to live at The Grove in the same degree of comfort as she now lives there with me then I empower my trustees to apply such portion of the capital of my residuary estate by way of addition to the income as they in their absolute and uncontrolled discretion may think fit; moreover any capital so applied shall not be replaced out of income of a subsequent year but shall be treated as an additional bequest to my sister.

By cl. 11 of the will, the trustees were directed, after the death of Miss McPheeters, to hold Mrs. Cunard's residuary estate for such purposes as she might by codicil direct. By cl. 6 of the second codicil dated July 11, 1933, Mrs. Cunard, subject to the bequests contained in her will and the first and second codicils thereto and to the payment of any duties, devised and bequeathed the remainder of her estate to the Queen's Institute of District Nursing absolutely.

Mrs. Cunard died on Jan. 24, 1935. During the years ended Apr. 5, 1939, and Apr. 5, 1940, the income in the hands of the trustees, after discharging all outgoings properly chargeable to income, amounted to no more than £1,058 9s. 9d., and £1,046 5s. 8d. The trustees were of opinion that these sums were not sufficient to enable Miss McPheeters to live at The Grove in the same degree of comfort as she had lived there with her sister, and they, accordingly, in exercise of the power conferred upon them by cl. 10 (b) of the will, applied capital by way of addition thereto. In the year ended Apr. 5, 1939, they raised by the sale of investments and paid over to Miss McPheeters £2,049 5s. 11d., and in the year ended Apr. 5, 1940, £1,900 3s. 4d.

Assessments to income tax in the sums of £2,826 12s. 3d. and £2,923 6s. 8d.

(the gross equivalents of the net amounts of £2,049 5s. 11d., and £1,900 3s. 4d.) were made under r. 21 of the All Schedules Rules, as amended by the Finance Act, 1927, s. 26, upon the trustees, who now appeal to the court from a decision of the Special Commissioners confirming those assessments.

A The administration of Mrs. Cunard's estate took a considerable time, and the residue was not ascertained until Feb. 7, 1940, more than 5 years after her death. Before the Special Commissioners, the appellants admitted that so much of the £1,900 3s. 4d. as was paid to Miss McPheeters out of capital between Feb. 7, and Apr. 5, 1940, was correctly assessed upon them; but they denied that any part of the capital paid to her in the year ended Apr. 5, 1939, and between the Apr. 6, 1939, and Feb. 7, 1940, was so assessable.

B The trustees made this admission because they were advised that the Special Commissioners were bound by the decisions of FINLAY, J., as he then was, in *Brodie's Trustees v. Inland Revenue Comrs.* (1), and *Lindus and Hortin v. Inland Revenue Comrs.* (2). In the former case, the testator, Dr. Brodie, gave a life interest in certain property to his widow, with the proviso that if in any year the income therefrom did not amount to £4,000, his trustees should raise and pay to her out of capital such a sum as, added to the income, would make a total of £4,000, it being his expressed intention that the income payable to her should not be less than £4,000 a year.

C In *Lindus and Hortin v. Inland Revenue Comrs.* (2), the headnote sufficiently states the facts, as follows, at p. 442:

D The trustees under a will were directed, on the death of the testator's widow, which occurred in 1909, to hold in trust one-half of the residuary estate and to pay the income thereof to his daughter for her life without power of anticipation and, on her death for her children in equal shares. The income from the daughter's moiety proved insufficient for the maintenance of herself and her home and by a deed of family arrangement executed in 1925, in which the daughter and all her children joined, the trustees were authorised to supplement the income of the daughter arising from the trust funds by payment to her out of the capital of the fund of such sums as the trustees in their absolute discretion thought necessary and proper for the maintenance of herself and her home. During each of the years 1925-26 to 1929-30 inclusive the trustees paid the daughter sums out of the *corpus* of the trust fund in addition to the income of the fund, while they also paid for her the rates, taxes, etc., on her house and other household expenses.

E It was held by the judge in each of these cases that the sum raised out of capital, in addition to the income bequeathed by the will, was the taxable income of the recipient. In my opinion, those cases cover the present one.

F It was suggested that it was possible to distinguish the present case from those cases, but I am unable to do so. It seems to me that, where money is directed to be paid out of capital in addition to an income bequeathed by the will, the addition must always be taxable income in the hands of the beneficiary, and the trustees who pay a net sum are assessable for the tax which should have been deducted and paid over to the Exchequer.

G As to the payments which were made by the appellants in the present case to Miss McPheeters out of capital before Feb. 7, 1940, under the power conferred upon them by cl. 10 (b) of the will, they contended that those payments were not assessable to tax on the authority of the decision of the Court of Appeal in *Corbett v. Inland Revenue Comrs.* (3). The facts in that case were [21 Tax Cas., at p. 449]:

H Under the will of her father who died on Apr. 22, 1934, the appellant's wife [Mrs. Corbett] was entitled to a life interest in a share of his residuary estate. The executors made up a balance sheet and income account as at Apr. 5, 1935, in which appeared a large sum credited to the appellant's wife . . . but the residuary account of the estate could not be made up until May 7, 1935.

Before that date the executors had paid to Mrs. Corbett a sum of £6,000, part of the amount shown in the balance sheet of Apr. 5, 1935, as being due to her. That sum of £6,000 was paid on account of the life interest to which she was entitled in a share of the residuary estate. The Court of Appeal, consisting of LORD GREENE, M.R., ROMER and MACKINNON, L.JJ., held that they were bound by the decision of the House of Lords in *R. v. The Special Commissioners of Income Tax (ex p. Dr. Barnardo's Homes)* (4) to hold that the £6,000 paid before the residue had been ascertained was not income of the beneficiary and was not assessable to income tax.

I can see no distinction between the present case and the case of *Corbett v. Inland Revenue Comrs.* (3), and, therefore, I hold, subject to one further point to be mentioned, that the sums of money paid to Miss McPheeters out of capital before the residue had been ascertained were not assessable to income tax.

In answer to that plea, it was contended on behalf of the Crown that the sums paid to Miss McPheeters out of capital before Feb. 7, 1940, were assessable by reason of the provisions of the Finance Act, 1938, s. 30, which is in Part III of that Act. It is to be observed that that Act was passed in the year following the decision of the Court of Appeal in *Corbett's case* (3).

The Finance Act, 1938, s. 30 (1) and (2) provides as follows :

(1) The following provisions of this section shall have effect in relation to a person who, during the period commencing on the death of a deceased person and ending on the completion of the administration of his estate (in this part of this Act referred to as "the administration period") or during a part of that period, has a limited interest in the residue of the estate or in a part thereof.

It is admitted that Miss McPheeters had a limited interest in the residue of the estate of Mrs. Cunard : she was entitled to a life interest. Subsect. (2) provides :

When any sum has been paid during the administration period in respect of that limited interest the amount thereof shall, subject to the provisions of the next following subsection, be deemed for all purposes of the Income Tax Acts to have been paid to that person as income for the year of assessment in which that sum was paid, or, in the case of a sum paid in respect of an interest that has ceased, for the last year of assessment in which it was subsisting.

It was argued by the Crown before the Special Commissioners, as it was argued before me, that these payments of capital to Miss McPheeters, in addition to the income to which she was entitled under the will of Mrs. Cunard, were sums paid during the administration period, and that they were sums paid during that period in respect of her limited interest ; that is to say, in respect of her life interest in the estate.

Before the commissioners that argument was successful, and they held that these payments out of capital were payments within the meaning of sect. 30 (2) in respect of the life interest given to her under the will. That appears to me to put a very forced and unnatural construction on the words "in respect of". The words "in respect of", as used in that subsection, appear to me to be the same as "on account of." It cannot, I think, be said that a sum paid by way of addition to the income bequeathed by the will is a sum paid "in respect of" that income within the meaning of those words as used in the Finance Act, 1938, s. 30 (2). Therefore, in my opinion, the decision of the Special Commissioners was erroneous and the assessment in respect of the payments made in the first of the two years should be discharged, and that made in respect of the second year must be reduced to the appropriate figure.

Unless the parties are agreed as to what reduction ought to be made, the case must go back to the Special Commissioners to fix the amount.

The second appeal is an appeal by Miss McPheeters against assessments to sur-tax made upon her upon the footing that the decision of the Special Commissioners in the first appeal was correct. The same adjustments must be made with regard to the assessments made upon her.

The appellants in both cases are entitled to their costs.

Appeals allowed with costs.

Solicitors : *Markby, Stewart & Wadesons* (for the appellants) ; *Solicitors of Inland Revenue* (for the respondents).

[Reported by P. J. JOHNSON, ESQ., Barrister-at-Law.]

ADREMA, LTD. v. JENKINSON.

[KING'S BENCH DIVISION (Humphreys, Wrottesley and Tucker, JJ.),
May 4, 1945.]

Emergency Legislation—Essential work—Appointment of supervisor—Supervisor subsequently directed to other duties in the same department at the same rate of pay—Whether alteration of work equivalent to termination of employment—Essential Work (General Provisions) (No. 2), Order, 1942 (S.R. & O., 1942, No. 1594), art. 4 (1) (a).

The appellants were makers of addressing machines and their undertaking was scheduled under the Essential Work (General Provisions) (No. 2) Order, 1942. In Apr., 1943, H., a young lady, was employed as supervisor in their embossing department. A year later an application by the appellants to the national service officer for permission to terminate her employment was refused. On May 30, 1944, a new supervisor was appointed and a letter was sent to H. containing this information and directing her to perform the duties of an embossing operator. H. refused to do this work, but consented to work and did work as a checker in the department until June 10, 1944, at the same rate of wages as she had been paid prior to May 30, 1944. An information preferred against the appellants alleged that they had without permission terminated the employment of H., a specified person, contrary to the Essential Work (General Provisions) (No. 2) Order, 1942, art. 4 (1) (a). The magistrate held that, on a proper construction of art. 4 (1) (a), there had been an alteration in the work of H. equivalent to a termination of employment and inflicted a fine on the appellants. On appeal, the question for the determination of the court was whether the magistrate had come to a correct decision in law :—

HELD : the alteration in the nature of the work H. was required to do was not necessarily a discharge from her employment by the appellants within the meaning of art. 4 (1) (a) of the Order. There was only a direction to do different work at the same rate of wages and this did not amount to a termination of employment in the appellant's undertaking. The magistrate, therefore, came to a wrong decision in point of law.

[EDITORIAL NOTE. This case considers the construction of the Essential Work Order, which makes it an offence to "terminate the employment" of a person within the Order. The employee here was given different work in an inferior capacity, although at the same wages, and it was held by the magistrate that this amounted to a termination of the employment. The Divisional Court holds that "employment" does not denote work of any particular sort, and that a mere alteration of work is not a termination. Any other construction would lead to the absurd conclusion that every internal redistribution of work would need the consent of the National Service Officer. It must be noted that there might, of course, be occasions when the change of work was such that it was made impossible for the workman reasonably to continue and this might well amount to a termination of the employment.]

FOR THE ESSENTIAL WORK (GENERAL PROVISIONS) (No. 2) ORDER, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION [14] 129.]

CASE STATED by a metropolitan police magistrate. The defendants, Adrema, Ltd., a firm scheduled under the Essential Work (General Provisions) (No. 2) Order, 1942, appealed against a conviction resulting from an information charging them with unlawfully terminating the employment of one Doris Haag, a specified person under the Order, without the permission in writing of the national service officer in breach of art. 4 (1) (a) of the Order. The Essential Work (General Provisions) (No. 2) Order, 1942, art 4 (1) (a) is as follows :

"... (a) the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of a specified person or without terminating such employment cause him to give his services to some other undertaking (except in the case of emergency for a period not exceeding fourteen days), except with the permission in writing of a national service officer."

The facts are fully set out in the judgment of HUMPHREYS, J.

Valentine Holmes and R. T. Paget for the appellants.

W. Arthian Davies and R. S. S. Lane Mitchell for the respondent.

HUMPHREYS, J. : This is a case stated by one of the metropolitan magistrates who convicted the appellants and inflicted a fine upon them for having committed an offence under the Essential Work (General Provisions) (No. 2) Order, 1942.

The language of the information, which follows the words of the Order, is as follows. The offence is stated in those terms, that the appellants, being persons carrying on an undertaking scheduled under that Order, did terminate the employment in the said undertaking of Doris Haag, a specified person within the meaning of the said Order, without the permission in writing of a national service officer. The case stated raises a very short point, but one which counsel for the appellants told us he thought might be of considerable public importance. The Order, by art. 4 (1), provides:

Subject as hereafter in this Order provided, where a person carries on a scheduled undertaking the following provisions shall apply : (a) the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any specified person or without terminating such employment cause him to give his services in some other undertaking (except in a case of emergency . . .).

The question which is raised in this case is whether, upon the facts of this case, the employer, who comes within the language of the Order, did terminate the employment in the undertaking of the person named, who is also a person who comes within the words of the Order. That is the sole question.

The facts as stated by the magistrate are, apart from matters which I need not read in full, because no technical question arises here at all as to both the undertaking and the person concerned being within the language of the Order, that in Apr., 1945, one Doris Haag entered the employment of the appellants as supervisor of their embossing department at the said undertaking and continued to be employed by the appellants in that capacity up to May 30, 1944. On Apr. 17, 1944, the appellants applied for permission to terminate the employment in the undertaking; that is to say, they applied to a national service officer. That application was refused. There was an appeal to the local appeal board, which appeal was dismissed on May 23, 1944. On May 30, the appellants appointed another person, a Mrs. Holland, as supervisor of their embossing department at the undertaking in the place of Doris Haag, and upon that day this letter was written by the appellants to Doris Haag :

Dear Mrs. Haag, This is to advise you that Mrs. Holland has been appointed to take charge of the embossing department at Horley, and from now on you will carry out the work of an embossing operator.

Then the case goes on to say that Doris Haag refused to do the work of an embossing operator, but consented to do the work of a checker and did work as a checker until June 10, 1944, and was paid therefor at the same rate as she had been paid prior to May 30, 1944; that is to say, she was paid the same rate of wages as a checker as she had formerly received as a supervisor—or the supervisor. The work both of a checker and of an embossing operator was different from that of a supervisor, but was performed in the same department of the appellant's works. The case then goes on to state that on June 10, the lady was ill, and she sent a medical certificate. On June 17, she wrote that she regretted she had been absent from work, due to illness, but hoped shortly to return; and added this :

I would point out, however, that I was engaged as a supervisor and certainly would not have left my previous position to take the job of an embossing operator. Therefore, I am not prepared to work in that capacity.

Exactly what is the meaning of that statement in that letter I am not quite clear myself, because she had in fact for some days been engaged in working in the capacity of a checker, and there is no statement in the case that anybody had asked her again to become an embossing operator. Then she goes on to say :

Your letter in this connection has been handed to the national service officer as the matter is of course in his hands.

Upon those facts, it was contended on behalf of the appellants that they had not terminated the employment in the said undertaking of Doris Haag on May 30, 1944, since she continued to be employed in the said undertaking after that date.

On behalf of the respondent it was contended that the appellants had terminated the employment by their letter of May 30, and that to employ her as a checker was to engage her in a fresh employment on different work of an inferior grade, though at the same wages, and, therefore, that the appellants were guilty of the offence with which they were charged.

A Certain authorities were drawn to the attention of the magistrate, but in my view none of those authorities is really of much assistance, in the elucidation of this simple question: Upon the facts of the case, is it right to say that the appellants did terminate the employment in the undertaking of the lady by their letter of May 30. The magistrate then gives his own view as follows:

B I, being of the opinion that, upon the true interpretation of art. 4 of the Essential Work Order, the word "employment" denotes not merely a contractual relationship but work of a particular sort, held, that the alteration of the employee's work was, in the circumstances of this case, equivalent to the termination of the employee's employment, and that the appellants had terminated the employment of the said Doris Haag.

C The first observation I desire to make is that I cannot find in the words which I have read, and which are the essential words of this Order, anything to justify the view of the magistrate that the word "employment" denotes work of a particular sort; and I have great difficulty, therefore, in coming to the conclusion that an alteration in the work of an employee necessarily, at all events, amounts to a termination of the employment of the employee. I am far from saying that there may not be circumstances in which so great an alteration is made in the position of the employee by an order of his employers that it may be said that his position is impossible, and that the effect of what is done by his employers is to terminate his employment altogether. But, dealing with this case as I am disposed to deal with it, solely upon the facts of the case, I cannot agree that it is correct to say, as a matter of English, that this lady's employment was terminated at all.

D I would add that I think it is quite immaterial to consider whether the employers desired to get rid of this lady, and, if they did desire to get rid of her as an employee, what their reason was. I do not think it matters in the least. What we have to consider is what they did, and whether what they did amounts to a criminal offence against the terms of this Order. What they did was not to write a letter saying: "You must leave our employment," or: "We desire E you to leave our employment"; what was done was to direct her that her work was to be altered; and although the letter does not say so, it is clear that the intention was that she was to be paid exactly the same wages as she had hitherto enjoyed, and she was told that she was in the future to work as an embossing operator. In my opinion, to say that a person, because the nature of his work is altered, is necessarily discharged, is impossible. And in this case there was an offer—or rather it amounts to a direction—to do rather different F work from that which she had been doing.

G What the position might have been if the lady had said: "I will work as a supervisor or I will not work at all," I do not stop to enquire. In point of fact, she did not say so; she said she was quite willing to work, and continued in the employment, not as an embossing operator but as a checker; and, so far as the case is stated, she appears not to have lost a day's work but continued to work *de die in diem* at the date of the letter at the same wages as before, and up to June 10, at all events, when she only ceased to work because she fell ill.

H To my mind that is the whole of this question; and my answer to the question asked by the magistrate, which is whether he came to a correct determination in point of law upon the construction of the words of this article of the Order, is that in my opinion he did not come to a correct decision. I do not agree with him that the meaning of the words "terminate . . . the employment or alter the nature of the employment," and I think some such words would be required to justify the conviction of the appellants in this case.

Upon the whole of the facts of the case, therefore, I come to the conclusion that the magistrate was wrong, and that the appellants, whatever they did—and again I do not stop to enquire whether they may have offended against some other terms of this order, or against some other Order—in what they did, did not, in my opinion, terminate the employment in the undertaking of this lady by their letter of May 30.

For those reasons, I think the appeal should be allowed, and the conviction quashed.

WROTTESELEY, J.: I agree; and I agree with the reasons of the judgment just delivered. I should like to add only a few observations. Firstly, I do not think the authorities which have been cited to us in this case are of any service. They are in regard to reinstatement, which is a special question which does not arise in this case, for Mrs. Haag, the lady concerning whom this case is stated, never was, in the ordinary sense, turned out of the employment of the appellants, and, therefore, there was no breach of this article of the Order if we are to interpret it in the plain meaning of the words used. What the Order says is that the person carrying on the undertaking—the appellants here—shall not terminate (except for serious misconduct) the employment in the undertaking of a specified person; and for this purpose Mrs. Haag is a specified person. I think those words mean exactly what they say, that what the appellants here could not do was to dismiss, to use ordinary language, from their employment, or from the employment in the undertaking, this lady. If that be the proper meaning, that is exactly what this Order forbids. It does not forbid the changing of the work upon which any employee is employed; it does not prevent the termination of any particular contract of employment between employer and employee; or, as in many cases, it does not prevent them moving an employee from one type of job on to another type of job, or from one type of work on to another type of work; nor does it prevent them from moving an employee from one grade into another grade.

Had the wider view which has been contended for by counsel [Mr. Lane Mitchell] for the respondent been the true view, I am bound to say that I should have expected some words to be employed which an ordinary person would have understood to mean that, or some words such as to indicate that, the nature of a person's employment inside the undertaking was not to be varied or changed, some words like that from which one would have known at once that it was forbidden. But no such words occur in this article. Moreover, if the view contended for by the respondent be the true view here, it is impossible to see why these words are used to create the alternative offence, "or without terminating such employment cause him"—that is the specified person—"to give his services in some other undertaking (except in case of emergency for a period not exceeding fourteen days)." There would have been no need for that, because quite obviously anything of that kind was already forbidden by the words "employment in the undertaking," construed in the way in which counsel [Mr. Lane Mitchell] for the respondent would have us construe them.

It has, I think, to be borne in mind that this Order creates a criminal offence and, therefore, is not lightly to be extended by the court. Moreover, there is ample scope for the useful employment of this clause without construing it as contended for the respondent. In its plain and ordinary meaning the provision is already salutary, and it prevents a real mischief. It prevents employers tempting away from one another employees by offering them more favourable terms of employment; and sub-para. (b) of art. 4 (1), which is quite obviously complementary to sub-para. (a), similarly prevents the employee running about and trying to extract more favourable terms of employment from other employers. Both those things, in times of emergency like these—and this is emergency legislation—lead to waste of time and fall in production. In addition, of course, we all know that matters such as the proper terms and conditions which ought to be offered to employees are already looked after in other legislative provisions, provisions as well known as this one. On that view of the case, it will be seen that I regard art. 4 (1) (b) as being a complementary provision to art. 4 (1) (a), and there is therefore plenty of scope for the words in art. 4 (1) (a), when read in their plain and natural meaning, without extending them to the meaning contended for by counsel [Mr. Lane Mitchell] for the respondent.

Counsel [Mr. Lane Mitchell] for the respondent was constrained to say that every change of employee from one type of work to another is a crime, if done without the permission of the national service officer. That is a startling proposition for which one would expect at any rate plain terms, this being a statute creating a criminal offence, and that shows by itself that we should resort to the plain and ordinary meaning of the words. There is no suggestion

of *mala fides* here. When questions of *mala fides* arise, no doubt the court will be quite able to deal with the situation. There being nothing of that kind suggested here, in my view the opinion expressed by the magistrate, that the word "employment" here denotes not merely contractual relationship but work of a particular sort, so that an alteration of the employee's work was equivalent to terminating the employment, is a wrong opinion and one which I, like my Lord, cannot agree.

A I agree that the appeal ought to be allowed, and the conviction ought to be quashed.

TUCKER, J. : I agree. It is clear on the facts of this case that at all material times from Apr., 1943, when Doris Haag entered the employment of the appellants, down to June 10, the relationship of employee and employer subsisted, and the relationship of employee and employer in the particular undertaking. It may well be that during that time there may have been a termination of a contract of employment and the creation of a new contract, and there may have been, and probably was, an alteration in the nature of the work performed; but at all material times, without any interval, the relationship of employee and employer was subsisting, and in the one particular undertaking. In those circumstances, it seems to me impossible to say that the employment in the undertaking of any specified person has been terminated.

C I agree that if it had been desired to prohibit and make criminal a transfer or alteration of this kind, clear words should have been used to bring about that result. I think it is impossible to hold that, on the wording of art. 4 (1) (a) of this Order, namely the Essential Work (General Provisions) (No. 2) Order, 1942, it has that effect, and I think that the magistrate came to an erroneous determination on this matter, and I agree that the appeal should be allowed.

Appeal allowed with costs. Conviction quashed.

D Solicitors: *Swann, Hardman & Co.* (for the appellants); *Solicitor to the Ministry of Labour* (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

E THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. HEPPELLES (1932) LTD.

[KING'S BENCH DIVISION (Lewis, Oliver and Birkett, JJ.), April 30, 1945.]

Food and Drugs—Article consisting of or comprising a substance recommended as a medicine—Sale by retail chemist—Article so sold prepacked and labelled when supplies purchased wholesale—Label purporting to state the active constituents of the article—Omission of one of the active constituents on label—Charge of selling a medicine without disclosing its composition—Pharmacy and Medicines Act, 1941 (c. 42), ss. 11 (1) (a), 13 (1) (a).

F The respondents, retail chemists and druggists, had been selling, for a number of years, tablets known as "Taxol" a proprietary preparation for the treatment of constipation. These tablets were already packed in labelled bottles when the respondents purchased their supplies wholesale. G The label showed the proportion of the ingredients contained in each tablet but omitted any reference to another ingredient, namely, aloes, a vegetable drug with a drastic purgative action. On behalf of the appellants, the Pharmaceutical Society of Great Britain, an information was preferred against the respondents, under the Pharmacy and Medicines Act, 1941, s. 11 (1) (a), for unlawfully selling by retail an article consisting of or comprising a substance recommended as a medicine, there not being written on the container or a label affixed thereto, the appropriate designation of the substance so recommended, or of each of the active constituents thereof, or of each of the ingredients of which it had been compounded. At the hearing the respondents relied on the Pharmacy and Medicines Act, 1941, s. 13 (1) (a) and pleaded that they did not know and had no reason to believe that the tablets contained aloes or any other active ingredient not named on the label. The appellants contended that the defence under sect. 13 (1) (a) was only available in cases when the article sold was not recommended as a medicine. The magistrate, forming the opinion that

the contention of the respondents was well founded and a defence in accordance with sect. 13 (1) (a) dismissed the information. On appeal, the question for the court was whether the magistrate came to a correct determination in point of law :—

HELD : it was a sufficient defence for a retailer who dealt in medicines to show that he did not know and had no reason to believe that the article sold by him contained an ingredient which did not appear on the label. The magistrate, therefore, arrived at a correct decision in law in his construction of the Pharmacy and Medicines Act, 1941, ss. 11 and 13. A

[EDITORIAL NOTE.] This case decides a difficult point of construction under the Pharmacy and Medicines Act, 1941. It is held that, on a prosecution under sect. 11 for selling a preparation without disclosure of each of the active ingredients, it is not necessary for the defendant, being a dealer in medicines, to prove that he did not know that what he sold was recommended as a medicine. It is a sufficient defence under sect. 13 for him to prove that he did not know and had no reason to believe that the article sold contained something which did not appear on the label. B

AS TO PHARMACY AND MEDICINES ACT, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 192.]

CASE STATED by a metropolitan magistrate for the opinion of the High Court. The facts are fully set out in the judgment of LEWIS, J.

R. A. Robinson for the appellants.

H. V. Lloyd-Jones for the respondents. C

LEWIS, J. : This is a case stated by a metropolitan magistrate, and raises a short, but at first sight, rather an intricate point under the Pharmacy and Medicines Act, 1941.

The case stated is as follows :

At a court of summary jurisdiction sitting at Bow Street, aforesaid an information was preferred for and on behalf of the Pharmaceutical Society of Great Britain (hereinafter called "the appellants") against Heppells (1932), Ltd. (hereinafter called "the respondents") for that they did unlawfully sell an article, namely, "Taxol" consisting of or comprising a substance recommended as a medicine, there not being written on the container or a label affixed thereto, the appropriate designation of the substance so recommended, or of each of the active constituents thereof, or of each of the ingredients of which it had been compounded—contrary to sect. 11 (1) (a) of the Pharmacy and Medicines Act, 1941, which information was heard by me on July 6, 1944, when I dismissed the information. D

After setting out that the appellants, the Pharmaceutical Society, were dissatisfied, there were the following facts :

Upon the hearing of the said information the following facts were proved or admitted ; (a) The appellants have the duty of enforcing sect. 11 of the Pharmacy and Medicines Act, 1941. The respondents carry on business as retail chemists and druggists at 26, Piccadilly, London, and elsewhere. (b) On Jan. 28, 1944, one Fred Cholerton Highfield, an inspector appointed by the appellants for the purpose of the said Act, bought from the respondents at their shop at Piccadilly aforesaid, in the course of his duty as such inspector, a prepacked bottle of Taxol Tablets, a proprietary preparation marketed by a firm known as Continental Laboratories, Ltd. (c) the said tablets were labelled : Taxol Brand Tablets. Physiological Treatment of Constipation. Formula : Intestinal Gland Ext., 0 gr. 05 ; Biliary Extract, 0 gr. 10. Agar Agar 0 gr. 05. Lactic Ferment, 0 gr. 05. Fiat tablet 0.35 grms. (d) Each of the said tablets contained in addition to the ingredients named on the label a small but substantial proportion of aloes, a vegetable drug with a drastic purgative action not properly described as a physiological process. (e) The respondents sold the said bottle of tablets intact and labelled precisely as they had purchased it by wholesale. They did not know and had no reason to believe that the tablet contained aloes or any other active ingredient not named on the label. (f) The respondents had sold Taxol Tablets for a number of years and were aware of the contents of the said labels. E

Then there follow the arguments before the magistrate who expresses the opinion : F

I was satisfied that the respondents had sold without disclosure of each of the active ingredients a substance recommended as a medicine, but I was not satisfied that sect. 13 (1) (e) provides a defence only when the seller proves that he did not know and had no reason to believe that what was sold was recommended as a medicine. Being of opinion that the contention of the respondents was well founded, I dismissed the said information. The question upon which the opinion of the court is desired is whether upon the above statement of facts I came to a correct determination in point of law. G

H

It is necessary to look at the Pharmacy and Medicines Act, 1941, s. 13 (1), which says this :

It shall be a defence for a person charged with selling or supplying, in contravention of any of the provisions of the last two preceding sections, an article consisting of or comprising a substance recommended as a medicine to prove (a) that he did not know and had no reason to believe, that the article consisted of or comprised such a substance

A Sect. 11 (1) says :

Subject to the provisions of this Act, no person shall (a) sell by retail any article consisting of or comprising a substance recommended as a medicine . . . unless there is written so as to be clearly legible on the article or a label affixed thereto, or, if the article is sold or supplied as aforesaid in a container, on the container or a label affixed thereto or, if the article is sold or supplied as aforesaid in more than one container, on the inner container or a label affixed thereto (i) the appropriate designation of the substance so recommended, or of each of the active constituents thereof, or of each of the ingredients of which it has been compounded ; and (ii) in a case where the appropriate designation of each of the active constituents or the ingredients is written as aforesaid, the appropriate quantitative particulars of the constituents or ingredients.

It is argued for the Pharmaceutical Society that sect. 13 (1), which I have read, is only a defence to the retailer if he can show that he did not know that what he sold was recommended as a medicine. I do not take that view, and I think it is sufficient for him to show, he being a retailer who, of course, deals in medicines, in the words of the section " that he did not know, and had no reason to believe "—then I add in my own words—" that the article sold, Taxol, contained something which did not appear on the label."

In my view the decision arrived at by the magistrate was right, and this appeal must be dismissed ; in other words, the answer to the question which we are asked is : " We are of opinion that the magistrate came to a correct determination in point of law."

OLIVER, J. : I find sects. 11 and 13 extremely difficult to interpret, I am not even clear now what they mean, but I am perfectly in agreement with the judgment my Lord has delivered.

BIRKETT, J. : I am of the same opinion.

Appeal dismissed with costs.

E Solicitors : Ferris, Roberts, Thomas & Co. (for the appellants) ; Lamartine Yates & Morgan (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

SMITH v. THE NATIONAL METER CO., LTD. AND ANOTHER.

F [KING'S BENCH DIVISION (Uthwatt, J. sitting as additional judge), April 16, 1945.]

G *Libel and Slander—Libel—Employer and workman—Workman suffering from dermatitis caused by conditions of employment—Certificate of disablement—Application for compensation—Letter to company's insurers disclaiming liability—Letter containing defamatory statements of workman's uncleanness and exposure of fellow-workers to risk of infection—Appeal to medical referee—Appeal out of time—Purported appointment of medical referee by registrar—Repetition of certain defamatory statements in insurers' letter to medical referee—Privilege—Proceedings before medical referee not judicial in character—Workmen's Compensation (Medical Referees in England and Wales) Regulations, 1932 (S.R. & O., 1932, No. 960), regs. 25, 26, 27, 30.*

The plaintiff, a centre lathe turner employed by the defendant company from Nov. 23, 1942, until Feb. 6, 1943, claimed compensation for disablement by dermatitis, the cause of which she attributed to the fact that her work from time to time had brought her hands in contact with oil. On Jan. 22, 1943, she was certified by the examining surgeon to be suffering from " dermatitis produced by dust or liquids " and that certificate, together with a second certificate to the same effect issued by another doctor, was forwarded to the works manager of the defendant company, the certificate of the examining surgeon being received by the company on Saturday, Jan. 30, 1943. On Feb. 9, 1943, the works manager caused a memorandum

in writing to be sent to the defendant company's insurers which contained the following passages: "During the time from which [the plaintiff] entered our employ and up to the time she was absent due to the above complaint, she has worked only 48 per cent. of possible time. This is due to the fact that her general health has been such that she has had several periods of leave for one reason or another. She has so far made no personal notification to us that she has dermatitis . . . she appears to have made no efforts to consider the other workers, as she still used the washing and drying facilities . . . used by the other workers. A doctor . . . states that he considers the trouble chiefly due to the low state of health and he added that personal cleanliness seems to be partly responsible . . . There has been no previous skin trouble of any kind in these works and we . . . refuse to accept any responsibility . . . the complaint is more political than medical . . ." The insurers, acting on behalf of the defendant company, applied on Feb. 12, 1943, to the county court registrar asking for an extension of the period within which the defendant company might file an application for reference to a medical referee. This application, though not made within 10 days of the receipt of the examining surgeon's certificate, as provided by the Workmen's Compensation (Medical Referees in England and Wales) Regulations, reg. 25, was successful and on Feb. 13, 1943, the registrar extended the period of appeal for seven days. The appeal was posted by the insurers on Feb. 16, reaching the county court registrar on Feb. 18, 1943, and on that day the registrar purported to appoint Dr. M. as medical referee to deal with the case. On Feb. 19, 1943, the insurers sent a letter to Dr. M. which repeated most of the statements contained in the memorandum sent by the defendant company to the insurers. The plaintiff claimed damages for libel against the defendant company and the second defendant as representing the insurers:—

HELD: (i) the statements in the letter of the works manager to the insurers that the plaintiff was an unhealthy woman, of uncleanly habits, and that she, with knowledge of her complaint, was willing to expose her fellow workers to the risk of infection, were untrue and defamatory. Though qualified privilege attached to the occasion on which the letter was sent, malice having been proved, the defendant company was liable in respect of the two libels.

(ii) the application to the registrar to refer the matter by way of appeal to the medical referee not having reached the registrar within the extended period of appeal, the purported appointment of the medical referee was a nullity.

Hill v. Ladyshore Coal Co. (1930), Ltd. (1) and Conroy v. Wilkinson (Thomas) & Sons, Ltd. (2) applied.

(iii) (a) the insurers were the agents of the defendant company in writing the letter to the supposed medical referee and, malice of the company having been proved, any qualified privilege attaching to the letter was displaced thereby. The company and the second defendant were, therefore, jointly responsible unless absolute privilege attached to the letter;

(b) it was unnecessary to come to any conclusion on the question of malice in the insurers.

Smith v. Streatfield (3) followed.

(iv) since the essential function of a duly appointed medical referee was the determination of medical facts and since a medical referee in ascertaining facts was not bound by the strict rules of evidence, the proceedings before him were not judicial in character and, therefore, no absolute privilege attached to statements submitted to him.

Royal Aquarium and Summer and Winter Garden Society, Ltd. v. Parkinson (5) applied.

[EDITORIAL NOTE.] The principal question of interest here decided is whether proceedings before a medical referee appointed under the Workmen's Compensation Act are proceedings before a tribunal exercising judicial functions so as to confer absolute privilege on a defamatory statement submitted to the referee by the parties. It is held that the tribunal does not satisfy the tests laid down by LORD ESHER in the *Royal Aquarium* case (5) and in one particular respect differs fundamentally from a judicial proceeding—namely, the fact that each party may submit a statement unseen

by the other, to the referee. Absolute privilege does not, therefore, attach. The point is discussed upon the basis that the referee was duly appointed, but the appointment was in fact a nullity, since application to the registrar for appointment was out of time. On this point it is held that "application" means time of receipt of application, and not time of posting.

AS TO ABSOLUTE PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 461-466, paras. 563, 564; and FOR CASES, see DIGEST, Vol. 32, pp. 102-109, Nos. 1335-1413.

A AS TO APPOINTMENT OF MEDICAL REFEREE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 975-977, para. 1333; and FOR CASES, see DIGEST, Supp., Nos. 3828d-3834c.

See also WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., pp. 598-600.]

Cases referred to:

***(1)** *Hill v. Ladyshore Coal Co. (1930), Ltd.*, [1936] 3 All E.R. 299; Digest Supp.; 155 L.T. 567; 29 B.W.C.C. 255.

B ***(2)** *Conroy v. Wilkinson (Thomas) & Sons, Ltd.*, [1938] 1 All E.R. 668; Digest Supp.; 31 B.W.C.C. 18.

***(3)** *Smith v. Streetfield*, [1913] 3 K.B. 764; 32 Digest 155, 1876; 82 L.J.K.B. 1237; 109 L.T. 173.

(4) *Munster v. Lamb (1883)*, 11 Q.B.D. 588; 32 Digest 105, 1368; 52 L.J.Q.B. 726; 49 L.T. 252.

***(5)** *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431; 32 Digest 128, 1592; 61 L.J.Q.B. 409; 66 L.T. 513.

C **(6)** *Dawkins v. Rokeby (Lord)* (1873), L.R. 8 Q.B. 255; 32 Digest 102, 1339; 42 L.J.Q.B. 63; 28 L.T. 134; *affd.* (1875), L.R. 7 H.L. 744.

(7) *Chuter v. Ford (J.J.) & Sons, Ltd.*, [1915] 2 K.B. 113; 34 Digest 468, 3830; 84 L.J.K.B. 703; 112 L.T. 881; 8 B.W.C.C. 160.

(8) *Boswell v. Partridge, Jones & John Paton, Ltd.*, [1941] 2 K.B. 300; [1941] 2 All E.R. 740; 34 B.W.C.C. 165.

D ACTION by the plaintiff for libel. The facts are fully set out in the judgment. *F. W. Beney, K.C.*, and *Gilbert C. Dare* for the plaintiff.

P. Colin Duncan and *A. L. Gordon* for the first defendants.

G. O. Slade, K.C., and *R. M. H. Everett* for the second defendant.

UTHWATT, J.: In these proceedings the plaintiff alleges that she has been libelled by her former employers, the defendants, the National Meter Co., Ltd. (whom I will call "the company"), and the defendant, Gibson, who is a member of a Lloyds syndicate, with whom the company was insured against Employers' liability. That syndicate calls itself the British Standard Assurance Association, and I will refer to the Association as "the insurers." The insurers maintain a claims department, of which Buss is the manager. One Bagrie is employed in that department and he appears to have been in charge of the claim by the plaintiff which has led to these proceedings.

F The plaintiff, having received a short training in munition work, began work with the company on Nov. 23, 1942, the works manager being A. S. Ladley. On account of influenza she was absent from work from Dec. 2, 1942, till Dec. 16, 1942. Her only other absence from work, apart from absence due to dermatitis, was for two days. As regards her work, I find as a fact that the plaintiff's work was such as from time to time brought her hands into contact with oil, though she was often employed on clean dry materials entirely free from oil, and that Ladley at all material times knew that some of her work was likely to and did bring her hands into contact with oil. In the early part of 1943, owing to the condition of her hands, she consulted Dr. Held, who sent her to Dr. Forman, a dermatologist at Guy's Hospital. She stopped work on Jan. 12, and saw Dr. Forman on Jan. 13. He certified that she was suffering from dermatitis and was unable to follow her employment. His certificate was sent to Ladley in a covering letter, dated Jan. 14.

H Following on letters dated Jan. 15 and 18, passing between Ladley and Dr. Forman (Dr. Forman stating in his letter that the plaintiff's dermatitis had been provoked by an external irritant) there was towards the end of January a telephone conversation between them. I accept Dr. Forman's version as being substantially accurate. I find as a fact that Dr. Forman did not say anything to the effect that the plaintiff attended him in a grubby condition. Further, though the effect of personal cleanliness and general health in relation to dermatitis was discussed, I find as a fact that Dr. Forman did not say or give Ladley any reason to infer that his opinion was that either of these matters had anything

to do with the plaintiff's condition. Ladley may well have baited his hook to get this opinion; but in my view he failed to catch his fish and knew that his creel was empty. On Jan. 22, 1943, the plaintiff was certified by Dr. Gilchrist (the examining surgeon under the Act) to be suffering from "dermatitis produced by dust or liquids," a disease to which the Workmen's Compensation Act applies. On Jan. 26, 1943, the plaintiff returned to work, Dr. Held certifying that she had recovered from dermatitis. On Jan. 30, 1943, the company received from the plaintiff, through her solicitor, in a letter dated Jan. 29, 1943, a copy of Dr. Gilchrist's certificate, dated Jan. 23, 1943, and a claim for compensation under the Workmen's Compensation Act. In that certificate the process in which she is supposed to have stated that she was employed at, or immediately before, the date of disablement is described as "centre lathe turning; machine oiling." That statement is incorrect, but I think that the mistake was due to an error on the part of the doctor. Her work was of various kinds, but, speaking generally, she was employed as a centre lathe turner. On Feb. 6, in consequence of another attack of dermatitis, the plaintiff gave up her work with the company. On Feb. 8, 1943, the plaintiff sent to Ladley in a covering letter a certificate of Dr. Dawkins that she was suffering from acute dermatitis and was unable to follow her occupation. That letter and certificate were, like Dr. Forman's certificate and the plaintiff's letter which enclosed it, in Ladley's possession when he wrote the memorandum of Feb. 9, to which I will shortly refer.

The only other matter that I need here mention is that the plaintiff from time to time complained to Ladley about the washing facilities, which were somewhat rudimentary, and he was helpful in the matter. He suggested that she should bring her own towel. That she did not do. The plaintiff continued to use these facilities, notwithstanding her knowledge that she was liable to get dermatitis, but she had been advised that dermatitis was not infectious. The plaintiff tried after her return on Jan. 26 to keep her hands from contact with oil by wearing gloves, but this precaution proved ineffective and was quickly dropped. On Feb. 9 Ladley sent a memorandum in writing to the secretary of the company, with a view to that memorandum being passed on to the company's insurers, and to that end a copy of the memorandum was on Feb. 11 sent by the company to Matthews, Wrightson & Co., their insurance brokers.

It is claimed that the memorandum and the copy labelled the plaintiff. It runs as follows:

During the time from which Mrs. Smith entered our employ and up to the time she was absent due to the above complaint, she has worked only 48 per cent. of possible time. This is due to the fact that her general health has been such that she has had several periods of leave for one reason or another. She so far has made no personal notification to us that she has dermatitis, although for some time previous to being absent she has, we find, been treating herself with a lotion. During this time she appears to have made no effort to consider the other workers, as she still used the washing and drying facilities which are used by the other workers. A doctor at Guy's Hospital has been in communication with us and states that he considers the trouble to be chiefly due to the low state of health and he added that personal cleanliness seems to be partly responsible, as Mrs. Smith, after three days absence from work, attended him in a grubby state. There has been no previous skin trouble of any kind in these works and we, therefore, in view of all the circumstances, refuse to accept any responsibility for this trouble. The opinion of the writer is that the complaint is more political than medical and she probably had the complaint before coming to us. It is just as possible for her to have contracted it in her household work as in our works.

The letter is obviously indefensible; and that is the mildest term which can be applied to it. The plaintiff had in fact only worked approximately 48 per cent., or thereabouts, of her possible time. Ladley knew that a fortnight's absence was due to influenza and he knew about the dermatitis. The reference to general health gives a false impression. The statement about the absence of any personal notification was true only if one is prepared to neglect the fact that Ladley had received two doctor's certificates stating that she was suffering from dermatitis and that both had been enclosed in letters written by the plaintiff. Ladley's explanation is that by "personal notification" he meant notification in person. Ladley's idea of the meaning conveyed by words seemed throughout to be curious.

As regards the next statement, beginning with the words "During this time," I have stated the facts as to the plaintiff's conduct, but there were, as Ladley knew, no other facilities at the works at her disposal.

The second paragraph is untrue, as I have held, and I am unable to accept Ladley's evidence that at the time he wrote the memorandum he believed that Dr. Forman had in fact made the statements which the memorandum attributes to him. I may observe in passing that Ladley, in answer to a question (which he understood in a sense different from that intended by his questioner) said that he had some difficulty in accepting some of Dr. Forman's statements.

Upon the concluding paragraph I make no comment beyond this: that Ladley was entitled to express any opinion he honestly entertained, but the ordinary man, reading the reference to the complaint being more "political than medical", would not take it as meaning merely, as Ladley said in his evidence, accepting a *tabula in naufragio* placed before him in cross-examination, that the plaintiff was making a mountain out of a molehill, and I do not accept that as its meaning.

Taking the letter as a whole, it conveys to my mind the imputation that the plaintiff was an unhealthy woman, of uncleanly habits which were in part responsible for her skin trouble and that she, with knowledge of her complaint, was quite willing unnecessarily to expose her fellow workers to the risk of infection. The memorandum is in law capable of being defamatory and is defamatory in fact. Justification is not pleaded. Qualified privilege attached to the occasion on which the memorandum was sent by Ladley to the secretary of the company and to the occasion on which a copy was sent by the company to Matthews, Wrightson & Co. There is ample evidence of malice and I hold that there was malice in fact. The company is accordingly liable in respect of these two libels.

There remains to be dealt with a third document, signed by A. H. Buss, which the plaintiff alleges to be a libel, for which the company and the defendant Gibson are liable. It is convenient at the outset to state the effect of the regulations as to medical referees made under the Workmen's Compensation Act, so far as they bear upon the points involved in this case.

Under reg. 25 an employer aggrieved by the action of a certifying surgeon in relation to his certificate may within ten days of the receipt of the notice of disablement apply to the registrar of the appropriate county court for the matter to be referred to a medical referee (who is to be selected from a panel of duly qualified medical practitioners appointed by the Secretary of State), subject to a proviso that it is within the discretion of the registrar, on good cause shown, to extend by not more than seven days the period in which the application is required to be made. Under reg. 26 any application under reg. 25 is to be accompanied by the certificate, or a copy thereof, of the certifying surgeon and by any available report of any medical practitioner by whom the workman has been examined. Under regs. 26 and 27 the registrar, if the application is in order, is bound to refer the matter to a medical referee and to make an order directing the workman to submit himself for examination by the medical referee, with which order the workman is bound to comply. The duties of the referee then begin. He is to appoint a day for the personal examination of the workman and is to notify both parties of the day so appointed. The workman and the employer, if the applicant, are bound to attend on that day. If they fail to do so, (subject to a power to adjourn) the medical referee is to decide on the matter on such information as may be available with or without a personal examination (reg. 30). Except as provided by reg. 30, the medical referee is bound to make a personal examination of the workman and he is also bound to consider any statements made or submitted by either party. The medical referee is to give his decision on the matter referred to him in a certificate which is to follow one or other of the prescribed forms. (See sect. 43 (1) (f) of the Act and reg. 35). The ambit of the enquiry is, therefore, determined by the form of the certificate which may possibly be given. In every case the question to be determined is whether at the date of the certifying surgeon's certificate the workman was or was not suffering from the scheduled disease and, if so suffering, whether he was or was not thereby disabled from earning full wages at the work at which he was employed. It may also be necessary for the medical referee to determine the date at which disablement from the disease began.

In addition the medical referee is to certify the condition of the workman at the date of his examination. If the workman is then suffering from the scheduled disease, he is to state certain matters as to his working capacity. In certain cases he is to state his findings as to the probability of further incapacity through a recrudescence of the disease or as to increase of susceptibility to further attack. To complete the picture, it should be stated that no process is set opposite "dermatitis produced by dust or liquids" in the schedule, with the result that sect. 44 (1) of the Act had no application to the particular case.

I now turn to the facts of the case. I may mention at the outset that Buss was called on behalf of the defendant Gibson and at a late stage it became evident that he knew nothing about the facts of the case. His rubber stamp signature was attached to all the relevant letters. It would not appear that he had seen any of them. I reject his evidence entirely, except in so far as it bears on the office practice of the insurers. The matter was handled by one Bagrie. Bagrie was available to give evidence, but he was not called. I deal first with the facts bearing on the appointment of a medical referee. The certifying surgeon, Dr. Gilchrist, had made his certificate on Jan. 22, 1943, and that certificate was received by the company on Saturday, Jan. 30, 1943. By letter dated Feb. 12, 1943, an application was made by the insurers on behalf of the company, asking for an extension till Feb. 19, 1943, of the period within which the employers might file an application for reference to a medical referee. The application was based on grounds personal to the insurers and it was made after the ten days mentioned in reg. 25 had expired, the registrar being told that the insurers did not know the "precise date" on which the certifying surgeon's certificate had reached the employers, though the insurers had Thompson's letter dated Jan. 29, 1943, enclosing the certificate, in their possession. The move was successful. By letter dated Feb. 13, the registrar extended by seven days the period within which the company might file its application. I propose to assume, without deciding the point, that the extension was duly granted.

In a letter bearing date Feb. 16, 1943, signed by Buss, there was enclosed an appeal against the certifying surgeon's certificate, signed on behalf of the insurers. The registrar on Feb. 18, 1943, purported to appoint Dr. MacCormac as medical referee to deal with the case and gave notice of the appointment to the plaintiff.

I find as a fact that the application did not reach the registrar's office until after office hours on Feb. 17, 1943. I do not find that it was received on that day. It is entered in the books of the county court under date Feb. 18, 1943, and I accept the evidence as to the course of business in the county court. In the view that I take of the construction of reg. 25 it is unnecessary for me to find the date of actual posting. The insurers asked me to infer merely from the date borne by the letter that it was posted on the date borne by it. There was no evidence as to the actual posting or as to the existence or contents of any stamp book or other postage book kept by the insurers which might have helped to a conclusion on this matter, but it is only fair to the insurers to observe that it was not until the trial that any point was taken by the plaintiff as to the invalidity of the appointment of the referee. It is equally right to mention that the letter dated Feb. 16, was the work of the absent Bagrie and that in a letter dated Feb. 17, 1943, to the brokers, not on its face appearing to be Bagrie's letter, the insurers themselves took the view that their appeal was out of time. As I shall shortly hold, they were right. So much for the facts bearing on the appointment of a referee.

On Feb. 11, the company, as I have stated, wrote to Matthews, Wrightson & Co., their brokers. They enclosed Thompson's letter of Jan. 29, copy of the certificate of disablement (there being therein a correction, initialled by Ladley, in the statement as to the nature of her employment; it is altered to "centre lathe turner on clean dry materials free from oil") and Ladley's memorandum, and stated that the plaintiff had been working only on clean dry materials entirely free from oil. They asked the brokers to handle the matter on their behalf. Apparently following on a telephone conversation between the brokers and the insurers—there was no evidence as to the substance of this conversation—Thompson's letter and the certifying surgeon's certificate were sent by messenger by the brokers to the insurers on Feb. 12. (See letter of that date).

By letter dated Feb. 12 from the brokers to the insurers the telephone conversation was confirmed, and Ladley's memorandum was sent to the insurers and the substance of the letter of Feb. 12 was repeated. That letter was stamped by the insurers as having been received on Feb. 15, and I have no reason to doubt the accuracy of the stamping.

Meantime the insurers by letter dated Feb. 12 asked their own doctor, Dr. Jeffery, to examine the plaintiff, informing him that the company's view was that any disease from which the plaintiff was suffering was wholly attributable to her uncleanness and not in any way connected with her work. The plaintiff was examined by Dr. Jeffery on Feb. 15. He certified that she was at the date of his examination free from dermatitis and in his accompanying report stated her occupation to be that of a centre lathe worker and that "this is a straightforward case of occupational dermatitis due to handling oily metal." That report had been received by the insurers on February. 16. On Feb. 18 the registrar referred the matter to Dr. MacCormac. On Feb. 19 the insurers sent a letter to Dr. MacCormac, the supposed medical referee, which is the third libel complained of. It appears to have been the work of the absent Bagrie. At the date when that letter was written the information of the insurers upon the matter appears to have been confined to the statement appearing in Ladley's memorandum and in the correspondence and doctor's certificates and reports, the statements made to them by the brokers on the telephone (upon which no evidence was given) and, judging by the references to "influenza" and "Dr. Forman" which appear in the alleged libel and do not appear in Ladley's memorandum, to some conversation with somebody in the company's employment.

The letter was as follows :

We are the insurers of the applicants in this matter, and we understand from the registrar of the Bloomsbury County Court that it has been referred to you. We, therefore, wish to bring to your notice certain points which we feel you should be aware of when examining Mrs. Smith. She has been in our insured's employ since Nov. 23, 1942, and we are given to understand that her attendance has been somewhat irregular. In fact, we are told that she has only worked 48 per cent. of possible time. This is apparently put down to her general health, inasmuch as she has had periods of leave for one reason or another. We have not specifically been told the reason for each period of absence with the exception of the period from somewhere round about Dec. 5 to Dec. 19, when she had influenza. Our insured informs us that for some time previous to the date on what she was certified, she had been treating herself with a lotion, and a doctor at Guy's Hospital, believed to be a Dr. Forman, has been in touch with our insured and stated that he considers the trouble to be chiefly due to low state of health and personal cleanliness also enters into it. We are asked to assure you there has been no previous skin trouble of any kind in our insured's works, and they feel quite sure that whatever she is suffering from or has suffered was not caused through her employment with them. We are also asked to emphasise that her occupation is that of a centre lathe turner, which involves work on clean dry materials entirely free from oil. We are sorry to have had to write to you at this length, but we thought it only proper that you should have these facts, not only to help you in arriving at your decision, but also so that the applicants' point of view can be thoroughly considered.

In my opinion, the letter was defamatory. If it is to be treated as written on behalf of the company, I find that there was malice on the part of the company which will displace any qualified privilege which attached to the occasion on which it was written.

To complete the tale, Dr. MacCormac examined the plaintiff and obviously questioned her about the statements contained in the letter of Feb. 19, but the letter was not shown to her. In addition, he paid a visit to the works and was given an opportunity of making such enquiries as he thought fit. On Feb. 22 he certified that the plaintiff was not at the time of her examination by the certifying surgeon suffering from dermatitis produced by dust or liquids. The plaintiff, through her solicitors, tried to get a copy of the letter from Dr. MacCormac, but, faced with objections by the insurers (voiced by the absent Bagrie), Dr. MacCormac refused to supply a copy. Ultimately, the papers were sent by him to the county court registrar, who gave the plaintiff a copy of the letter of Feb. 19. Upon that, these proceedings were begun in respect of that letter and, with a sight of Ladley's memorandum obtained on discovery, the proceedings were amended by including claims in respect of the two libels with which I have already dealt.

The first question to be decided is whether any medical referee was duly appointed. Under the regulations the application has to be in writing and accompanied by certain documents. Posting the application with the documents may be an irrevocable act, but in my view an employer or workman does not "apply to the registrar" within the meaning of reg. 25 unless and until the application reaches the office of the registrar. Until that point of time the registrar is not seised of the matter. There is no application before him. Upon the footing of this construction and the authority of *Hill v. Ladyshore Coal Co., Ltd.* (1) and *Conroy v. Thomas Wilkinson & Sons, Ltd.* (2), I hold that Dr. MacCormac's appointment as a medical referee was a nullity. A

The next question is whether the insurers were the agents of the company in writing the letter of Feb. 19, 1943. In my opinion they were. Under the terms of the policy effected by the company with them, the insurers were entitled if they desire, "to conduct any negotiations or any legal proceedings of any nature" and it is apparent that in agreement with the company they exercised that right and took full charge of the matter from the moment the occurrence supposed to give rise to the employer's liability was brought to their notice. They had no *locus standi* to apply to the county court registrar for an extension of time for appealing or to appeal or to write anything to the referee except as representing the company, who were entitled under reg. 31 of the regulations as to medical referees to make a statement to the medical referee. Despite the phrasing of parts of the letter, it would be neglecting the realities of the case to treat the letter as anything other than a letter written by them as such agents. Form N. may or may not have reached the insurer's office, but that is immaterial, for the insurers knew the practice under the rules. The company supplied material bearing on the case for use by the insurers as they thought fit. Both the company and the insurers proceeded on the footing that the insurers were the company's agents in the matter. Nor is the agency of the insurers affected, in my opinion, by the fact that the appointment of the medical referee was a nullity; the general question need not be considered, for in the despondent letter of Feb. 17, written to the company's brokers, the insurers informed the company that the appeal was out of time. Despite that, the matter was allowed to proceed. B C D

Taking this view of the matter, the company and the defendant Gibson are jointly responsible for the letter. I impute malice to the company. Unless, therefore, absolute privilege attached to the occasion on which it was written, both the company and Gibson are liable. Whatever view I may entertain as to the correctness of the decision in *Smith v. Streetfield* (3)—a tottering authority—I am bound as a judge of first instance to follow it. That decision renders it unnecessary for me to come to any conclusion on the question of malice in the insurers, a question which in this case is only an inference from the facts I have found. It was argued that absolute privilege attached to the letter, on the ground that it was a statement made in the course of proceedings before a tribunal exercising judicial functions. I have already stated the functions of the medical referee and I propose to discuss the matter on the basis that a medical referee was duly appointed. E F

Are the proceedings before the medical referee proceedings before a tribunal exercising judicial functions so as to confer absolute privilege on the statements submitted to the referee by the parties? The principle on which absolute privilege rests in the general case of proceedings before courts is stated in *Munster v. Lamb* (4), and the limits of the application of that principle to other tribunals are stated in *Royal Aquarium, etc. v. Parkinson* (5). LORD ESHER, M.R., said, at p. 442: G

It is true that, in respect of statements made in the course of proceedings before a court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins v. Lord Rokeby* (6) the doctrine was extended to a military court of inquiry. It was so extended on the ground that the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to courts of justice and tribunals H

acting in a manner similar to that in which such courts act.

A I do not think that the tribunal here satisfies the tests laid down by LORD ESHER, M.R., in *Royal Aquarium etc. v. Parkinson* (5). The function of the medical referee is certainly not administrative. His decision certainly affects legal rights; but that is not the test. He has to determine several facts which, apart from statutory provision, would be decided by the courts on evidence. In ascertaining facts he is not bound by the strict rules of evidence. He has to do his best on the materials before him. (See *Chuter v. J. J. Ford & Sons* (7)). He is bound to consider the statements made by the parties and to attach to them such value as he may think they deserve. In determining some of the facts, his medical skill and knowledge may perhaps play a small part; but these are preliminary and incidental matters—not the substance of the task of the medical referee. Essentially he is determining on his own professional judgment and skill medical facts.

B Again, in one important aspect the proceedings differ fundamentally from a judicial proceeding. Each party is entitled to submit a statement and a statement is made to the referee alone. Neither party is entitled to know what is therein alleged by the other. It is impossible to imagine anything less likely to find a place in a judicial proceeding. (See the observation of DU PARCQ, L.J., in *Boswell v. Partridge Jones & John Paton, Ltd.* (8), at p. 305, [1941] 2 All E.R., at p. 744). Public policy, so far from requiring that absolute privilege should attach to voluntary statements made in these circumstances, seems to me to demand the contrary. I have no doubt that qualified privilege attaches to those statements, with the result that an honest statement is protected. That protection is all that is required for the full and proper exercise of the functions committed to the medical referee. The protection given by absolute privilege would be a hindrance, not a help.

D I hold that absolute privilege does not attach to statements submitted to a duly appointed referee. It follows that no absolute privilege could attach to the letter of Feb. 19, 1943; and it is unnecessary for me to deal with the complication resulting from the fact that Dr. MacCormac's appointment was a nullity. I merely observe that there is much to be said for the view that a state of affairs had been brought into existence which would result in qualified privilege attaching to the letter in question.

E I assess the damages in respect of each of the first two libels at twenty guineas and in respect of the third libel at fifty guineas.

Judgment for the plaintiff with costs.

Solicitors: *W. H. Thompson* (for the plaintiff); *Bower, Cotton & Bower*, agents for *T. W. Stuchbery & Son*, Maidenhead (for the first defendants); *Hewitt, Woollacott & Chown* (for the second defendant).

[Reported by P. J. JOHNSON, Esq., Barrister-at-Law.]

F

Re LIABILITIES (WAR-TIME ADJUSTMENT) ACTS, 1941 AND 1944. Re AFFAIRS OF ALSOP.

G [COURT OF APPEAL (MacKinnon, Lawrence, and Morton, L.JJ.), May 1, 1945.]

Emergency Legislation—Interim adjustment order—Monthly tenancy determined before date of protection order—Action for recovery of possession of premises—All proceedings for recovery of possession of land stayed pending investigation when protection order made—Interim adjustment order extending debtor's occupation of premises—No extension permissible, as debtor already trespasser before date of protection order—"Tenant"—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), s. 3 (2), (5)—Liabilities (War-Time Adjustment) Act, 1944 (c. 40), ss. 6, 21, 22.

H On Dec. 4, 1939, the appellant let a barn to the debtor on a monthly tenancy, at a rent of 35s. per month, for the purpose of storing cars and machinery. From autumn, 1940, the debtor paid no rent and on Sept. 11, 1944, the appellant gave him notice to quit expiring on Nov. 4, 1944. The debtor failed to give possession when the notice expired, and on Nov. 17,

1944, the appellant issued a specially indorsed writ claiming possession of the barn, arrears of rent, and mesne profits thereafter until delivery of possession. On Dec. 4, 1944, before the action came on for hearing, the debtor applied for and obtained a protection order under the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (2); under sect. 3 (5) of the Act the court referred the debtor's affairs to the liabilities adjustment officer for investigation. On Mar. 1, 1945, the county court judge made an interim adjustment order by para. 7 of which "the question of possession of the barn held by the debtor as tenant" of the appellant was deferred, and the debtor, on undertaking to find other accommodation as soon as possible, was allowed to continue in possession, paying 35s. per month from the date of the protection order. The appellant appealed from para. 7 of the order. It was contended on his behalf that the county court judge had no jurisdiction to delay his taking possession of the barn:—

HELD: (i) the interim adjustment order was inaccurate in referring to the barn as being "held by the debtor as tenant" of the appellant. From Nov. 4, 1944, the debtor was a trespasser and his possession was not protected by the Rent and Mortgage Interest Restrictions Act, or by the Courts (Emergency Powers) Acts.

(ii) under the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (2) (a), all proceedings for possession of land were stayed temporarily when a protection order was made; but the judge's refusal to allow the appellant's action to proceed, when making the interim adjustment order, was not a proper exercise of his discretion under the Act, on the facts of the case.

(iii) where the debtor's occupation was on a monthly tenancy which had been duly determined before the date of the protection order, the county court judge, when making an adjustment order, had no jurisdiction to extend the debtor's occupation of the property.

Re Kirby's Affairs (1) applied.

(iv) the law on the subject, as stated in *Kirby's case* (1) had not been affected by sects. 6 and 21 of the 1944 Act. Sect. 6 referred to orders which might be made by the court in regard to "rent" and, therefore, did not apply to a debtor who had become a trespasser and had no right to be occupying the premises at the date of the protection order. Upon the true construction of the Acts of 1941 and 1944, the definition of "tenant" in sect. 21 of the 1944 Act included only persons lawfully retaining possession of premises after the determination of a lease or tenancy.

[EDITORIAL NOTE.] It was decided in *Re Kirby's Affairs* (1) that in making an adjustment order there is no jurisdiction to extend a debtor's occupation beyond the term of his lease. This decision is here extended to the case of a monthly tenancy determined by notice before the date of the protection order. The Liabilities (War-Time Adjustment) Act, 1944, contains a definition of "tenant" as including a person retaining possession of any premises after the termination of a lease or tenancy, but the court holds that, on a consideration of the whole Act, this applies only to a person holding over under the Rent Restriction Acts or the Courts (Emergency Powers) Acts, and does not include a trespasser.

Sect. 3 (2) of the Liabilities (War-Time Adjustment) Act, 1941, provides that any proceedings for the recovery of possession of land shall be stayed while a protection order is in force. Here the proceedings were for failure to go out on expiry of a notice to quit. In *Kirby's case* (1) GODDARD, L.J., suggested that the only proceedings which could be stayed were proceedings for the recovery of possession for non-payment of rent, but the court decides that there is nothing in the context or the general scheme of the Act so to limit the meaning of the section. The object being to give the debtor breathing time while his affairs are investigated it is reasonable that all proceedings should be stayed.

FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 20, and Supplement.]

Case referred to:

(1) *Re Kirby's Affairs*, [1944] 1 K.B. 213; [1944] 1 All E.R. 166; 113 L.J.K.B. 321; 170 L.T. 134.

APPEAL from an order of His Honour JUDGE ARCHER, K.C., made at Brighton and Lewes County Court, and dated Mar. 1, 1945. The facts are fully set out in the judgment of the court delivered by MORTON, L.J.

Geoffrey Lawrence for the appellant.

MORTON, L.J. [delivering the judgment of the court]: This appeal raises questions of some importance as to the construction of the Liabilities (War-Time Adjustment) Acts, 1941 and 1944, and the powers of the court thereunder. The appellant, Edward William Colman, appeals from an interim adjustment order made by His Honour JUDGE ARCHER, K.C., in the Brighton and Lewes County Court on Mar. 1, 1945. The appellant is a creditor of Henry Leslie Alsop (hereinafter called the debtor) and the only part of the order to which he raises objection is para. (7):

A The question of possession of the barn at Lancing held by the debtor as tenant of Edward William Colman is deferred, the debtor meanwhile paying to the said Edward William Colman 35s. per month from the date of the protection order, namely, Dec. 4, 1944, payable monthly, the first 3 months up to Mar. 4, 1945, to be paid within 14 days of the date of this order, the debtor on his part undertaking to find other accommodation for his goods and chattels therein and to give up possession of the said barn as early as possible.

B The facts which we are about to state were the undisputed facts upon which the judge arrived at his decision. On Dec. 4, 1939, the appellant let the barn at Lancing, referred to in the order, to the debtor on a monthly tenancy at a rental of 35s. per month payable in advance. The barn was used by the debtor for the purpose of storing certain vehicles and other articles. The debtor paid the rent up to the autumn of 1940, but from that time he paid no rent and on Sept. 11, 1944, the appellant, who appears to have been very patient, gave the

C debtor a notice to quit, expiring on Nov. 4, 1944. The debtor failed to give possession when that notice expired. As from that date he was a trespasser, and his possession was not protected by virtue of the Rent and Mortgage Interest Restrictions Acts or by the Courts (Emergency Powers) Acts. The order quoted above is inaccurate in referring to the barn as being "held by the debtor as tenant of Edward William Colman." On Nov. 17, 1944, the appellant

D issued a specially indorsed writ claiming possession of the barn, £84 arrears of rent, and mesne profits thereafter at the rate of £1 15s. per month until delivery of possession. On Dec. 4, 1944, before the action had come on for hearing, the debtor applied for, and obtained *ex parte* in the county court, a protection order under the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (2), which provides that in certain circumstances the court may make an order, to be known as a "protection order," and that:

E . . . while any such order is in force, (a) . . . any proceedings against the debtor . . . for the recovery of possession of land or of goods let under a hire purchase agreement shall be stayed, and shall not be further prosecuted except with the leave of the court and subject to such restrictions and conditions as it thinks fit . . . The court there referred to is the county court.

It follows that if the proceedings started by writ on Nov. 17, 1944, were "proceedings for the recovery of possession of land" within the meaning of F this subsection, the effect of the protection order was to stay these proceedings. Having made the protection order, the court referred the debtor's affairs to the liabilities adjustment officer for his investigation under sect. 3 (5) of the Act, and on Jan. 9, 1945, that officer made his report. The matter came before the county court judge on Mar. 1, 1945, and we have been supplied with a note of what took place. It appears from that note that the solicitor for the appellant

G submitted that the court had no jurisdiction to delay taking possession of the barn by the appellant, while the liabilities adjustment officer submitted that the appellant, the owner of the barn, could not obtain an order for possession without the leave of the court, by reason of sect. 3 (2) of the Act of 1941. It does not appear that the judge was referred to the recent decision of this court in *Re Affairs of Kirby* (1). The judge thereupon made the interim adjustment order to which we have already referred. The result of para. 7 of that order is that the H debtor is allowed to continue in possession of the barn; and the judge refused the appellant leave to proceed with his action for possession. The judge's reasons for his decision were:

This being a case where it appears to be practicable to preserve a business, and it being essential to that object that the debtor's cars and machinery should be available, and the debtor undertaking under guidance and advice of the liabilities adjustment officer he will arrange for the removal of assets as soon as he has a place of business, which he is to use his best endeavour to do at once, and meanwhile paying out of his earnings 35s. a month full rent of the barn, the court does not think fit at present to make any order for taking possession, but there shall be liberty to apply.

It would appear from these observations and from para. 7 of his order that the judge must have formed two conclusions of law, (i) that the appellant's action for possession was stayed by reason of sect. 3 (2) of the Act of 1941, and (ii) that this Act gave the judge power to extend the debtor's occupation of the property, notwithstanding that the debtor had become a trespasser before the protection order was made. We propose first to consider the second of these two conclusions. Subject to the question of the effect of the Liabilities (War-Time Adjustment) Act, 1944, which we shall discuss later, we think the judge was wrong in this conclusion, having regard to the decision of this court in *Re Affairs of Kirby* (1). The facts in the last mentioned case differed in certain respects from the facts in the present case, but the court unanimously took the view that the Act of 1941 did not give the county court jurisdiction, when making an adjustment order, to extend the debtor's occupation of property beyond the term of two leases, expiring on Mar. 25, 1943, under which he held the property as tenant. SCOTT, L.J., after referring to sects. 3 (2) and 6 (1) of the Act of 1941, said, at p. 219 ([1944] 1 All E.R., at p. 169):

The result is that the county court seems, at first sight, to be authorised to keep a debtor in possession after his contractual right to possession has ceased even by the expiration of the term of his lease . . . I think the county court's order of Mar. 23, 1943, that the debtor might remain in possession, was only valid for the two days to Mar. 25, when the leases came to an end by effluxion of time. From then onwards the court had no power to allow the debtor to remain in possession.

MACKINNON, L.J., expressed his agreement with the judgment of SCOTT, L.J., and also with that of GODDARD, L.J. At pp. 223, 224 ([1944] 1 All E.R., at p. 171), GODDARD, L.J., said, in reference to the Act of 1941:

Its title and its whole structure show that its object is the arrangement, adjustment and settlement of the affairs of persons financially affected by the war. Financial embarrassment cannot by any process of thought be said to have any relation to trespass on another's property, even where the trespass is the failure or refusal to go out on the expiration of a term of years . . . The words in the Liabilities (War-Time) Adjustment) Act, 1941, s. 3 (2): "for the recovery of possession of land" are immediately followed by "or of goods let under a hire-purchase agreement," and this seems to me strongly to point to the fact that what the legislature had in mind was recovery of possession of land for non-payment of rent. In respect of goods there is no prohibition against bringing an ordinary action of detinue. What is prohibited is the recovery of goods under a hire-purchase agreement where the right to recover the goods usually, though admittedly not invariably, arises owing to the non-payment of money. Otherwise, a financially embarrassed squatter could hold up proceedings taken against him by a dispossessed owner, at least temporarily, by going to the court *ex parte* and making out a case that his financial troubles were caused by the war and getting a protection order, which would stay the action of trespass. Even if the section does effect a stay of proceedings against one who is a trespasser, in my opinion the court, when making an adjustment order, has no jurisdiction to extend the debtor's occupation of the property beyond the terms of the lease. It follows that the court ought not to have protected the debtor beyond Mar. 25, 1943 . . .

It will be observed that GODDARD, L.J., was inclined to think that the words in sect. 3 (2) (a) of the Act of 1941, "any proceedings against the debtor for the recovery of possession of land," refer only to proceedings against the debtor for the recovery of possession of land for non-payment of rent. We return later to this tentative expression of opinion which was in our view *obiter*. Whether or not it was well-founded, there is here a clear decision by all three members of this court that the county court judge, when making an adjustment order, has no jurisdiction to extend the debtor's occupation of property beyond the term of his lease. It seems to us that this decision applies equally to the present case, although here the debtor's occupation was not under a lease but under a monthly tenancy which had been duly determined by notice before the date of the protection order.

This being the position apart from the provisions of the Act of 1944, we must consider whether that Act effected an alteration in the law as stated by this court in the case just cited. The Act of 1944 is entitled:

An Act to provide for the adjustment and settlement of debts and liabilities arising in certain areas and to amend the Liabilities (War-Time Adjustment) Act, 1941.

The only sections to which we have been referred as having any possible bearing on the present case are sect. 6 and the definition of "tenant" in sect. 21. Sect. 6

substitutes a new subsection for sect. 6 (1) of the Act of 1941. That new subsection provides :

Where at the date of the protection order the debtor is the tenant of any premises, the court may in the liabilities adjustment order provide that, in respect of any period whether before or after the making of the order, the debtor shall be wholly or partly relieved from the payment of rent . . . Where the court grants relief under this section in respect of a period after the making of the order, it may define the period either by specifying it or by directing that the relief shall continue until a further application is made.

Sect. 6 (3) of the Act of 1944 is as follows :

The court in the liabilities adjustment order may provide for the postponement of payment by the debtor of any sum which has or will become payable by the debtor in respect of rent, whether or not the court has reduced the rent.

So far, and apart from the effect of sect. 21, it would seem clear that sect. 6 in no way confers a power on the county court to extend a debtor's occupation of property after his tenancy has expired or has been duly determined by notice. The section refers throughout, both in the subsections which we have quoted and in other subsections, to orders which may be made by the court in regard to "rent." This reference seems quite inconsistent with the view that the section extends to cover a case where the debtor had become a trespasser and had no right whatever to be occupying the premises at the date of the protection order. Sect. 21, however, provides as follows :

In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say . . . "tenant" includes a person retaining possession of any premises after the termination of a lease or tenancy.

At first sight it would appear that this definition would include a person who retained possession of premises as a trespasser, but we have come to the conclusion, after a careful study of the Act of 1944, and of the Act of 1941 which it amends, that it would not be right to give so wide a meaning to the definition. If, for instance, one tries to apply sect. 6 to the case of a trespasser, difficulties arise at once ; the references to "rent" in that section are quite inappropriate as applied to the position of a trespasser, and it seems to us most unlikely that the Act could have been intended to confer a power on the county court, under sect. 6 (1), to allow a trespasser to remain in possession and even to relieve him from making any payment to the owner of the land. It is to be observed that sect. 6 (1) of the Act of 1941 was limited in its application to cases where, at the date of the protection order, the debtor was in possession of any premises held on a lease or tenancy, or was holding over any premises, after the determination of a lease or tenancy, by virtue of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939, or the Courts (Emergency Powers) Acts, 1939 to 1940. Even in these cases, the court was only given power to *reduce* the rent. Further, it is to be assumed that the legislature was aware of the decision of this court in *Re Affairs of Kirby* (1). If it had been intended to give the court power to confirm in his possession of premises a person who had become a mere trespasser, and a power to relieve such a person from the payment of any rent, we feel confident that powers so remarkable would have been conferred in plain terms. By the Liabilities (War-Time Adjustment) Act, 1944, s. 22, that Act and the Act of 1941 are to be construed as one. We think it would be contrary to the scheme and intention of this piece of legislation to hold that such a power as we have just described is imported, as it were, by a "side wind," by the joint effect of sect. 6 and the definition of "tenant" in the Act of 1944. Reading the two Acts as a whole, we think it is necessary to read the definition of "tenant" in sect. 21 of the 1944 Act, as including only persons *lawfully* retaining possession of any premises after the determination of a lease or tenancy, e.g., by virtue of the Rent and Mortgage Interest (Restrictions) Acts or the Courts (Emergency Powers) Acts. The result is that the county court judge exceeded his powers in directing, in effect, that the debtor was to be at liberty to remain in possession of the barn on the terms set out in para. 7 of his order.

We must now consider (a) whether the appellant's action for possession was stayed by reason of sect. 3 (2) (a) of the Act of 1941, and if so, (b) whether the county court judge's refusal to allow that action to proceed, could be regarded as a proper exercise of his discretion, on the facts of this case. Question (a)

must be answered in the negative, if we accept as correct the suggestion of GODDARD, L.J., in *Kirby's* case (1) that the words "any proceedings against the debtor for the recovery of possession of land" ought to be construed as referring only to proceedings against the debtor for the recovery of possession of land for non-payment of rent. We do not think that GODDARD, L.J., expressed a concluded opinion on the point, but even if his observations are to be so construed, they were clearly *obiter dicta*. We have studied all the judgments in *Kirby's* case (1) with care and with respect, and we find ourselves unable to agree with the suggestion of GODDARD, L.J. The words used in sect. 3 (2) (a) of the Act of 1941, in their ordinary meaning, apply to all actions for the recovery of possession of land, and we can find nothing in the context, or in the general scheme of the Act, which leads us to the conclusion that they must be given a more limited meaning. As to the context, the words in question are followed by the words "or of goods let under a hire-purchase agreement." The express limitation, in the case of goods, to goods let under a hire-purchase agreement seems to us to indicate, by way of contrast, that there is no limitation in the case of actions for the recovery of land and that all such actions come within the scope of the subsection. As to the scheme of the Act, it seems to us quite natural that all actions for the recovery of possession of land should be stayed as a temporary measure, when the court makes a protection order, whether such actions are based upon non-payment of rent, or on breach of a covenant to keep in repair, or on a notice to quit or on any other ground. The object is, we think, to give a "breathing-space" to the debtor, and to the judge who is considering the case. We have carefully borne in mind the observation of GODDARD, L.J., at p. 224 ([1944] 1 All E.R., at p. 171) that if the subsection were given this construction :

... a financially embarrassed squatter could hold up proceedings taken against him by a dispossessed owner, at least temporarily, by going to the court *ex parte* and making out a case that his financial troubles were caused by the war and getting a protection order, which would stay the action of trespass.

That is true, but it seems to us an unavoidable result of the provisions of the subsection. When the application for a protection order first comes before the county court judge he may not be fully acquainted with the facts as to pending actions. All that the debtor has to do, on such an application, is to make out a *prima facie* case as to certain matters which are specified in sect. 3 (1) of the Act of 1941. Even if the judge were informed that an action for possession were pending, it must be borne in mind that a plaintiff might have issued a writ, and delivered a statement of claim, on the footing that the debtor was a trespasser, whereas investigation might reveal that the tenancy was never lawfully determined, or that the debtor was protected by the Rent and Mortgage Interest Restrictions Acts. This being so, it seems to us not at all unreasonable that all proceedings for the recovery of possession of land should be stayed for the time being, so that the whole position can be investigated.

As to question (b), it is clear that the county court judge refused leave for the appellant to proceed with his action. It is equally clear, from the concluding words of para. 7 of his order, and from the judge's own report of the proceedings, that he was fully aware of the facts, as set out earlier in his judgment. In our view the judge, not having *Kirby's* case (1) in his mind, must have thought that he had power to confirm a trespasser in his occupation of land. It is not surprising that, on this footing, he refused to allow the appellant to proceed with his action; he hoped that the debtor would very shortly deliver up possession peacefully to the appellant, and he made provision for the payment of rent from Dec. 4, 1944, to Mar. 4, 1945. If the judge had realised that he had no such power, he would surely have given leave to the appellant to proceed with his action. Any other exercise of the judge's discretion to grant or refuse such leave would clearly have been improper, as would have been an endeavour to use his discretion for the purpose of extending the debtor's occupation of the barn beyond the duration of his tenancy agreement, in defiance of the decision of this court in *Kirby's* case (1). We feel sure that the judge had no such intention. It follows that the course taken by the judge in refusing leave for the appellant to proceed with his action was not a proper exercise of his discretion under sect. 3 (2) (a) of the Act of 1941, as there were no grounds upon which he could properly refuse such leave.

In our judgment this appeal succeeds; the order contained in para. 7 of the order of Mar. 1, 1943, should be set aside, and the appellant should be granted unconditional leave to proceed with his action for possession.

Appeal allowed with costs against the debtor.

Solicitors: Capel, Cure, Glynn Barton & Co. (for the appellant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

THOMPSONS (FUNERAL FURNISHERS) LTD. v. PHILLIPS.
[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), May 1, 1945.]

Landlord and Tenant—Recovery of possession—Controlled premises—Premises occupied by servant of landlords for duration of employment—Part of services to be carried out on premises—Service occupancy—Termination of employment—Servant in occupation of premises after notice to quit—Acceptance of rent for two weeks—Whether creation of new tenancy—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), Sched. I (g), (i)—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3.

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The appellants, a company of funeral furnisners, claimed possession of certain premises in Liverpool to which the Rent Restriction Acts applied. The premises were purchased by the appellants in 1928 and, until 1942, were occupied by one of their servants. The appellants then entered into an agreement to employ the respondent as their chauffeur, the respondent agreeing, by letter dated May 21, 1942, to live at and occupy the said premises for which he was to receive 15s. less each week in wages. The respondent further agreed that either he or someone else would be present on the premises at all times to take orders and answer messages and enquiries for the appellants. He also promised to vacate the premises immediately he ceased to be employed by the appellants. The respondent then entered into the occupancy of the premises. Instead of receiving his wages less 15s., he was given his full wages and paid 15s. per week, each payment being entered in a rent book, kept by him, as rent received. By letter, dated Aug. 25, 1944, the appellants terminated his employment informing him that they required vacant possession of the house at the earliest possible moment. They allowed the respondent to stay on and for two weeks they accepted the 15s. and entered the payments in the rent book in the same way as it had been entered before. Subsequently the appellants refused payments of rent. It was contended on behalf of the respondent (i) that the original agreement of May 21, 1942, was never carried out as a service occupancy but was in reality treated as being a service tenancy; (ii) that when, in 1944, that service tenancy was terminated, the payments of 15s. for two weeks, and the acceptance of such payments, were sufficient evidence on which a new agreement for a tenancy could be found or inferred. The appellants contended (i) that the original agreement amounted to a service occupancy only, the true test being that the respondent did not have the exclusive occupation of the premises for his own purposes but occupied them as a servant for the purpose of performing his master's service in the premises; (ii) that the acceptance of two payments of 15s. did not create a new tenancy:—

HELD: (i) the substance of the agreement between the parties being that the respondent was to occupy the premises as the servant of the appellants in order to perform his services in part in those premises, the agreement constituted a service occupancy and not a tenancy.

(ii) the acceptance of two payments of rent was, in the absence of real intention on the part of either the appellants or the respondent to create a new tenancy, no evidence from which the creation of a new tenancy could be inferred.

Davies v. Bristow (1) applied.

[EDITORIAL NOTE.] It is held here that in the case of a service occupancy the receipt of the rent from the employer in addition to wages, such rent to be paid by the servant, who kept the rent book, to the landlord, did not create a tenancy so as to make applicable the provisions of the Rent Restriction Act.

AS TO SERVICE OCCUPANCY, see HALSBURY, Hailsham Edn., Vol. 20, p. 13, para. 8; and FOR CASES, see DIGEST, Vol. 30, pp. 519-521, Nos. 1746-1763.

AS TO WAIVER OF NOTICE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 142-144, paras. 153, 154; and FOR CASES, see DIGEST, Vol. 31, pp. 456-459, Nos. 6038-6065.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, First Sched., para. (g), see HALSBURY'S STATUTES, Vol. 26, p. 280.]

Case referred to:

- (1) *Davies v. Bristow, Penrhos College v. Butler*, [1920] 3 K.B. 428; 31 Digest 575, 7231; 90 L.J.K.B. 164; 123 L.T. 655.

APPEAL by the plaintiffs from an order of His Honour JUDGE CROSTHWAITE made at Liverpool County Court and dated Mar. 6, 1945. The facts are fully set out in the judgment of LAWRENCE, L.J.

Wilfrid Clothier, K.O., and *Allister Hamilton* for the appellants (plaintiffs in the court below).

Gerson Newman for the respondent (defendant in the court below).

LAWRENCE, L.J.: This is an appeal from His Honour JUDGE CROSTHWAITE in an action brought by the appellants for the possession of 167, Liverpool Road, Great Crosby, Liverpool. The county court judge held that the plaintiffs were not entitled to possession and were not entitled to avail themselves of subpara. (g) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the authority of certain cases which have not been relied upon in this court. The premises were of a value which rendered them controlled under the Rent and Mortgage Interest Restrictions Act, 1939. They were purchased by the appellants in 1928, the appellants being a company of funeral furnishers, and they then installed in these premises a servant of theirs who acted as a chauffeur for them and also collected orders on the premises by telephone. In 1942, the man who had been previously employed by the appellants left their employ and the premises were empty. The appellants then entered into an agreement to employ the respondent on the terms of a letter of May 21, 1942. That letter, which was addressed by the respondent to the appellants, said:

While I am in your employ as chauffeur I agree to live at and occupy the above premises, for which I am to receive 15s. each week less in wages. Either I or someone else will be on the premises at all times to take orders answer messages or answer enquiries for you. I will vacate the premises immediately I cease to be in your employment. You will pay all rates, taxes and outgoings and charges for electric lighting, whilst I am to pay all charges made by the Liverpool Gas Co.

Under that letter the respondent entered into the occupancy of the premises, but it appears that the letter was not exactly carried out, because instead of receiving his wages less 15s., he received his whole wages and paid 15s., and he was given a rent book in which the payment of that sum was entered as rent received.

On Aug. 25, 1944, the appellants decided to terminate the respondent's employment, and wrote to him on that day telling him of their decision and adding:

We shall require vacant possession of your house as per your agreement with us at the earliest possible moment.

But they did not insist upon the respondent leaving immediately; they allowed him to stay on and for two weeks they received the 15s., and entered it in the rent book in the same way as it had been entered before. On Sept. 15, they wrote to him urging him to make other arrangements, and in that letter they referred to his tenancy agreement. Later on they wrote other letters which put the matter upon a different footing and they did not accept the 15s. afterwards on the same terms that they had accepted it on those two occasions.

In those circumstances it is contended that the court ought to infer a new agreement of tenancy. It is said, in the first place, that the original agreement of May 21, 1942, was never carried out as a service occupancy but was in reality treated as being a service tenancy and that when, in 1944, that service tenancy was terminated, the payment of 15s. for those two weeks and the acceptance of that 15s. for those two weeks is evidence which ought to be accepted as implying an agreement on the part of the appellants to create a new tenancy. On the other hand, the appellants contend that the agreement of May 21, 1942, never was anything more than a service occupancy, that the fact that the 15s. was not deducted from the respondent's wages, and that this form of rent book

was used, are matters of mere machinery, and that the true test of whether it was a service occupancy or a service tenancy is whether the respondent had the rights of a tenant with reference to the premises, that is to say, whether he had the exclusive occupation of the premises for his own purposes or whether, on the other hand, he did not have the exclusive occupation of the premises for his own purposes but not only occupied them as a servant but occupied them for the purpose of performing his masters' service in the premises.

- A It is not necessary, in my opinion, to refer to any of the cases which have been decided. I am, on the whole, of opinion that the payment of the 15s. by the respondent and the recording of that fact in the rent book was really a matter of machinery, and that the substance of his agreement with the appellants was that he was to occupy those premises as their servant, in order to perform his services in part in those premises, and that it was, therefore, a service occupancy and not a service tenancy. The importance of that is that if it is a
- B service occupancy, then, unless there was a new tenancy agreement, the appellants are entitled at the hands of this court to have possession of the premises ; whereas, if it was not a mere service occupancy but was a service tenancy, then the provisions of the Schedule to the 1933 Act would apply, and it would be necessary for the court to decide whether it was reasonable to give the appellants possession, and also to decide whether they reasonably required them for the employment of another servant within the meaning of subpara. (g) of the First
- C Schedule to the 1933 Act ; and as that matter has not been considered by the county court judge it would have to go back to the county court for that matter to be decided. But as, in my opinion, the agreement of 1942 did not create a service tenancy but only created a service occupancy, that part of the Schedule to the 1933 Act has no application, and unless it is shown that there was a new agreement, the only evidence of which is the acceptance of this 15s. for these
- D two weeks, then the matter can be decided by this court.

- E In my opinion, we ought to hold that the appellants are entitled to possession. I think it is perfectly clear from the evidence that there was no real intention either on the part of the appellants or on the part of the respondent to create a new tenancy, and unless there was that intention, or circumstances from which that intention ought to be presumed, then no tenancy can be created. It would be, it seems to me, a very unfortunate thing, when a landlord, in such circum-
- F stances as the present, acts in the humane way in which the appellants acted in this case, if it were to be held that the mere fact that he accepted such a sum as 15s. a week, which may be regarded as indemnifying him against the outgoings on the premises, necessarily constituted a new tenancy. It would be a very poor return for the humane and courteous way in which the appellants treated the respondent. In my opinion, no such presumption arises, and I should find that no new tenancy was created. The appeal, therefore, in my
- F opinion, ought to be allowed with costs and possession awarded to the appellants after such a period as may be decided.

- G MACKINNON, L.J. : I agree. The first question is whether the respondent was merely allowed to live in the employers' house as a licensee or whether, being their employee, he was their tenant of this house. In the former case, the Rent & Mortgage Interest Restriction Acts do not apply to the house at all. In the latter case, the appellants in order to obtain an order of possession would have to satisfy the provisions of the First Schedule to the 1933 Act, which involves a consideration of two points by the judge making the order, the two points to which the county court judge did not direct his mind at all. For the reasons which have been stated by LAWRENCE, L.J., I think the proper answer to the question which of those two sorts of arrangement existed is that it was the
- H first sort.

I would only add a few words on the question which was decided by the county court judge and has been dealt with before us. He held that by the acceptance in those two weeks of 15s. a new agreement of tenancy between the appellants, the landlords, and the respondent was created. You can make an agreement either by express terms or impliedly by conduct. There clearly was no evidence whatever of any express agreement, and I can discover no evidence upon which it could properly be held that by their conduct the appellants entered into a new agreement with the respondent. The real truth is

that this was an attempt to rely upon the very technical rule that acceptance of the rent after forfeiture of the lease may amount to waiver of the forfeiture. The fallacy of that argument as applied to the acceptance of rent after a valid notice to quit was, I think, very correctly stated by LUSH, J., in *Davies v. Bristow* (1). He said, at p. 437 :

The expression "waiver of a notice to quit," though convenient as a description of the position where both landlord and tenant agree that a notice which has expired shall be treated as inoperative, is an inaccurate expression, and if one attempts to found a proposition of law upon it, it is likely to lead one astray. Where a breach of covenant available for forfeiture has been committed by a tenant it is correct enough to say that the landlord can waive the forfeiture, for by the breach of covenant the term is not avoided, it is only rendered voidable at the landlord's option. He can elect whether to affirm or disaffirm the tenancy, and if he by some act evinces an unequivocal intention to affirm it, as by the acceptance of rent with notice of the breach, he cannot afterwards insist on the forfeiture . . .

Then a little later he says, at p. 438 :

When once the notice to quit has expired the position of the parties is precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice. There is in that case no room for election by the landlord. The landlord and the tenant may, of course, agree that a new tenancy shall be created on the old terms, and that is what in effect they do when they agree that the notice to quit shall be waived. But the agreement to continue the tenancy must be proved.

So here, any alleged agreement to create a new tenancy must be proved, and I can see no evidence on which any such conclusion could be founded. I agree with the order proposed by LAWRENCE, L.J.

MORTON, L.J. : I also agree. I am satisfied that during his employment the respondent never had anything more than a mere service occupation, and I agree that there was no evidence on which any new agreement for a tenancy could be found or inferred. The only evidence that was given on that point was the evidence of a representative of the appellants, who said : "On Sept. 4 and 11 we received 15s. in the ordinary way as for two previous years." That seems to me to negative any intention to alter the situation as from the time when the respondent's employment ceased.

Appeal allowed with costs.

Solicitors : *Church, Adams, Tatham & Co.*, agents for *Norris & Sons*, Liverpool (for the appellants) ; *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

considered. LANGFORD PROPERTY LTD. v. GOLDRICH. [1949] 1 E.R. 402. Explained. LANGFORD PROPERTY CO., LTD. v. BATTEN. [1949] 2 All E.R. 422.

VAUGHAN v. SHAW.

[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), April 25, 1945.]

Landlord and Tenant—Rent restriction—Standard rent—Dwelling-house let in separate parts to two tenants—Subsequently whole house let to one tenant—Whether house originally let as a complete dwelling—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a)—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), ss. 3, 7 (1).

The respondent was the landlord of a house to which the Rent Restrictions Acts, 1920-1939, applied. On Sept. 1, 1939, the house was let in two separate parts, one tenant paying a rent of 17s. a week, the other a rent of 15s. 6d. a week. In Jan., 1941, the respondent let the whole of the house to the appellant at a rent of 25s. a week. The respondent then applied to the court to have the standard rent fixed at 32s. 6d. a week, since that was the total weekly rent of the house when it was let in two parts on Sept. 1, 1939. It was contended for the appellant that as the house itself was not let on Sept. 1, 1939, as a complete dwelling-house the standard rent was, therefore, the rent at 25s. a week at which the house was first so let after Sept. 1, 1939 :—

Held : in fixing the standard rent of a dwelling-house it was necessary

to ascertain the rent of the whole house when it was first let as a separate dwelling and not the total of the rents of the two parts of the house let separately.

[EDITORIAL NOTE. The question here is the ascertainment of the standard rent of a house first controlled by the Rent and Mortgage Interest Restrictions Act, 1939, The dwelling-house was let in separate parts until 1941 and it is held that it must be treated as a dwelling-house which was first let after Sept. 1, 1939. This follows from the definition of dwelling-house in the 1939 Act, which refers back to the definition in sect. 16 of the 1933 Act, and is in accordance with the decision in *Veale v. Cabezas* (1), where it was said that the aggregate of weekly rents was not the standard rent, since that was not the rent of the house as a whole, but of all the separate tenements into which it was then divided. The county court judge apparently overlooked the reference back to sect. 16 which applies an exactly equivalent definition of dwelling-house to that in sect. 12 (2) of the 1920 Act, which is not incorporated in the 1939 Act.

AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7119-7132.]

Case referred to :

(1) *Veale v. Cabezas*, [1921] W.N. 311; 31 Digest 565, 7124.

APPEAL by the defendant, a tenant, from an order of His Honour JUDGE TOPHAM, made at Portsmouth County Court and dated Mar. 15, 1945. The facts are fully set out in the judgment of MACKINNON, L.J.

H. Heathcote-Williams for the appellant.

B. S. Horner for the respondent.

MACKINNON, L.J. : This is yet another almost insoluble problem arising from that welter of chaotic verbiage which may be cited together as the Rent and Mortgage Restrictions Acts, 1920 to 1939. It relates to a house in Portsmouth which was brought under the control of those Acts pursuant to the provisions of the 1939 Act, which took effect as from Sept. 1, 1939. On Sept. 1, 1939, the house was let to two tenants occupying separate parts of it, with no physical separation between the two parts, but merely a right to occupy the staircase in common and the entrance in common, and some rooms separately. One tenant paid 17s. a week for his part, and the other tenant paid 15s. 6d. a week for his part. In Jan., 1941, those two tenants having left, the house was let as a whole to the appellant at 25s. a week. It has been stated, and it probably is the fact, that at that time much bombing had been going on, and there was very little demand for such a house, and, therefore, the appellant got it cheap. When houses were more in demand, the landlord made an application, with a view to increasing that 25s. a week, to the county court judge to fix the standard rent. That had to be, under the 1939 Act, the rent at which the house had been let before Sept. 1, 1939, or, if it had not been let, the rent at which it was first let after Sept. 1, 1939.

The dispute between the parties was this. The landlord said it was let in two parts before Sept. 1, at 17s. and 15s. 6d., and, therefore, those two sums ought to be added together so as to declare a standard rent of 32s. 6d. The tenant said : "That is wrong. You have to consider, not two dwelling-houses, as under the artificial terms of these Acts it has to be treated if it is let to separate tenants in separate parts, but you have to consider the letting of the one as a complete dwelling-house. It was not let before Sept. 1 in that way at all, and the first letting after Sept. 1 was a letting to me at 25s., and, therefore, the standard rent is 25s." The county court judge accepted the contention of the landlord and fixed the rent at 32s. 6d. The tenant appeals from that and says it ought to be 25s.

We have had our attention called to a great number of passages in this obscure mass of words, and it is quite obvious that this is an extremely obscure and difficult point. The judge, I think, was misled by the erroneous belief on his part that sect. 12 (2) of the 1920 Act no longer applied. I do not suppose the case was argued with the same care and industry as it has been argued before us. The judge relied very largely on the fact that sect. 12 (2) of the 1920 Act is not incorporated as part of the 1939 Act. Sect. 12 (2) provides :

This Act shall apply to a house or a part of a house let as a separate dwelling . . . He relied upon that provision as directing him to take into account the fact that this house had been let as two separate dwellings, or as two parts, and that when you had to apply the 1939 Act to-day you must take the aggregate of the

rents for those parts. That seems to me to overlook the provision in sect. 7 (1), which is the definition section of the 1939 Act, and which provides :

... other expressions have the same meanings as in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

Turning back one finds that the definition of "dwelling-house" in sect. 16 of the 1933 Act is as follows :

"Dwelling-house" has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let.

Therefore, though sect. 12 (2) of the 1920 Act is said not to apply under the 1939 Act, an exactly equivalent definition of dwelling-house is made to apply by the incorporation of sect. 16 of the 1933 Act.

That being so, it seems to me that the judge was wrong, very venially wrong because anybody may be forgiven for making a mistake about this series of Acts. But it seems to me that he did fall into an error in considering the question whether he was bound to ascertain the standard rent of this whole house as a separate dwelling-house. On that question I think the appellant was right in saying it was let as a separate dwelling when it was let to him the first time as a separate dwelling in Jan., 1941, at 25s. a week. Therefore, the standard rent ought to have been held to be 25s., and not 32s. 6d., the total of the two rents paid for the two parts of the house under the previous letting.

In the result, I think the appeal succeeds and must be allowed with costs.

LAWRENCE, L.J. : I agree. I think that the case turns in the final analysis upon the definition of standard rent in sect. 12 (1) (a) of the Act of 1920, and, therefore, as applied by the later Act, the interpretation of standard rent means "the rent at which the dwelling-house was let on Sept. 1, 1939." The dwelling-house in this case was the whole of these premises. The whole of the premises was not let as a separate dwelling-house on Sept. 1, 1939. It was first let afterwards, and then let at 25s. a week. Therefore, within the express terms of the definition of standard rent, that rent at which it was first let as a whole dwelling-house must be the standard rent.

It appears to me also that the decision which my Lord has proposed is in accordance with the case of *Veale v. Cabezas* (1). Although the point, as counsel for the respondent has pointed out, probably was not fully argued in that case, yet the decision of the Divisional Court in that case was in terms in accordance with the decision which we have now come to. That is a case which has stood for 24 years. For these reasons, I agree with what my Lord has proposed.

MORTON, L.J. : I also agree, but as we are differing from the judge I think I ought to state as shortly as I can, the chain of reasoning by which I have arrived at that result, even if it means plunging for a short time into the Acts which have already been described in unflattering terms.

The problem which the judge had to solve was : What was the standard rent of this house ? To ascertain what the standard rent was he had to consider sect. 12 (1) (a) of the Act of 1920 in its application to a house which was first controlled by the 1939 Act. He had to consider this problem in the light of the joint effect of those two Acts. The relevant definition is as follows :

The expression "standard rent" means the rent at which the dwelling-house was let on Sept. 1, 1939, or, in the case of a dwelling-house which was first let after the said Sept. 1, the rent at which it was first let.

This house was brought under control by virtue of sect. 3 of the 1939 Act, which as far as is material, reads as follows :

Without prejudice to the operation of the two preceding sections in relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the principal Acts, as amended by the last preceding section, shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed . . . [so much].

Then the figures are set out. One must next look and see what is the definition, if any, of a dwelling-house in the Act of 1939. For that purpose one has to turn to sect. 7 (1) of the Act of 1939, where certain expressions are defined. Sect. 7 (1) concludes :

... other expressions have the same meanings as in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

One must, therefore, pursue the matter back to the 1933 Act. This, I think, is a stage which the judge did not reach, because it would appear from his judgment that his attention could not have been directed to sect. 7 (1) of the Act of 1939, which brings in the Act of 1933. Turning back to the Act of 1933, one finds in sect. 16 the following definition of dwelling-house :

Dwelling-house has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling, or a part of a house being a part so let.

A Having traced the matter so far I must now consider : Was this a dwelling-house which was let on Sept. 1, 1939, or was it a dwelling-house which was first let after Sept. 1, 1939 ? In my view, having regard to the definition of a dwelling-house, it must be treated for these purposes as a dwelling-house which was first let after Sept. 1, 1939. Up to that date there was no letting of this dwelling-house by itself. There was a letting of two separate parts of it. I do not think that that is a letting of the dwelling-house within the meaning of the Acts. The judge in his judgment said :

The principal Acts are accordingly to be made to apply to this house simply because the rateable value does not exceed £75 independently of the question whether it was on the appropriate day let as a separate dwelling.

C With all respect, I think that is a misconception on his part which arises from the fact that his attention was not directed to the definition of " dwelling-house " that is contained in the 1939 Act by reference to the 1933 Act. I think it was necessary for him to consider whether the house was on the appropriate day let as a separate dwelling. In my opinion, it was not. It was not let as a separate dwelling until Jan. 13, 1941.

I agree with the order proposed by my Lord, and I agree that the decision at which we have arrived is in accordance with the case of *Veale v. Cabezas* (1).

Appeal allowed with costs.

D Solicitors : *Amphlett & Co.*, agents for *Stokes (R. V.) & Medcalfe*, Portsmouth (for the appellant) ; *Gordon Gardiner, Kearton & Co.*, agents for *J. R. C. Miller*, Portsmouth (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Applied. LLEWELLYN v. HINSON.
[1948] 2 All E.R. 95.

Distinguished. HARRISON v. HOPKINS.
[1949] 2 All E.R. 597.

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SHARPE v. NICHOLLS.

[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), April 23, 1945.]

F *Landlord and Tenant—Rent restriction—Recovery of possession—Plaintiffs claiming as personal representatives of deceased landlord.—One of the plaintiffs deceased landlord's widow—Premises required by widow "for her own occupation"—No evidence whether widow beneficially entitled to premises—Point not raised by defendant at trial—Whether point may be raised in Court of Appeal—Order by county court judge giving plaintiff possession "subject to plaintiff allowing defendant a Rent Act protected tenancy" of part of house with joint use of kitchen and out-offices—Order not within power of judge to make—Order for new trial—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), Sched. I, para. (h).*

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The appellant was for many years the tenant of a four-roomed cottage. She held the cottage as the tenant of a farmer and the tenancy was one protected by the Rent Restriction Acts. Recently the farmer had died and his widow desired the cottage for her own occupation. The proceedings claiming possession were, however, brought by the widow and her nephew as personal representatives, and not by the widow as landlord. In the county court the defendant relied upon inability to obtain alternative accommodation. No objection was taken to the fact that the proceedings were brought by the personal representatives and not by the widow, and no evidence was given to show that the widow became the beneficial owner on the death of the farmer. The claim was treated throughout the proceedings as being in fact a claim by the widow as landlord requiring the cottage for her own occupation and, as such, a claim within the Rent and Mortgage Interest Restrictions (Amendment) Act,

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1933, Sched. I, para. (h). An order was made giving the "plaintiff" possession "subject to plaintiff allowing defendant a Rent Act protected tenancy" of two rooms together with the joint use of the kitchen and out-offices. The appellant appealed from the order but the notice of appeal contained no reference to the second plaintiff, the nephew. The appellant contended that (i) the plaintiffs had failed to bring themselves within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (h), and, therefore, the county court judge should have dismissed the action; (ii) the judge was wrong in ordering that a tenancy should be created under the protection of the Rent Restriction Acts of two rooms with the joint use of the kitchen:—

HELD: (i) [MORTON, L.J., *dissenting*] in view of the fact that no point was taken at the trial as to the absence of proof that the widow could make a claim as the "landlord" claiming for herself within the provisions of Sched. I, para. (h), to the 1933 Act, there must be a new trial.

(ii) the county court judge was wrong in making the order that he did, because the result of the order would be in substance a sharing of the house and such a tenancy would not be a Rent Act protected tenancy.

Neale v. Del Soto (1) *applied*.

[EDITORIAL NOTE. This case considers the position arising where personal representatives apply for possession of a house under the Rent Restriction Acts for occupation as a residence by one of themselves, who was the widow of the testator. In the county court the proceedings were apparently treated as a claim by the widow as being beneficially entitled and so as being the landlord, and this was apparently admitted by the defendant. When the point is raised on appeal MORTON, L.J., in a dissenting judgment, holds that "landlord", as used in the 1933 Act, Sched. I, para. (h) cannot apply to one of several personal representatives and he would dismiss the action on this ground, but the majority of the court are in favour of a rehearing.

The order of the county court judge is further objected to as containing a condition contrary to the decision in *Neale v. Del Soto* (1), amounting substantially to a sharing of the house. The judge ordered that there should be a Rent Act protected tenancy of two rooms together with the joint use of the kitchen and offices and this, as shown by the *Neale* case (1), is impossible.

AS TO POSSESSION REQUIRED BY LANDLORD FOR HIS OWN OCCUPATION, see HALSBURY, Hailsham Edn., p. 332, para. 396; and FOR CASES, see DIGEST, Vol. 31, p. 580; Nos. 7283-7291.]

Cases referred to:

(1) *Neale v. Del Soto*, [1945] 1 K.B. 144; [1945] 1 All E.R. 191; 172 L.T. 65.

(2) *Davies v. Warwick*, [1943] K.B. 329; [1943] 1 All E.R. 309; 112 L.J.K.B. 245; 169 L.T. 130.

APPEAL by the defendant from an order of His Honour DEPUTY JUDGE TURNER, at the Leicester County Court, dated Feb. 6, 1945. The facts are fully set out in the judgment of MACKINNON, L.J.

E. S. Fay for the appellant.

Guy Dixon for the respondent.

MACKINNON, L.J.: This is a case arising under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933. The subject-matter of the dispute is a very small cottage, having four rooms and a box room, in Leicestershire. It was the freehold property of a farmer for many years and a great many years ago he let it at 7s. 7d. a week to the defendant. Recently the farmer died. His widow and her daughter and son-in-law were unable to carry on the farm and, therefore, they had to give it up to the landlord. The widow had to leave the house where she had lived with her husband, and desired to have somewhere as a home. This little cottage having belonged to her husband, she desired to live in it. Proceedings were accordingly taken against the defendant, the tenant, to try to get possession of it. The particulars of claim set forth as the plaintiffs in the action the widow, Mrs. Sharpe, and Leslie Allen Sharpe, an agricultural worker, who, we are told, is her nephew. The first paragraph states that the plaintiffs are the personal representatives of the deceased farmer. The plaintiffs claim possession of this house with an additional statement:

The plaintiffs claim possession of the said premises which are required by the said Violet Beatrice Sharpe [the widow] for her own occupation.

The defence was a reliance on the Rent Restriction Acts, alleging that the defendant was unable to obtain alternative accommodation, that she had occupied

the premises for 36 years and would suffer great hardship if an order was made.

The proceedings as thus formally constituted came on before the county court judge. No point has been made in the defence that the claim was by two persons suing as administrators with an allegation that one of them required the premises for her own occupation; and I gather that it was treated throughout the proceedings tacitly, without any objection on the part of the solicitor appearing for the defendant, that in effect it was a claim by the widow to be entitled to possession of her late husband's house and desiring to occupy it for herself. Her claim for such possession was put under the provisions of Sched. I, para. (h), to the Act of 1933:

A court shall, for the purposes of sect. 3 of this Act, have power to make . . . an order . . . for the recovery of possession of any dwelling-house . . . without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for (i) himself [which must include "herself"] . . . Provided that an order . . . shall not be made . . . on any ground specified in para. (h) of the foregoing provisions of this Schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

It is quite obvious that the case was discussed below upon that issue about the court being satisfied as to the greater hardship as between the two widows, Mrs. Sharpe and Mrs. Nicholls, and it was argued and discussed throughout upon the tacit assumption that Mrs. Sharpe satisfied the provisions of this para. (h) as being the "landlord" who desired occupation of this house as a residence for herself. So much is it evident that that assumption was made that when the county court judge made his note of the action he headed it "Between Sharpe, Plaintiff, and Nicholls (widow) Defendant." There is no mention of the other plaintiff whose name had in fact appeared on the particulars of claim. So fully was that acquiesced in by the defendant, now the appellant, that when the notice of appeal was served it was headed "Between Mary Lizzie Nicholls (widow) appellant, defendant, and Violet Beatrice Sharpe (widow) respondent, plaintiff"—again without any reference to the fact that the name of the nephew as a co-plaintiff had appeared upon the original particulars of claim.

The judge heard the matter with evidence as to the respective hardship that would be involved upon one or other of these elderly women if Mrs. Sharpe was denied possession of the house or if Mrs. Nicholls was ordered to give it up. He eventually made an order partly in favour of Mrs. Sharpe, as sole plaintiff, as he describes her in the formal order. The order was in these terms:

And it is ordered that the defendant do give the plaintiff possession of the said land on Apr. 6, 1945, subject to plaintiff allowing defendant a Rent Act protected tenancy of the front two rooms, together with joint use of kitchen and out-offices. Rent to be apportioned by registrar failing agreement by the parties.

From that order the defendant, Mrs. Nicholls, appeals, and the grounds of her notice of appeal allege:

(1) That the judgment was against the weight of the evidence [there is nothing in that; it was a question of fact and purely one for the judge and that ground of appeal has not been argued] (2) that the judge misdirected himself in that he could not order that a tenancy should be created of the said two rooms with joint use of kitchen and out-offices protected by the Rent Restriction Acts. (3) That the said judgment contravenes the provisions of the Rent Restriction Acts.

The second ground is an objection to that condition attached to the order for possession which I should have thought was a condition in favour of the appellant and not one in respect of which there was any reason why she should object to it. The third ground is very general: "That the said judgment contravenes the provisions of the Rent Restriction Acts."

In this court counsel for the appellant has taken two points. He first takes a point which was never taken in the defence and was never mentioned or argued in the court below and is not mentioned in the notice of appeal, except so far as it may be very generally included in the allegation "That the said judgment contravenes the provisions of the Rent Restriction Acts." That point is that the plaintiffs in this case who were claiming possession are two persons, Mrs.

Sharpe, the widow, and Leslie Allen Sharpe, the nephew, who state that they are the personal representatives of the plaintiff's husband. It is quite obvious that the existence of Leslie Sharpe was either overlooked or was tacitly admitted by the defendant's representative as being quite immaterial. As the result of this point not having been taken, we do not know whether the husband died intestate or whether there was a will which did not appoint executors and the plaintiffs are administrators with the will annexed; we do not know what was the size of the estate or whether by reason of its being less than £1,000 the whole estate vests in the plaintiff widow; if it was not so, we do not know whether the administrators before the hearing had made an assent vesting this little house in the widow. All these facts are totally unascertained by reason of the fact that the defendant never took the point in the court below. The other objection, specifically taken in the notice of appeal, is that the judge was wrong in ordering that a tenancy should be created under the protection of the Rent Restriction Acts of two rooms, with the joint use of the kitchen. I agree that that was not an order which he had power to make under the Acts and I think the decision of this court in *Neale v. Del Soto* (1) (reported since the hearing of this case) shows that he was in error in that respect. If he was so, it would be a matter for a cross-appeal by the plaintiff, if she was otherwise entitled to possession of the house, to have that condition deleted as one which the judge was not empowered to make. But no doubt the insertion of that invalid condition was part of the reasoning which the county court judge took into account in considering the question that he had to consider under the provisions of Sched. I of the 1933 Act as to the comparative degree of hardship caused by granting the possession of the house to Mrs. Sharpe or refusing it in favour of Mrs. Nicholls.

I regretfully come to the conclusion that, in the circumstances of this case, it ought to be reheard by some other judge and, subject to the protection of the plaintiffs in the matter of costs, I think it ought to be open to them at the rehearing properly to take this first point which has been argued before us by counsel for the appellant as regards the parties who were claiming and the absence of proof that Mrs. Sharpe, one of them suing in the capacity of administrator, is the effective person interested in this little house and can, therefore, make a claim on her behalf as the "landlord" claiming for herself within the provisions of Sched. I, para. (h). Having regard to the fact that no point was taken in the court below about the first ground of appeal now urged before us and the fact that this error of the judge in the condition that he added to the order for possession was really one in favour of the defendant, my present impression is (although we will hear what is to be said about it) that the plaintiff respondent here ought not to have to pay the costs of the defendant appellant and that the costs of the first trial and of the re-hearing should be left to the discretion of the judge who re-hears it.

LAWRENCE, L.J.: I agree. The first point is put most strongly by saying that the widow, Mrs. Sharpe, has not proved that she was the "landlord" at the time of the issue of the summons; but she may have been the "landlord" by reason of being beneficially entitled to the property. It was perfectly open to the defendant to admit that fact. I think the proper inference from the course which the trial in the county court took is that the defendant did admit that the widow was beneficially entitled to the premises and was the "landlord" within the meaning of the Acts. As my Lord has pointed out, no such point was ever taken. The order of the county court judge referred to her as the plaintiff and not to the other plaintiff, and the defendant's notice of appeal to this court also treated the parties in the same way. In view of those facts, and particularly in a case in the county court where matters of proof and of form are not gone into with the same particularity as they are in the High Court, I think the proper inference to draw is that the defendant admitted that Mrs. Sharpe was the "landlord" within the meaning of the Act. I think, therefore, that it is a matter of very great doubt whether the defendant ought to be allowed to raise that point again; but I am prepared to concur in the judgment which is proposed by my Lord.

MORTON, L.J.: Counsel for the appellant has put two arguments before this court. The first is that the plaintiffs have failed to bring themselves within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I,

para. (h), and, therefore, the county court judge should have dismissed the action. The second point is that the county court judge made an order which was impossible, having regard to the decision of this court in *Neale v. Del Soto* (1).

I shall deal with the second point first and I can deal with it quite shortly having regard to the judgments which have already been delivered. I agree that the county court judge went wrong in making the order that he did make. It is true that *Neale v. Del Soto* (1) was a decision upon the facts then before this court, but I think that the result of such an order as was made by the county court judge here would be (to quote *Neale v. Del Soto* (1), at p. 147 ([1945] 1 All E.R., at p. 193)) in substance a sharing of the house. It is in each case a question of degree whether there is a letting of part of a house as a separate dwelling within the meaning of the Act. But in the case of a very small cottage like this it seems to me that if each party has two rooms and they share the use of those very important rooms, the kitchen and the rooms which are sometimes referred to as the "usual offices," the decision in *Neale v. Del Soto* (1) applies and the order which the county court judge made was impossible, in that he ordered that there should be a Rent Act protected tenancy of two rooms together with the joint use of kitchen and out-offices. In my view, such a tenancy would not be a Rent Act protected tenancy.

I agree that if the first point taken before this court is not a good one or is not open to the appellant, there should be a new trial before another judge. For my part, however, I think that the first point argued before us is a good one and is open to the appellant; that the appeal should be allowed and that judgment should be entered for the defendant. It is true that the point is not specifically taken on the pleadings and does not appear to have been taken at the hearing. That is a matter, I think, which could be dealt with when the question of costs comes to be considered. It is also true that the notice of appeal although it does contain the paragraph "That the said judgment contravenes the provisions of the Rent Restriction Acts", does not take this point with any particularity. That, again, I think, is a matter which could be dealt with in dealing with the costs. It seems to me that, unless the plaintiffs alleged and proved the necessary facts to bring them within Sched. I, para. (h), to the Act of 1933, it was not within the power of the county court judge to make an order for possession, and that this is a point of law which is open to the appellant in this court. We have been referred to the observations of GODDARD, L.J., in *Davies v. Warwick* (2), where the following passage occurs, at p. 336 ([1943] 1 All E.R., at p. 313);

The cases cited show that the effect of sect. 3 of the Act of 1933, which restricts the power of the court to grant orders for possession, is not to afford a statutory defence to a party, but to limit the jurisdiction of the court. If the court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession, it is the duty of the court to refuse it, even though the statute is not raised by the defendant, because there is no jurisdiction to grant it, but that, in my opinion, is all that the cases quoted establish.

In my view, the present case is one in which the Court of Appeal finds that it is debarred from granting an order for possession and I shall now proceed to state the reasons which lead me to that conclusion. The statement of claim has been referred to briefly. I think I must read the whole of it. It is quite short and it begins: "1. The plaintiffs are the personal representatives of Allen Sharpe formerly of 35, The Square, Littlethorpe, Narborough, in the county of Leicester." It does not state whether they were the executors of Allen Sharpe or administrators of Allen Sharpe with or without the will annexed. It goes on: "The plaintiffs as such personal representatives as aforesaid"—I emphasise these words—"are the owners of the property, 11, Princess Street, Narborough, aforesaid which said property was let to the defendant on a weekly tenancy at a rental of 7s. 7d. per week." The plaintiffs are alleging in terms: "We are the owners as personal representatives." Thus they exclude by their own pleading any possibility that they had vested the fee simple in Mrs. Sharpe even if they were entitled to do so under the will or as the result of an intestacy. "3. The said tenancy was duly determined by one week's notice to quit in writing dated Sept. 7, 1944, expiring on Sept. 18, 1944. The plaintiffs claim possession of the said premises which are required by the said Violet Beatrice Sharpe for her own occupation." The defence is simply this:

The defendant disputes the plaintiffs' claim because she is unable to obtain alternative accommodation. She has occupied the premises for 36 years and would suffer great hardship if an order was made.

That defence is clearly intended to set up the provisions of the Rent Restriction Acts.

I now turn to the Acts to see what it was necessary for the plaintiffs to do in order to induce the court to make an order in their favour for possession. Sect. 3 (1) of the Act of 1933 is this :

No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply [it is common ground that this is such a dwelling-house] or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either (a) the court has power so to do under the provisions set out in Sched. I to this Act ; or (b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

I can eliminate (b) from the consideration of this case because it is quite clear from his judgment that the judge was not satisfied that suitable alternative accommodation was available for the tenant. I now proceed to investigate whether the court had power to make an order for possession under the provisions set out in Sched. I to the Act. Sched. I begins with these words :

A court shall for the purposes of sect. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for (i) himself ; or (ii) any son or daughter of his over 18 years of age ; or (iii) his father or mother.

Then there is a provision which has already been read by my Lord in regard to the question of hardship. There was no evidence at the trial as to the beneficial ownership of this particular cottage. The plaintiffs' whole case, as I have shown from their pleadings, is based upon the allegation that they were the owners as personal representatives. I cannot find any admission at the trial in any shape or form that the widow had any beneficial interest in the house. I do not know in the least who was entitled to the house. For all I know, Sharpe may have made a will leaving it to a nephew or to any other person. In those circumstances, one must consider ; can it be said that " the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for himself " when the plaintiffs are legal personal representatives suing in that capacity and one of them wants to live in the house ? In my opinion, such a case is not within the terms of para. (h) at all. Strange results would follow if that were not so. For instance, you might have four legal personal representatives, none of whom was related to the testator at all, and one of them might require the house as a residence for himself, having no beneficial interest whatsoever in the property. I am clearly of opinion that such a case could not possibly be within the terms of para. (h). It is also to be observed that the words " himself or any son or daughter of his . . . or his father or mother " seem to refer to a person who is the landlord not in the sense that he is one of several personal representatives but in the sense that he is the sole owner of the property subject to the tenancy. It seems to me, therefore, that the plaintiffs entirely failed to prove that they came within para. (h) ; and if they failed to prove that they came within para. (h) it seems to me that the words of sect. 3 of the Act absolutely precluded the county court judge and would preclude this court, from making any order for the recovery of possession.

Perhaps I should mention the definition clause which was referred to in the course of the argument. There is a definition clause which includes a definition of " landlord " in sect. 12 (1) (g) of the Act of 1920 :

The expression " landlord " also includes in relation to any dwelling-house any person other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house . . .

That definition is not set out in the Act of 1933 and it is, I think, of some importance that there is a definition section in the Act of 1933, *i.e.*, sect. 16. That section repeats some but not all of the definitions in the Act of 1920 and it does

not repeat any definition of "landlord." Sect. 18 (1) of the Act of 1933 provides :

This Act may be cited as the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and this Act and the principal Acts may be cited together as the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933.

We were not referred to any other section bearing on the matter. It is to be observed that sect. 18 does not say that the Act of 1920 and the Act of 1933 shall be read and construed as one Act, and I feel considerable doubt as to whether the definition of "landlord" which appears in the 1920 Act can be said to be imported into the 1933 Act. But whether that is so or not, and even assuming that the definition is imported into the 1933 Act, I am of opinion that the expression "the landlord" as it is used in Sched. I, para. (h), to the 1933 Act cannot apply to one of several legal personal representatives. I do not think that my brethren differ from the construction which I have put upon para. (h) but they think there should be a rehearing, for the reasons which they have stated.

For my part, I think that the county court judge should have dismissed the action and that we should allow the appeal and make an order dismissing the action, subject to such provision as to costs as may be reasonable. I need not go further into that, however, for as my brethren differ from me as to the course which should be adopted the order will be as they direct.

Appeal allowed. New trial ordered. No order as to costs in the Court of Appeal. Costs of both trials in the county court to be in the discretion of the judge on the second trial.

Solicitors: *Bennett, Ferris & Bennett*, agents for *Bray & Bray*, Leicester (for the appellant); *A. H. Headley*, Leicester (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

BURSTON v. INLAND REVENUE COMMISSIONERS (No. 1).

[KING'S BENCH DIVISION (Macnaghten, J.), April 17, 1945.]

Income Tax—Sur-tax—Appeal from assessment by way of case stated—Issue raised in court that assessment should be reduced by one-sixth part—Issue involving new facts—Appeal dismissed—Case remitted to commissioners to determine new issue raised—Order remitting case intended to mean, and so understood by parties, that either side might ask for special case stated if point of law emerged—Decision of commissioners adverse to taxpayer—Decision communicated by post—Taxpayer requiring commissioners to state special case after a lapse of ten months—Commissioners complying with request—Whether supplemental case part of original case stated and request to state supplemental case covered by original request made within time limit prescribed—Income Tax Act, 1918 (c. 40), s. 149—Finance Act, 1927 (c. 10), s. 42 (7)—Finance Act, 1938 (c. 46), s. 38.

By a deed of covenant, dated Mar. 9, 1937, the appellant covenanted to pay to Burlah Trust, Ltd., a private company which had been formed on Mar. 6, 1937, over a period of eight years or for the remainder of his life, whichever period should be shorter, three-fourths of the net dividends which he received on shares held by him in Houndsditch Warehouse Co., Ltd. The Special Commissioners made an additional assessment on the appellant for the year 1937-1938 in the sum of £46,884, of which £42,927 was attributable to the dividends which the appellant had received. The appellant appealed to the Special Commissioners who confirmed the assessment. The appellant, thereupon, required the commissioners to state a special case for the opinion of the High Court, the only question for the determination of the court being whether the sum of £42,927 should be treated as the income of the appellant by virtue of the Finance Act, 1938, s. 38, or whether it fell outside the terms of the section. In that action counsel for the appellant raised the question that, if the settlement fell within the Finance Act, 1938, s. 38, there were facts which had not been stated and which would show that the assessment ought to have been reduced by a one-sixth part. The judge held that the Finance Act, 1938, s. 38 (3) was applicable to the settlement and dismissed the appeal, ordering,

at the same time, the case to be remitted to the Special Commissioners to consider whether the claim for the abatement of the assessment by one-sixth was well founded or not. Although the formal order requested the commissioners to "consider" that question, it was intended by the judge to mean, and so understood by both parties, that the commissioners should determine the question and, if that determination depended solely on new facts, that such determination should be final. It was equally understood that, if a question of law emerged, either party would be free to require the commissioners to state a special case. On Jan. 4, 1943, the Special Commissioners heard the parties, and on Jan. 11, 1943, they communicated their decision by post to the appellant's solicitor. The commissioners disallowed the appeal, stating that "this appeal on the question of quantum must fail, if not under subsect. (3) of sect. 38 of the Finance Act, 1938, then under subsect. (1)." On Nov. 11, 1943, the appellant required the commissioners to state a special case for the opinion of the court, and the commissioners complied with that request. The Attorney-General, on behalf of the respondents, took the preliminary point that the commissioners had no power to state a case, because they had not received the request to do so within the prescribed limit of 21 days. The arguments of the appellant suggested that the present case, being supplemental, was in reality an amendment of the original case, and that the request to sign and state the original case, made within the prescribed time limit, must be taken to be a request to sign and state the supplemental case also :—

HELD : when the original case was remitted to the Special Commissioners, the parties understood that, if any question of law arose on the new matter the commissioners had to determine, *i.e.*, the reduction of the assessment by one-sixth, they could apply for a special case to be stated. In order to do so, it was then necessary for either party to comply with the provisions of the Income Tax Act, 1918, s. 149, and the Finance Act, 1927, s. 42 (7), by expressing immediately after the determination of the appeal their dissatisfaction and then requiring, within 21 days thereafter, the commissioners to state a case. Since the appellant's request was not made within 21 days from the date when the written communication of the determination was received by him, the commissioners had no power to state and sign a case and, in the circumstances, the court had no jurisdiction to hear it.

[EDITORIAL NOTE.] This case decides an important point of income tax practice in regard to supplemental cases. It is held that when a case is remitted by the court to the Special Commissioners to determine a new issue a supplemental case stated by the commissioners thereon is in no sense part of the original case. The provisions of the Income Tax Act, 1918, s. 149, by which the taxpayer is limited to 21 days in which to request the commissioners to state a case, must be strictly complied with, and the time runs from the communication of the decision of the commissioners upon the new issue. Here the decision was communicated by post, and although the taxpayer could not, therefore, express his dissatisfaction "immediately," as required by sect. 149, he could have expressed it by return of post and could still have requested the statement of a case within the statutory period.

AS TO APPEAL BY CASE STATED TO THE HIGH COURT, see HALSBURY, *Hailsham* Edn., Vol. 17, pp. 360-367, paras. 738-752; and FOR CASES, see DIGEST, Supp., Income Tax, 629a-631a.]

Case referred to :

(1) *Burston v. Inland Revenue Commissioners, Halperin v. Inland Revenue Commissioners* (1942), 24 Tax Cas. 285.

SUPPLEMENTAL CASE STATED, pursuant to an order of the court dated Feb. 3, 1942, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The question for the determination of the commissioners was whether a reduction should be made of the amount of the assessment to sur-tax on the appellant for the year 1937-1938 on the ground that the appellant might not have an interest in the whole of the income from the trust company (*Burlah Trust, Ltd.*). The facts are fully set out in the judgment.

J. Millard Tucker, K.C., and *Heyworth Talbot* for the appellant.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

On the preliminary objection taken by the Attorney-General :

A MACNAGHTEN, J. : The appellant held a half interest in a prosperous company called the Houndsditch Warehouse Co., Ltd., and with the object of avoiding liability to sur-tax in respect of the dividends payable by that company he covenanted, on Mar. 9, 1937, to pay three-quarters of the dividend that he might receive from the Houndsditch Warehouse Co., Ltd., to a company called the Burlah Trust, Ltd., and on Jan. 26, 1938 entered into certain other transactions.

B The Special Commissioners made an additional assessment to surtax upon the appellant for the year 1937-38 in the sum of £46,884, under the provisions of the Finance Act, 1938, s. 38. Of that sum £42,927 was attributable to the dividends which the appellant had received in respect of his interest in the Houndsditch Warehouse Company. From that assessment the appellant exercised his right of appeal to the Special Commissioners, and they confirmed the assessment. Thereupon the appellant required the Special Commissioners to state a case for the opinion of the court in accordance with the provisions of sect. 133 of the Income Tax Act, 1918, which reads thus :

C Immediately after the determination by the General Commissioners, or by the Special Commissioners, of an appeal under this Act, the appellant or the surveyor, if dissatisfied with the determination, as being erroneous in point of law, may declare his dissatisfaction to the commissioners who heard the appeal. (b) Having declared his dissatisfaction, he may, within twenty-one days after the determination, by notice in writing addressed to their clerk, require the commissioners to state and sign a case for the opinion of the High Court thereon. [Then, by subsect. (2)] The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm, or amend the determination in respect of which the case has been stated, or shall remit the matter to the commissioners with the opinion of the court thereon, or may make such other order in relation to the matter . . . as to the court may seem fit.

E From the case stated by the Special Commissioners, it appears that the question, and the only question, of law on which the opinion of the court was asked is whether the sum of £42,927 should be treated as the income of the appellant by virtue of the Finance Act, 1938, s. 38, as contended by the Crown, or whether it fell outside the terms of the section, as contended by the appellant. That was the question, and the only question. The Crown contended that the various transactions which the appellant entered into on Mar. 9, 1937, and Jan. 26, 1938, as set out in the case, constituted a single settlement, and, by virtue of any one or all of subsects. (1), (2) and (3) of sect. 38, the sum of £42,927 must be treated as the income of the appellant for all the purposes of the Income Tax Acts.

F The case [*Burston v. Inland Revenue Comrs.* (1)] came on before LAWRENCE, J., as he then was, on Feb. 2, 3, 1942. The judge decided the question that had been submitted to the court in favour of the Crown. He held that the transactions set out in the case were a "settlement" within the meaning of that word as used in the Finance Act, 1938, s. 38. But, during the course of the argument, counsel for the appellant, raised a further question, namely, that, if the settlement did fall within the provisions of the Finance Act, 1938, s. 38, there were facts which had not been stated, which would show that the assessment ought to have been reduced by a one-sixth part. It was not possible to raise that contention before LAWRENCE, J., not only because it was not raised in the case, but also because all the facts on which the contention was based had not been stated. The judge would have dismissed the appeal and affirmed the assessment, but for the fact that this further point had been raised in the course of the argument. He concluded his judgment thus, at p. 291 :

H But it has now for the first time been contended that in any event Mr. Burston is only entitled to five-sixths, because he has settled £2,000 upon trustees for his children and his children are interested in the Burlah company to the extent of 20,000 deferred shares. This point, for some reason or other, was not taken before the commissioners and no notice of it was given to the Crown. It has been strenuously contended before me by the appellant either that I ought to decide the case in favour of the appellant as to one-sixth of the sum in question [that apparently was to be done without the

further facts] or that in any event I ought to send it back to the commissioners. The Crown, on the other hand, contends that it is entirely a matter within my discretion, and that, in the circumstances of this particular case, which are of such a highly peculiar nature, I ought not to send it back to the commissioners. I feel that it is possible that the tax, on the view the commissioners have taken, owing to the fact that the point was not taken before them, may be overpaid by the appellant, and I therefore, in spite of the fact that the point was not taken, feel that I am not satisfied with that position, and I, therefore, think that the case must go back to the commissioners; but it must go back to the commissioners upon terms as to costs, and the terms I impose are that the case should go back to the commissioners to consider this point and to find any facts which may be material to it, and that the costs of this further hearing will be the Crown's in any event. This appeal will be dismissed with costs.

A discussion took place as to what the form of the order should be. I have had the advantage of reading a transcript of the shorthand note of everything that was said. The intention of the judge is quite plain. He had decided the question raised in the case finally, and that was to stand, but since there might be facts on which the assessment ought to be reduced by one-sixth he remitted the case to the Special Commissioners for them to hear such facts as the appellant might be advised to place before them and to determine whether this claim for the abatement of the assessment by one-sixth was well founded or not. It is clear from the discussion that took place, that both parties understood that the Special Commissioners were to determine that question and no other.

It was also the intention and understanding of all parties that, if that determination depended solely upon new facts, and there was no further question of law to be determined, that determination would be final. It would be a final determination which would end the matter, whether it was in favour of the Crown, or whether it was in favour of the appellant. On the other hand, it was perfectly well understood by both parties that, if a question of law emerged from the further facts which had been produced, then, if either party was dissatisfied with that determination, and required the Special Commissioners to do so, they should state a special case for the opinion of the court. It is abundantly clear that that is what the judge intended, and that is what the parties understood that he intended. The formal order says:

The court is of opinion that the determination of the said commissioners subject to the question of amount is correct and doth affirm the said determination accordingly. That, counsel for the appellant says, is unintelligible, unless you know what has taken place; but when you know what has taken place, it seems to me it is quite intelligible. The court has come to the conclusion that the determination of the commissioners on the only question of which the court had cognisance was correct, namely, that these various transactions constituted a settlement within the Finance Act, 1938, s. 38, but that there was a question as to whether the amount had been correctly ascertained.

Then the order goes on:

And it is ordered by the court that the said case be remitted to the said commissioners for them to consider the question of a reduction of the amount of the assessment on the ground that the appellant may not have an interest in the whole of the income from the trust company.

I think that that could have been more accurately expressed by saying that the question was whether the assessment should be reduced by a one-sixth part—that was the only question that was raised—in consequence of the allegation that the appellant may not have had an interest in the whole of the income.

On Jan. 4, 1943, the Special Commissioners heard the parties. The appellant was represented by counsel, and the Attorney-General was also there. It is quite clear, from what took place at the end, that both sides contemplated that the decision of the Special Commissioners might be a decision which, if there was a question of law, could be brought before the court.

That meeting closed without the Special Commissioners giving their decision, but on Jan. 11 they arrived at their decision and put it into writing. On that day they communicated both with the solicitor of Inland Revenue and with the solicitors for the appellant, and their decision was adverse to the appellant. They wrote:

We are of opinion that this appeal on the question of quantum must fail, if not under subsect. (3) of sect. 38 of the Finance Act, 1938, then under subsect. (1).

The decision being adverse to the appellant, it was open to him, if he was dissatisfied and expressed dissatisfaction with the decision, to call upon the Special Commissioners to state a case for the opinion of the court. But on learning the decision of the Special Commissioners the appellant did not "declare" his dissatisfaction with it, nor did he within 21 days require the commissioners to state and sign a case for the opinion of the High Court. It was not until Nov. 11, ten months later, that he asked the Special Commissioners to state and sign a case for the opinion of the court. Unfortunately, as it seems to me, the commissioners complied with that request. I think their proper answer would have been that they had no power to state or sign a case for the opinion of the court because they had received no request to do so within 21 days of their determination.

The Attorney-General has raised that point as a preliminary point to my hearing this appeal. I have had the advantage of hearing the arguments of counsel for the appellant against the point raised. If I understand it rightly, his point is that the supplemental case is really part of the original case, and that the appellant has complied with the requirements of the Income Tax Act, 1918, s. 133, in that he did express dissatisfaction with the original determination of the Special Commissioners, and that that expression of dissatisfaction on the original case must be taken to have been an expression of dissatisfaction on the supplemental one; and that he did ask the Special Commissioners to state and sign a case for the opinion of the court; and that that request to the Special Commissioners to state and sign the original case must be taken to have been a request to state and sign a case for the opinion of the court on the supplemental case. I have already said, when this case was sent back to the Special Commissioners, it was the intention of the parties that, if any question of law arose on the matter which the Special Commissioners had to determine, namely, whether the assessment should be reduced by one-sixth, the parties could apply to the Special Commissioners to state and sign a case for the opinion of the court. In order to do so, it was necessary for either party to comply with the Act by expressing dissatisfaction, and then within the prescribed time requiring the commissioners to state a case.

I regard this case as one of some importance. The statement of supplemental cases, according to such experience as I have had, is by no means uncommon. If anybody is dissatisfied with a determination made by the Special Commissioners on a case remitted to them, it is important that the course they ought to adopt should be known.

I, therefore, hold that this objection of the Attorney-General is well founded, that this supplemental case has been stated and signed by the Special Commissioners without any warrant, and I have no authority to hear it. Therefore, the only order that I can make is that the appellant must pay the costs.

Appeal dismissed with costs.

Solicitors: *Hyman Isaacs, Lewis & Mills* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by P. J. JOHNSON, Esq., Barrister-at-Law.*]

Re TREE, IDLE v. THE CORPORATION OF HASTINGS.
[CHANCERY DIVISION (Evershed, J.), April 25, 1945.]

Charities—Validity—Gift for the promotion of emigration to Dominions of British Empire—Gift confined to persons residing in the borough of Hastings in or prior to 1880, or their descendants—Assistance to be given to any one person or any one family not to exceed specified amount—Whether beneficiaries limited to poor members of class indicated—Public character—Whether class indicated section or portion of general public—Descendants of persons residing in Hastings in or prior to stated year—Whether proof of ancestry introduced purely personal element as essential part of qualification.

A testator left half his residuary estate upon trust to apply the income thereof for the purpose of assisting persons who resided in the borough of Hastings in or prior to 1880, or their descendants, to emigrate to any of the Dominions of the British Empire, the object of the testator being

to improve the condition in life of such persons. The trustees were directed that in no case should more than £50 be given in respect of any one person or more than £150 in respect of any one family, and that assistance should only be granted after due enquiry as to the suitability for emigration of the person or family concerned. The questions for the determination of the court were (i) whether, upon the true construction of the will, the persons intended to be capable of benefiting ought to be limited to poor members of the class indicated; (ii) whether the gift was of the necessary public character as referring to a section of the public or of the community and not merely to private individuals or a fluctuating body of private individuals; the class definable by reference to a locality, *i.e.* residence in Hastings, having been increased by adding their children or descendants who, in order to qualify under the will, must rely on a purely personal relationship to an individual or individuals, which in its essence was non-public:—

HELD: (i) the purpose asserted in the will being that of assisting persons financially, by a limited amount, to emigrate and improve their condition in life thereby, the true intention of the testator was to confine the class of persons which could benefit to poor persons.

(ii) the class capable of benefiting was defined by the testator by reference to a section of the community as a whole, distinguished from the rest of the community by a characteristic which did not involve the notion of selection by the testator, at any stage in the devolution, of individuals as individuals. The gift had, therefore, the necessary public character and constituted a valid charitable trust.

Re Compton, Powell v. Compton (3) distinguished.

[EDITORIAL NOTE. The question for decision here is whether a gift for the promotion of emigration, confined to persons resident in a certain borough on a specified date, or their descendants, is a public charitable gift. The proof of ancestry required is something personal, but the court holds that the quality essential to inclusion within the class of beneficiaries is the connection with the locality, which is impersonal. The case is, therefore, distinguishable from *Re Compton* (3), where the class consisted of the descendants of named persons. The definition of the class by reference to a section of the community distinguished by a characteristic which does not involve selection by the testator makes it a good charitable bequest.

On the question of the limitation of the gift to poor members of the class it is held that a consideration of the words used "assisting persons to emigrate," with the object of improving their condition in life, coupled with the limitation to £50 shows that poor rather than rich persons are intended. In *Re Sidney* (4), where a gift for emigration purposes was held not charitable, there was no such indication that emigration was to be confined to poor persons.

AS TO GIFTS FOR PUBLIC PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, 136, 137, paras. 161-168, 177; and FOR CASES, see DIGEST, Vol. 8, pp. 259, 260, Nos. 209-217.]

Cases referred to:

- (1) *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; 11 Digest 19, 224; 52 L.J.Q.B. 193; 48 L.T. 239.
- (2) *Verge v. Somerville*, [1924] A.C. 496; Digest Supp.; 131 L.T. 107; *sub nom. Verge v. Somerville, A.-G. for Australia v. Somerville*, 93 L.J.P.C. 173.
- (3) *Re Compton, Powell v. Compton*, [1945] 1 Ch. 123; [1945] 1 All E.R. 198; 172 L.T. 158.
- (4) *Re Sidney, Hingeston v. Sidney*, [1908] 1 Ch. 488; 8 Digest 259, 215; 77 L.J.Ch. 296; 98 L.T. 625.
- (5) *Barclay v. Maskelyne* (1858), 32 L.T.O.S. 205; 8 Digest 337, 1249; 4 Jur.N.S. 1294; 7 W.R. 43.
- (6) *A.-G. v. Ward* (1797), 3 Ves. 327; 44 Digest 332, 1625.
- (7) *Powell v. A.-G.* (1817), 3 Mer. 48; 8 Digest 244, 37.

ADJOURNED SUMMONS by the trustees of the will of Ben Harry Went Tree, who died on Jan. 21, 1927, to determine whether a valid charitable trust was constituted by a disposition of one half of the testator's residuary estate "upon trust to invest the same and devote the income thereof . . . for the purpose of assisting persons who resided in the borough of Hastings in or prior to the year 1880 or the descendants of such persons to emigrate to any of the Dominions of the British Empire my object being to improve the condition in life of such persons and the upholding of the Empire . . ." The facts and

arguments are fully set out in the judgment.

J. Pennycuik for the trustees.

Geoffrey Cross for Arthur Reginald Tree, as representing the next of kin.

H. O. Danckwerts for the Crown.

Wilfrid Hunt for the Corporation of Hastings.

A EVERSHERD, J. : The question which has to be determined in this case is whether a valid charitable trust is constituted by a disposition of half of the testator's residuary estate in terms which I will read. The testator died in the year 1927, the will being made during the previous year. The material language is as follows :

B And my trustees shall hold the remaining half part of my residuary estate upon trust to invest the same and to devote the income thereof from time to time as they may deem expedient for the purpose of assisting persons who resided in the Borough of Hastings in or prior to the year one thousand eight hundred and eighty or the descendants of such persons to emigrate to any of the Dominions of the British Empire my object being to improve the condition in life of such persons and the upholding of the Empire but it is my wish and I hereby direct that in no case shall more than the sum of fifty pounds be given to or in respect of any one person or more than the sum of one hundred and fifty pounds to or in respect of any one family and that assistance shall only be granted after due enquiry as to the suitability of the person or family concerned for emigration and under the advice of the Lord Commissioner or other responsible official of the respective Dominion.

D On these words two questions have been argued. The first is whether, upon the true construction of the language, the persons intended to be capable of benefiting ought to be limited to poor members of the class indicated ; and, second, whether the gift complies with the necessary condition that it is of a public character ; that is to say, is the class, from which the persons who may benefit will be drawn, a section of the public or of the community ; or is it what has been called in the language used in *Goodman v. The Mayor of Saltash* (1) and *Verge v. Somerville* (2), "a trust for private individuals, albeit a fluctuating body of private individuals ?"

E A number of cases have been cited, the last of which was *In Re Compton* (3), recently before the Court of Appeal. I am bound to say that the language used by LORD GREENE, M.R., in *Re Compton* (3) has caused me some difficulty, and I wondered whether I should reserve my judgment in the present case. But since, as I understand it, the real point depends upon the answer to be given to the second question I have tried to formulate (namely, has the trust the necessary public character, or has it not ?) I came to the conclusion that there would be no advantage to be gained by considering the matter. I have reached a conclusion, and I think, therefore, my best course is to state that conclusion and give my reasons to the best of my ability.

F My conclusion is that in this case, in all the circumstances, the necessary condition has been satisfied ; in other words, that there is here a valid charitable trust.

G Before proceeding further, I interpose to say this : authority has been cited, *Re Sidney* (4), to show that a trust for the purpose of promoting emigration *simpliciter* would not be a valid charitable trust, on the ground that it would not be apparent from a trust so constituted that any benefit was intended to be conferred upon any section of the community. BUCKLEY, L.J., as he then was, gave reasons in his judgment for that conclusion which I need not repeat. On the other hand, *Barclay v. Maskelyne* (5) shows that where the trust is further elaborated, it may be perfectly clear that the trust is one which intends to benefit, and would benefit, a section of the community so as thereby to comply with the necessary conditions to make it charitable.

H I now turn to the terms of the will. Upon the first matter that was argued, namely, whether on the true construction of the words used, the intention was to limit the class of persons which could benefit to poor persons (poor, that is, without being destitute), my own inclination is to think that it is so limited. I reach that conclusion by observing that the purpose asserted is that of "assisting persons who resided in the borough of Hastings . . . to emigrate to any of the Dominions"—it is to be noted that the assistance is limited to the act of emigration—"my object being to improve the condition in life of such persons." Further, it is to be observed that the amount of the pecuniary benefit in each individual

case permitted for the purpose of assisting that individual to emigrate is £50. The testator, therefore, is contemplating that an individual will reasonably require the assistance provided by a sum not exceeding £50 to enable him to improve his condition in life as a result of emigrating. These matters taken together indicate, to my way of thinking, that the testator had in mind a person whom the provision of an amount of that kind would enable to improve his condition ; which seems to show that he would be poor rather than rich, though, as I say, he would not by any means necessarily be destitute.

I have not so far referred to the class concerned. I must now turn to that, because I think it is conceded that, whether or not I am right in suggesting that the persons intended to be benefited are what might be properly described as the poorer persons of the specified class, it still is necessary to show (and this, I think, inevitably follows from the decision in *Re Compton* (3)) that this trust, if it is to be valid, must possess the necessary public quality. The class selected is obviously somewhat peculiar, and no clue is given in the will why the testator so described the class. As I have stated, the class consists of persons who resided in the borough in or prior to the year 1880, or the descendants of such persons. It is plain that, from the administrative point of view, a class so described may give rise to great difficulties. Whether the Conqueror ever resided on that part of the coast after the battle, I do not know ; but, if he did, presumably anybody who was descended from him would be able to bring himself within the class. However, I think it is conceded that, for present purposes, the difficulty of ascertaining whether the necessary condition is satisfied by someone who claims to be entitled to benefit is neither here nor there. The question is whether a class so described is a portion of the public within the principle as stated by LORD GREENE, M.R., in *Re Compton* (3).

I shall certainly follow LORD GREENE, M.R., in avoiding any attempt to define exhaustively when a trust is public and when it is private. But the argument was most forcibly put to me by counsel representing the next of kin that this trust is bad. He said that a member of the class to be benefited must be qualified as such by reference to a characteristic which must be said to be so personal to himself that the whole trust is essentially private rather than public. According to counsel for the next of kin, anyone entitled to qualify must say : "I qualify because I am I ; that is, because I am the son of my father, or the grandson of my grandfather." That, counsel says, is a characteristic essentially personal to the claimant, and not a characteristic which could be said to delimit some section of the community from the community as a whole, by reference to something common to all the persons entitled to qualify.

Briefly stated, the case of *Re Compton* (3) was a case where the testator created, for the purpose of establishing an educational trust, a class consisting of the descendants of three persons whom he named and described. It is to be observed that throughout the judgment the distinction which was drawn in broad and general terms is a distinction between what LORD GREENE, M.R., called a private or family trust, on the one hand, and a public trust on the other. The number of persons who may qualify, in the one case or the other, though possibly relevant, is certainly not conclusive. If the matter rested upon just such a brief statement as I have made, my own view certainly is that when one speaks of a private or family trust, one has in one's mind a conception which applied in the case of *Re Compton* (3), but would not apply in a case such as this. I think the idea which underlies the notion of a private or family trust, though it may be difficult to define, is reasonably clear to the mind. However that may be, it is necessary to observe a little more closely the language that LORD GREENE, M.R., uses, and to see whether the principles, as he formulated them, apply in this case either to establish or to defeat the validity of the trust.

As I understand the matter, it must, I think, follow, if the argument of counsel for the next of kin is right, that a gift to a class which consists of a section of the community defined by reference to location would *prima facie* be good for this purpose ; yet, that if the class is increased by adding to the persons so defined (that is, by reference to locality) the children or descendants of those persons, then it must inevitably fail ; because it is fundamental to his argument that proof of ancestry as a qualification is a proof of something personal to the applicant and not of something impersonal such as is necessary if the trust is to be "public." I confess that such a conclusion would seem

to me to be strange and somewhat irrational ; but that, of course, is not saying it is wrong.

In *Re Compton* (3), the conclusion of LORD GREENE, M.R., was expressed in these terms, at p. 131 ([1945] 1 All E.R., at p. 202) :

A I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named *propositus* cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation, or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim on it.

B So far as that passage is concerned, it seems to me that no difficulty is created because it is fundamental to the conclusion so stated that there should be a named *propositus* ; that is to say, it is fundamental that the *propositus* is someone selected, not by reason of his possessing characteristics which he might have in common with thousands of others, or, indeed, with any other individual, but is selected without regard to any characteristics, save that he was an individual chosen as such by the testator either because he was a friend or relative, or for some other reason.

C Though the conclusion, as I have tried to state it, does not seem to me to give rise to difficulty in the case which I have to decide, other language of LORD GREENE, M.R., does create a real difficulty. After referring to the poor inhabitants of a parish as a class, LORD GREENE, M.R., says, at p. 129 ([1945] 1 All E.R., at p. 201) :

D But they do not enjoy the benefit, when they receive it, by virtue of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others, and that is something into which their status as individuals does not enter.

A little later, after referring to the *propositi* AB, CD and EF, he says, at p. 130 ([1945] 1 All E.R., at p. 201) :

E In such a case, too, a purely personal element enters into and is an essential part of the qualification, which is defined by reference to something, i.e., a personal relationship to individuals or an individual which is in its essence non-public.

It is, briefly, on those passages that counsel for the next of kin has mainly founded his argument.

F As I have already indicated, I think the essential quality here is the connection, albeit at one, or more than one, remove, with a particular locality, Hastings. True it is, as counsel for the next of kin urges, that proof of ancestry in a sense is something personal. But, in my view, proof of descent from a resident in Hastings, that is, not from a named resident but from any resident, is, within the principle of *Re Compton* (3) proof of a quality which is impersonal in the sense that, so far as this testator is concerned, the residents, or the descendants of residents, as individuals, are not a link in the chain selected by him as such, nor is he in the least concerned who they, as individuals, may be. It is open to any person, who can claim to have the characteristic of a Hastings ancestry. G if I may so describe it, to come in and say : " I am a member of the class entitled to benefit." And that class, however awkwardly ascertained or defined, is a section or portion of the general public.

H To take an example from the cited cases, if the class consisted of men who had fought during the first great European war in some theatre of operations, there would clearly be a common characteristic, though a characteristic at the material time not to be determined by reference to connection with a locality. Further, any man who comes forward and claims to belong to the class must, in a sense, prove something which is strictly personal and individual to himself. For he must say : " I fought in that theatre of operations in such and such a year." So, if the class were residents of Hastings, a claimant will assert : " I am a resident of Hastings." That fact is in truth personal to himself. And if there is more than one qualification required, obviously the individuality becomes more pronounced. For example, if the gift were to such of the residents of Hastings as were in receipt of an income not exceeding £x per annum (which I apprehend, would be, *prima facie*, a valid public charity), the claimant would

have to show, in addition to the fact of residence, the fact that his income did not exceed the limit of £x, a matter certainly personal to himself. Though, therefore, it is true that, if there is more than one qualification to be satisfied, the individual characteristics of the claimant become more pronounced, nevertheless the essential element remains impersonal, namely, the connection with some locality, or some other qualification which does not involve the notion that the testator is picking out or selecting individuals as individuals but is merely defining a way in which out of the total of the community some section or portion thereof may be delimited, that portion being those members of the community as a whole who can each claim to satisfy a number of conditions, impersonal in the sense that their own individualities are, from the testator's point of view, an immaterial consideration. If a gift to all the inhabitants of Hastings, not having more than so much income per annum, or to the inhabitants of Hastings other than the members of the Roman Catholic community, are good charitable gifts, it seems to me that on principle there should be no difference in the case of a class defined by reference to persons resident in a particular locality plus descendants of persons so resident. It seems to me, therefore, that the present case is distinguishable from *Re Compton* (3), and that the language which I have cited in the judgment of LORD GREENE, M.R., referring to status as individuals is intending to refer to something other than the characteristics which, though necessarily peculiar to the individuals making the claim, nevertheless, do not mark out the individuals as individuals selected as such by the testator. A

In his argument in reply, counsel for the Crown referred to two cases in TYSEN, *THE LAW OF CHARITABLE BEQUESTS*, 2nd Edn., as lending some assistance on this point. I have had an opportunity of referring to them. One of them was *Attorney-General v. Ward* (6), where, according to TYSEN, at p. 58, the class was "The sons of the clergy in London." Unfortunately, reference to that case does not seem to me to carry the matter any further. The actual terms of the gift in that case were as follows, at p. 328: B

... and also to pay £500 to the sons of the clergy in London according to the will of my late uncle, James Horton, Guilsborough. C

According to the report, no argument was addressed to the question whether that was or was not a good charitable bequest. It was throughout assumed that it was; the question decided in that case being wholly different and in no way related to the question of the validity of the charitable bequest. E

The second case is a little more helpful. That is the case of *Powell v. The Attorney-General* (7). In that case there was a bequest of residue to the widows and children of seamen belonging to the town of Liverpool. There were two questions argued, as I understand the somewhat short report, namely, first, whether that was a good charitable gift, and, secondly, (with the emphasis mainly on the second point) whether in truth that was a description of an already existing charity. The decision of the court is reported as follows, at p. 49: F

The Master of the Rolls (SIR WILLIAM GRANT) held that it was a valid bequest, and that the words were sufficiently descriptive of the last of the charities mentioned in the Master's Report. G

That is, therefore, some authority for the view that a gift to widows and children of seamen belonging to the Port of Liverpool is a good charitable gift, and, as such, it does, I think, lend some, though slender, support to the conclusion which I have already stated. The point that they were intended as poor widows and children only arose because the existing charity, which was held to be the one intended, was in fact a charity which had been established and instituted some time before for giving relief to the poor sailors' widows and orphans, the inhabitants of Liverpool. H

I have reached the conclusion, as I have stated, that, as a matter of principle, the condition that there should be a public characteristic is satisfied in this case, and that the testator, in defining this class, has defined it not so as to consist of, or be derived from, some specified individual or individuals—and I may add that the result would be the same whether the individual was a body corporate or not—which are selected by him as such, but by reference to a section or portion of the community as a whole, distinguished from the rest

of the community (but still remaining a part of it) by reference to a characteristic which does not involve the notion of selection by the testator, at any stage in the devolution, of individuals as individuals. On these grounds, I think the right answer to the question raised here is that it is a good charitable bequest. The question of administration, as I have said, by reason of the definition of the class, is one which has not been considered, and I have assumed, therefore, that for present purposes I need not regard it.

A Declaration accordingly; costs of all parties of the summons to be taxed as between solicitor and client and paid out of the estate.

Solicitors: Blyth, Dutton, Hartley & Blyth, agents for Menneer, Idle, Brackett & Williams, Hastings and St. Leonards (for the trustees); Skelton & Rust (for the next of kin); Treasury Solicitor (for the Attorney-General); Sharpe, Pritchard & Co., agents for D. Jackson, Town Clerk, Hastings (for Corporation of Hastings).

B [Reported by A. E. BLACK, Esq., Barrister-at-Law.]

Re THE HON. MRS. DEIRDRE SAMUEL,
THE TRUSTEE v. ISIDORE KERMAN.

C [CHANCERY DIVISION (Evershed, J.), May 3, 1945.]

Bankruptcy—After-acquired property—Vesting in trustee—Gift of jewellery to bankrupt—Jewellery received from donor by bankrupt's solicitor as her agent and handed over by solicitor to another agent appointed by bankrupt—Jewellery sold by bankrupt and proceeds retained by her—Solicitor acting in ministerial capacity and not liable for conversion—Bankruptcy Act, 1914 (c. 59), ss. 22, 47.

D Mrs. S., who was at all material times an undischarged bankrupt, was divorced by her husband in 1943. In Nov., 1943, shortly before the decree of divorce was to be made absolute, the husband, Major S., decided to make her a gift of certain jewellery on condition that she should change her name. This Mrs. S. did. On Nov. 26, 1943, the respondent, K., who had been acting as Mrs. S.'s solicitor in both the bankruptcy and divorce proceedings, received a signed form of authority from Mrs. S., to receive the jewellery on her behalf. At the same time he received another letter written by Mrs. S., instructing him to hand over the jewellery to Mrs. M., (the bearer of the letter), who would be "disposing of the same on my behalf for the education of my son." K. thereupon obtained delivery of the jewellery from Major S.'s solicitors, and the deed box containing the jewellery was deposited in Mrs. M.'s name at a bank. On Dec. 1 and again on Dec. 18, the deed box was brought out of the bank by a member of K.'s firm on Mrs. S.'s behalf, certain items were taken out and retained by Mrs. S., and the deed box was then returned to the bank. The jewellery retained by Mrs. S. was sold and the proceeds were received and used by her for her own purposes. It was contended by the trustee in bankruptcy that as the jewellery became the after-acquired property of the bankrupt and the title thereto vested in the trustee immediately the gift took effect by delivery to K., on Mrs. S.'s behalf, K. had been guilty of an act of conversion in handing over the jewellery to Mrs. M., on Nov. 26, especially since he knew of Mrs. S.'s intention to dispose of it. It was further contended that K., having received the jewellery as the bankrupt's solicitor, owed a duty, as an officer of the court, to withhold it from her, even apart from her expressed intention to dispose of the goods:—

H HELD: (i) in accepting the jewellery from Major S.'s solicitors, K. received it on behalf of his principal, the bankrupt, and was acting entirely in a ministerial capacity. Although the trustee's title arose and was complete as soon as the jewellery was received by the bankrupt through her agent, K., the bankrupt could still give a good title to the property to a bona fide purchaser for value, so that K.'s dealings would not amount to a conversion. K. had not, therefore, committed the tort of conversion or any other act which rendered him liable to account to the trustee for the value of the jewellery.

(ii) on the facts of the case, K.'s knowledge of the bankrupt's intention to dispose of the jewellery did not make him liable; he was bound to deliver the property to his principal or to some other agent appointed by the principal.

(iii) the fact that K. was a solicitor did not alter the position.

[EDITORIAL NOTE.] This case is of considerable importance to solicitors. It is held that the solicitor of a bankrupt receiving after-acquired property and delivering such property to an agent of the bankrupt is not liable for conversion at the suit of the trustee. His acts can be described as ministerial, within the test laid down by BLACKBURN, J., in *Hollins v. Fowler* (2), and bearing in mind the power of the bankrupt to give a good title to a *bona fide* purchaser for value under the Bankruptcy Act, 1914, s. 47. EVERSHED, J., refuses to accept the view that the solicitor, as an officer of the court, knowing his client to be an undischarged bankrupt, owed some duty to withhold the goods, and with reference to his duty to his client expresses himself as follows: "It seems to me that, if a solicitor is under a duty to withhold from his own client possession of property to which he, as solicitor, has no claim, either because his client has expressed an intention to deal with it in a way which may, and presumably will, involve the client in a breach of the provisions of the Bankruptcy Act or until the solicitor is satisfied that the client will deal with it in a way which is strictly in accordance with the terms of the Act, the result would impose upon a solicitor a burden which I think is wholly impossible and which would not be in the best interests of the administration of justice, being an unwarranted interference with the position subsisting between solicitors and their clients."

AS TO PROPERTY ACQUIRED BY BANKRUPT BEFORE DISCHARGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 219-222, paras. 290, 291; and FOR CASES, see DIGEST, Vol. 5, pp. 724-740, Nos. 6286-6391.]

Cases referred to:

- (1) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 4 Digest 15, 60; 43 L.J.Bey. 107; 30 L.T. 773.
- (2) *Hollins v. Fowler* (1875), L.R. 7 H.L. 757; 1 Digest 684, 2940; 44 L.J.Q.B. 169; 33 L.T. 73.
- (3) *Consolidated Co. v. Curtis & Son*, [1892] 1 Q.B. 495; 3 Digest 47, 326; 61 L.J.Q.B. 325.
- (4) *Re Pascoe (John), Ex parte Trustee in Bankruptcy and Northumberland County Council*, [1944] Ch. 219; [1944] 1 All E.R. 281; 113 L.J.Ch. 152; 170 L.T. 169.
- (5) *Cohen v. Mitchell* (1890), 25 Q.B.D. 262; 5 Digest 729, 6324; 59 L.J.Q.B. 409; 63 L.T. 206.

MOTION by the trustee in bankruptcy asking for a declaration that certain jewellery, the after-acquired property of the bankrupt, had been converted by the bankrupt's solicitor, and claiming the value of such jewellery.

G. O. Slade, K.C., and *V. R. Aronson* for the applicant.

Gilbert Beyfus, K.C., and *C. Gallop* for the respondent.

EVERSHED, J.: This case raises a point of some nicety and some difficulty in regard to certain transactions with jewellery which came into the possession of the respondent, Kerman, the solicitor of the bankrupt, in the manner which I will presently describe. In 1943, when the narrative opens, the bankrupt, who should now be called Miss Deirdre du Barry, was called Mrs. Deirdre Samuel, being the wife of Major Peter Samuel who was prosecuting a suit for divorce against her. The decree absolute in that proceeding was made on Nov. 22, 1943. At some time prior to any of the matters here in question certain items of jewellery had been given or transferred by the bankrupt to her husband, Major Samuel, in consideration of his having discharged debts incurred by her, or for some other reason. In Nov., 1943, therefore, and before the decree absolute, Major Samuel had in his ownership and legal possession these various items of jewellery. I say "legal possession" because the physical possession of the jewellery was had by the bankers of which he is a director, M. Samuel & Co., and the physical control of the jewellery appears to have been in one Lawrence, a servant of that bank acting also as secretary to Major Samuel. The decree being about to be made absolute, Major Samuel determined that, provided his then wife was prepared to change her name, he on his part was prepared to give back to her this jewellery. The condition as to change of name was fulfilled and that is how it comes about that the bankrupt, who has usually been referred to as Mrs. Samuel, by changing her name has acquired the appellation of du Barry.

The intention of Major Samuel was effected in accordance with certain letters. The arrangement contemplated in these letters was that Lawrence should deliver the jewellery to Ridsdale & Son, who were acting as Major Samuel's solicitors in the divorce proceedings, and that Ridsdale & Son would in turn hand over the jewellery to Mrs. Samuel, or to some person on her behalf. On Nov. 17, 1943, therefore, Ridsdale & Son communicated with the firm of Forsyte, Kerman & Phillips, of which the respondent, Kerman, is a member, and stated the intention of Major Samuel to give back the jewellery and the fact that Ridsdale & Son were authorised on his behalf to hand it over. They suggested that Forsyte, Kerman & Phillips should receive or accept delivery of the jewellery on behalf of their principal. At this and at all material times Mrs. Samuel was in fact, to the knowledge of all parties here concerned, an undischarged bankrupt, so that, when this intended gift took effect, the jewellery would indubitably become after-acquired property within the meaning of that phrase as used in bankruptcy matters. Kerman, the respondent, having seen the letter from Ridsdale & Son, communicated with his principal, Mrs. Samuel, for whom he had been acting both in the bankruptcy proceedings and in the divorce proceedings. He suggested that his principal should execute a form of authority to his firm which would entitle them to obtain the jewellery from Ridsdale & Son, and they accordingly enclosed a form of authority for Mrs. Samuel, the bankrupt, to sign. That form was duly executed by the bankrupt.

Pursuant to the arrangement contemplated, I find the facts on Nov. 26, which is the material date, to be as follows. In the early part of the day Mrs. Maple, who had for some years been in the service of the bankrupt and, during the subsistence of the marriage, of the bankrupt's husband, as a housekeeper, presented herself at the offices of Forsyte, Kerman & Phillips and there produced to Kerman the form of authority to which I have already referred, together with another letter written in manuscript by the bankrupt. It was no doubt intended to be addressed, as it was in fact handed, to Kerman's firm, though it does not so state on the face of it. Its language is:

Dear Sirs, with reference to the jewellery which my husband has promised to hand to me on the divorce being made absolute, and which you will be collecting on my behalf, I shall be glad if you will accept this letter as my authority to hand the same to Mrs. Maple, of 18, Alexandra Grove, Finsbury Park, N.4, who will be disposing of the same on my behalf for the education of my son, Ian. Yours faithfully, Deirdre Samuel. Deirdre du Barry.

Armed with the first of the two letters which Mrs. Maple produced, Kerman was able to present himself at the offices of Ridsdale & Son and there to obtain the delivery or handing over of the jewellery. He then, with the jewellery, came back to his own offices, and in the afternoon Mrs. Maple was again present when the next part of the transaction took place. That consisted of the depositing of the jewellery, which was in a deed box, with a firm of bankers, the Royal Bank of Scotland in Burlington Arcade, in the name of Mrs. Maple. The reason for that proceeding was that on this date, Nov. 26, the bankrupt was in Scotland, and Mrs. Maple, being unwilling to take the responsibility of personal custody of this valuable jewellery at her own home, thought it best to place it in the custody of the bank pending the return of the bankrupt. The jewellery was, therefore, so deposited in the name of Mrs. Maple. It has not been proved in evidence whether a receipt was given by the bankers which Mrs. Maple retained or whether such receipt, if given (as probably it was) was retained by Forsyte, Kerman & Phillips; but it is quite clear that the jewellery was deposited not in the name of Forsyte, Kerman & Phillips but in the name of Mrs. Maple.

That ended, so far as is material, the transactions of Nov. 26. It is those transactions, if any, which, according to the argument presented on behalf of the trustee, involve the alleged common law tort of conversion on the part of Kerman, the solicitor. Before I return to deal with those arguments I will proceed to state the rest of the facts so far as they appear to be relevant. On Dec. 1, Mrs. Maple appeared at the office of Forsyte, Kerman & Phillips with the bankrupt. The object of the visit was to obtain certain of the jewellery in order that Mrs. Samuel, the bankrupt, might dispose of it. I say "the object of the visit": I mean that the bankrupt and Mrs. Maple went there for the

purpose of getting the jewellery, the bankrupt's intention being to dispose of it by sale. A clerk employed by Kerman's firm, one Watts, proceeded to the bank and came back with the deed box, which was opened, certain items of jewellery were picked out and retained by the bankrupt, and the balance not then required was put back in the Royal Bank of Scotland. On Dec. 18 the performance was in all material respects repeated, so that the rest of the jewellery then passed into the possession of the bankrupt, and at various dates some or all of that jewellery was sold and the proceeds received and used for her own purposes by the bankrupt. It was suggested that at one or both the interviews in Dec., Mrs. Maple or the bankrupt made it quite plain to Kerman and Watts, or one of them, that this jewellery was being taken away for the express purpose of its being sold. Having heard the evidence both of Mrs. Maple and of Kerman, I think it is quite clear that neither the bankrupt nor Mrs. Maple stated in terms that they were taking it away in order that they might then and there sell it. On the other hand, I think it is also quite clear, and Kerman frankly so admitted to me, that he realised that the bankrupt intended to sell the jewellery, so that any express reference to what she then and there proposed to do with it seems immaterial.

Only two other matters of fact need be mentioned. The first concerns a bill of costs which was prepared by Watts on Nov. 29, which was for a sum of £196 or thereabouts. The firm appears to have had in hand or to have previously received on account some funds, so that the actual amount due was £119 17s. On or about Dec. 20, shortly after the second occasion when the jewellery was taken away, Mrs. Maple appeared once more at the offices of Forsyte, Kerman & Phillips, having in her hand in cash the amount necessary to discharge the bill. Whether the bankrupt was with her seems irrelevant; but the money was paid over and Mrs. Maple was given a receipt. I mention those facts because some of the cross-examination seemed to be directed to establishing that Kerman knew that the intention of the bankrupt in disposing of the jewellery included an intention out of the proceeds to discharge her bill to the firm for the costs, all of which were costs incurred since the bankruptcy. I accept Kerman's statement that he was no party to any such intention, *i.e.*, that it was not in his mind that out of this jewellery, and out of no other source, must he expect payment of his firm's bill. I do not think he had applied his mind to the problem whence would come the funds to pay his bill, because he had been acting for this lady for some time, and from time to time she had produced money from some source unspecified to discharge his firm's costs. I think, therefore, if it be suggested as a material circumstance that Kerman was party to the sale in the sense that the sale was being carried out to his knowledge for the purpose, *inter alia*, of providing his costs, the matters of fact necessary to establish that proposition have not been proved.

The second and last matter of fact to which I desire to refer is this. Some question arose whether the trustee had such knowledge of the likelihood that these jewels would go to Kerman that he was remiss in not addressing himself to the firm and establishing his right, as trustee, to the possession of the jewellery the moment it reached the hands of Kerman. On that matter I am quite satisfied of the fact that Rainsbury, the trustee, had no knowledge whatever that the jewels had found their way to Kerman, and, though I am not suggesting any impropriety in this, it is plain that the letters written to Rainsbury and the statements made to him by Lawrence were designed to confine information to the bare fact that the jewels had gone to Ridsdale & Son, who were the solicitors of Major Samuel. I do not think, therefore, that there is any possible ground for suggesting that the trustee stood by while these jewels were finding their way into and out of the possession of Kerman; so that (if I am wrong in the conclusion which I have reached on the main matter) the trustee ought now to be prevented from asserting his claim on some ground which was suggested to emerge from *Ex parte James* (1).

These are all the facts which are material; and on those facts the question may be regarded as one of a strictly technical character—technical, that is to say, in the sense understood by those who practise the profession of the law. It must be quite plain, as counsel for the applicant has pointed out very forcibly, that the court is not concerned in cases of this kind to consider whether the result would be hard on Kerman and whether the actions which I have

described involved any moral obloquy on the part of anyone. Counsel for the applicant has pointed to numbers of cases in which perfectly innocent parties have, nevertheless, as a result of the facts as they have turned out, been found to have committed the tort of conversion. I shall, therefore, do my best to approach the matter from that point of view. At the same time it is right to say, as counsel for the applicant made quite clear at the beginning of his opening, that no one has suggested or could suggest in this matter any lack of good faith on the part of Kerman. That he was in a difficulty in the sense that anyone acting for an undischarged bankrupt is in a difficulty is clear, and is shown by the fact that Kerman thought it prudent, before these transactions took place, to seek and obtain the advice of counsel, on which he acted. On the question of law which I have to decide, all that is quite irrelevant. I only mention it to show that it could not be here suggested, and is not suggested, that Kerman has done otherwise than act for his client to the best of his ability and in so doing he has acted with perfect good faith. But it may be, nevertheless, and counsel for the applicant has argued that the result is, that Kerman is liable for the value of this jewellery, many thousands of pounds, as having committed the tortious act of conversion.

The act of conversion on which the claim is founded is the delivery of the jewellery to Mrs. Maple at Kerman's office on the afternoon of Nov. 26, 1943, having regard particularly to the known intention as expressed in the letter of Nov. 10, which I have read. It is that matter which I must now proceed to examine.

It has been said that to attempt an exhaustive definition of the acts which constitute conversion would be a difficult matter, and I propose to follow the example set in many of the cases by refraining from so doing; but in the textbooks and in the cases there have been statements made which have been cited to me in the course of the arguments and which form a guide to the answer which must be given to the present problem. I refer to the passages in *BOWSTEAD ON AGENCY*, 10th Edn., pp. 269, 270, and to *SALMOND ON TORTS*, 9th Edn., pp. 302 and 313. I also refer particularly to *Hollins v. Fowler* (2). Those authorities show beyond doubt that, provided certain conditions have been fulfilled, it is no defence on the part of the person charged to say that he was the innocent agent for someone else. In *Hollins v. Fowler* (2) the brokers, Hollins and others, were in fact held to have acted as principals but in the course of the advice given to their Lordships by BLACKBURN, J., examples are given of cases in which the tortfeasor is an agent and not a principal. An example of this class of case is *Consolidated Co. v. Curtis & Son* (3), in which the tortfeasors were auctioneers purporting to sell by auction certain furniture on behalf of a Miss Russell, who turned out to have had no title whatever to the furniture. That fact was wholly unknown to the auctioneers, who acted in perfect good faith and in the belief that Miss Russell had every right to instruct them to sell on her behalf. The auctioneers sold and delivered the furniture to the purchaser at the auction; and they were held liable for conversion. The result falls within the statement of BLACKBURN, J., in *Hollins v. Fowler* (2), at p. 766:

It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion . . . But BLACKBURN, J., goes on to say that the general statement "requires some qualification"; and at pp. 766, 767, he says:

I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody.

It is not suggested that that is an exhaustive or a complete statement of the qualifications which might have to be made to the general principle which BLACKBURN, J., had earlier laid down, but it is, I think, a convenient and accurate test which can be applied in the present case. And there are numerous authorities which, in accordance with the qualification I have read, establish that, if the act done by the agent is what has been called purely ministerial, it would not amount to a conversion. Thus, if the agent or servant of the reputed owner

merely on that person's instructions transfers goods from one place to another, or if it is a case in which the goods have merely been handed by one servant to another on the same premises, it would be difficult to see how these acts in either case could amount to a conversion. The distinction is, I think, well illustrated by considering the facts in *Consolidated Co. v. Curtis & Son* (3), where the acts of the auctioneers consisted in disposing altogether of the property to a third person by selling and delivering possession. That act could, in no ordinary sense of language, be called ministerial, nor could it be described as an act of such a nature which would be excused if done by the authority of a person entrusted merely with the custody of the goods. What the auctioneers did, had the effect of removing the goods permanently from the custody or control of their principal and was intended to confer on a third party the right and title to the goods. If the act impugned falls on that side of the line, that is to say on the side of the line illustrated by *Consolidated Co. v. Curtis & Son* (3), the fact of agency is no excuse.

I come now to the present case. I must first observe that this intended gift by Major Samuel to his former wife became complete only upon delivery of possession. That has been conceded. Therefore, until these jewels reached the hands of the bankrupt or some person authorised to receive them on her behalf, no question of "after-acquired property" arose. It is beyond doubt that Kerman, in accepting from Ridsdale & Son these jewels, received them on behalf of his principal, the bankrupt. At the moment of the delivery of the jewels into his hands, Kerman was not only entitled but bound to receive them as agent or minister for the bankrupt. And this remains true and must be asserted by the trustee whatever the intention, known or unknown, of the bankrupt at the moment of delivery. But it is said that a moment of time later, since the title of the trustee then immediately attached to them, Kerman, whose hand the moment before was the hand of the bankrupt, ought to be treated as holding them not on behalf of his principal but on behalf of Rainsbury, the trustee, and that, therefore, any dealing by him with the jewellery which, in the events which happened, amounted to an interference with the trustee's dominion and right of property over the goods must amount to a conversion. In other words, if the trustee's argument is right, I must hold that Kerman having properly received the goods as agent of the bankrupt, must the very next moment refuse to hand them over to the principal on whose behalf he obtained them and claim, against her, their retention on behalf of another, that is the trustee. I confess that such a result appears to me to offend common sense.

It is clear beyond doubt since the decision of the Court of Appeal in *Re Pascoe* (4) that the moment the after-acquired property is acquired—in this case the moment the jewellery had been received by the bankrupt through her agent—the title of the trustee arose and was complete, and no intervention on his part was necessary to make it complete. Therefore, the true ownership of and right of title to these jewels became that of the trustee the moment the gift had been completed, and, as I think is clear from the Bankruptcy Act, 1914, s. 22, the bankrupt's duty, having obtained this property, was to account for it to the trustee. But it does not follow from those facts, and from those facts alone, that the bankrupt had no right or interest at all in the possession of this property. So far as disposing of the property is concerned, it is clear that since statutory effect has been given to the principle stated in *Cohen v. Mitchell* (5), by virtue of sect. 47 of the Act, she would be empowered to give to a purchaser dealing with her *bona fide* and for value a good title to any of the jewellery she sold, so that, in so far as jewellers and others have acquired from her this jewellery, their title is not impeached; but I accept the argument of counsel for the applicant that it does not follow that it can properly be said that Miss du Barry had the right to go and sell this jewellery in defeasance of the trustee's title and in breach of her duties under sect. 22.

The result of these matters is not easy to state with accuracy, as is shown by the language of LORD GREENE, M.R., in *Re Pascoe* (4) at pp. 225, 226 ([1944] 1 All E.R., at p. 284):

In other words, the bankrupt was entitled to deal with his after-acquired property by means of transactions with third persons of the kind specified, and as against him the person with whom he dealt could not dispute his title, but those cases clearly do not establish the proposition that, as between the bankrupt and the trustee, after-

acquired property belongs to the bankrupt until the trustee claims it. I can find no support for that proposition. The precise relationship of the bankrupt to his after-acquired property has been described by various analogies. He has been likened to a factor or some other agent having authority to pass the title to the goods. He has been likened to a trustee. None of these analogies are really accurate and, of course, they cannot be pressed. He has certain powers to confer a title to, and certain rights in respect of, his after-acquired property. Thus, he has the right to protect it against wrongdoers, but the title of the trustee is only qualified by those rights given to the bankrupt by section 47, which protect transactions with third parties but do not in any way qualify the title of the trustee, save in so far as that title is liable to be impaired in cases which fall under the section.

That passage shows to my mind that a bankrupt, as regards after-acquired property, cannot be likened merely to a warehouseman or to a finder of stolen property, but has certain rights of possession and certain powers of disposal which are stated by LORD GREENE, M.R., in the passage referred to and which are in general more and not less extensive than those appropriate to a mere custodian.

In my judgment, therefore, the question whether Kerman committed the act of conversion may be answered in his favour by applying the test to be found in the second passage which I read from BLACKBURN, J., to the circumstances of the case here, bearing in mind what were the rights and what were the powers of the bankrupt as regards the property and then asking whether the acts done by Kerman were sufficiently consistent with her rights and powers in the sense that the bankrupt could have authorised them. Applying such a test, I think that Kerman's acts can properly be described by the use of the word "ministerial"—at least that they do not amount to such a dealing in the property as would constitute a conversion of the trustee's property.

I should have thought that that result would be clear if all Kerman had been told by his principal, the bankrupt, to do had been, "Please hand these jewels when you get them to Mrs. Maple," without any expression of intention on Mrs. Maple's part as agent for the bankrupt to dispose of them. It seems to me that, on principle and on the authority of numerous cases, of which some selection was made by counsel for the respondent, such as *Rogers v. Lambert* (6), where a person has rightly obtained possession (as it must plainly be taken that the bankrupt, through her agent, did in the first place, in order to complete the gift to her) and then hands the goods to a servant, then *prima facie*, in the absence of some claim actively asserted against the servant, the servant would be bound to hand them back to the master.

It is said that, assuming I am right so far, the fact of the bankrupt's intention to sell the jewels having been communicated and being known to Kerman alters the case. Can this on principle be so—at least where the intention was to do something, whether in other respects right or wrong, within the bankrupt's power? If the main argument of counsel for the applicant is well founded, I am far from clear that the circumstances of a particular intention, certainly an intention to do something within the bankrupt's power, having been expressed, can or should affect the matter. Once the jewels had been handed to Mrs. Maple it was in the bankrupt's power to dispose of them in any way she thought fit, whether or no she had previously expressed any intention. To that extent, therefore, the "dominion and right of property" of the trustee would have been interfered with. On the other hand, notwithstanding her originally expressed intention, the bankrupt might afterwards by persuasion or otherwise have changed her mind and not disposed of any of the jewels. The conversion, according to the argument, would have been complete: but, presumably, there would have been no damage flowing therefrom. I conclude that the fact of the bankrupt's intention having been expressed and being known to Kerman does not have the effect of making him liable.

This brings me to another aspect of the matter. Kerman was the solicitor of the bankrupt. He, as such solicitor, received these goods. It is said that, because he knew that his client was an undischarged bankrupt, he, as an officer of the court, owed some duty to withhold the goods, when he got them, from his own client, and that that duty was owed apart altogether from any expressed intention on the bankrupt's part to dispose of the goods in a particular way. I cannot accept that view. It seems to me that a solicitor of a bankrupt, receiving after-acquired property, is in no worse position than that of a parlour-

maid receiving the goods at the bankrupt's door: and equally, in the circumstances, as I have stated them, he would be bound to deliver such property to his principal or to some other agent whom that principal appointed. Must a solicitor refuse to hand the goods over to his client and, without regard to his client's instructions, communicate with the trustee in bankruptcy, or, without any such communication, assert against his client the title of the trustee? Must he, before handing over any such property, satisfy himself that the client will in no circumstances commit any breach of the duties imposed by sect. 22 of the Act? It seems to me that, if a solicitor is under a duty to withhold from his own client possession of property to which he, as solicitor, has no claim, either because his client has expressed an intention to deal with it in a way which may, and presumably will, involve the client in a breach of the provisions of the Bankruptcy Act or until the solicitor is satisfied that the client will deal with it in a way which is strictly in accordance with the terms of the Act, the result would impose upon a solicitor a burden which I think is impossible, which would not be in the best interests of the administration of justice, and which would be an unwarranted interference with the position subsisting between solicitors and their clients.

As I have said, I am not desirous of trying to exhaust this matter by covering all possible cases, but, on the facts, I think the knowledge or appreciation which Kerman had that his client was proposing to dispose of this jewellery would not have justified Kerman in refusing to hand the jewellery to his principal or to some other agent whom that principal appointed. I, therefore, reach the conclusion, for the reasons which I have stated, that the tort of conversion has not been established, nor am I satisfied that Kerman has committed any other act which renders him liable to account to the trustee for the value of the jewellery, with the result that, in my judgment, the application fails.

Motion dismissed.

Solicitors: *Spector & Spector* (for the applicant); *Forsythe, Kerman & Phillips* (for the respondent).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

PRATT v. NORTH WEST NORFOLK ASSESSMENT COMMITTEE AND COUNTY VALUATION COMMITTEE FOR THE COUNTY OF NORFOLK.

[KING'S BENCH DIVISION (Lewis, Oliver and Birkett, JJ.), May 1, 4, 1945.]

Rates and Rating—Valuation list—Proposals by county valuation committee to increase large proportion of assessments in area—Systematic examination of all assessments in rating area by county valuation officer with a view to revaluation—Separate proposals in respect of each hereditament—Whether valuation committee making in effect new valuation list—Jurisdiction of quarter sessions on appeal—Quarter Sessions Act, 1849 (c. 45), s. 11—Rating and Valuation Act, 1925 (c. 90), ss. 18, 19, 21 (2), 31 (1), 37—Rating and Valuation (Postponement of Valuations) Act, 1938 (c. 19), s. 1—Rating and Valuation (Postponement of Valuations) Act, 1940 (c. 12), s. 1 (3).

On Aug. 17, 1942, the respondent county valuation committee made a proposal to amend the current valuation list, which had come into force on Apr. 1, 1934, by raising the gross value of the appellant's hereditament from £14 to £20, and the rateable value from £8 to £12. On Dec. 8, 1942, the appellant made his objection in writing to the proposal, and on Dec. 18, 1942, the respondent assessment committee disallowed the objection and determined to raise the gross value and the rateable value by the proposed amounts. On Jan. 5, 1943, the appellant gave notice of appeal to quarter sessions. By consent of the parties a special case was stated for the opinion of the High Court, the parties agreeing that judgment in conformity with the court's decision should afterwards be entered at quarter sessions. The agreed facts showed, *inter alia*, that in Dec., 1940, the county valuation committee, being of opinion that the general level of the existing assessments in the rating area was too low, made proposals to increase the assessments of a great number of houses. The assessment

A committee, on Nov. 14, 1941, approved the proposals and between Nov., 1941, and Dec., 1942, the valuation committee made proposals relating to some 577 hereditaments. The assessments of nearly all these hereditaments were increased by the assessment committee. In addition to these proposals the acting county valuation officer undertook a systematic examination of all the assessments in the rating area, large and small alike, and a further 618 hereditaments were inspected by him on behalf of the valuation committee with a view to revaluing all the hereditaments. In making the proposals to increase the gross and the rateable values of the hereditaments, including that of the appellant, the valuation committee acted under the Rating and Valuation Act, 1925, s. 37, whereby any person, including the valuation committee, aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force might make a "proposal" for the amendment of the list. It was contended on behalf of the appellant that the valuation committee though proceeding by separate proposals in respect of each hereditament were in effect carrying out a revaluation of the whole of the rating area and were thereby creating a new valuation list contrary to the Rating and Valuation Act, 1925, s. 19, and the provisions of the Postponement of Valuations Acts, 1938 and 1940; the proposed increases, approved by the assessment committee, were, therefore, illegal and invalid. It was contended for the respondents (i) that the court had no jurisdiction to determine the appeal, because quarter sessions were debarred from entertaining it; (ii) that the valuation committee were not preparing a new valuation list; that they had a statutory duty under the 1925 Act, s. 18, to take such steps as they thought fit for promoting uniformity in the principles and practice of valuation and a statutory power under sect. 37 to make proposals for the amendment of the valuation list, which power was in no way limited by the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, or contrary to the provisions of the Rating and Valuation Act, 1925, s. 19:—

D
E
Held: (i) the essential complaint to quarter sessions being that the proposed increases were bad in law and not binding on the appellant, quarter sessions were not debarred from entertaining it, and their jurisdiction extended to hearing and determining the issue raised. It followed that the court had jurisdiction to hear the appeal:

Hulme v. Bucklow Area Assessment Committee (1) distinguished.

Stirk & Sons v. Halifax Assessment Committee (2) applied.

F
(ii) the method by which the respondents sought to avoid the difficulties caused by the statutory postponement of the preparation of a new valuation list for their area could have no sanction in law, since it was impossible to say that all that was done by the respondents was the routine work of amendment or correction or the seeking of mere uniformity. The respondents had attempted to do, with the aid of sect. 37, that which could only be done under the powers of sect. 19 by the rating authority. The proposal against which the appellant appealed was, therefore, not a valid and legal proposal.

G
[EDITORIAL NOTE. Sect. 19 of the Rating and Valuation Act, 1925, empowers a rating authority to make a new valuation list, but the making of a new list is indefinitely postponed owing to the war, by the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940. Sect. 37 of the 1925 Act enables amendments to be made to a valuation list on the proposal of a person aggrieved, which includes a county valuation committee. Sect. 37 may not be used by a county valuation committee to bring about a new list by a piecemeal revaluation of all the hereditaments in the list, thereby achieving indirectly the result forbidden by the postponement Acts, and it is held here on the facts that the valuation committee had gone far beyond their routine duty of amendment and correction, and had in effect attempted to exercise the powers of the rating authority, at present postponed, under sect. 19.

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On the question of jurisdiction it is held that as the matter complained of is not a mere question of irregularity, but rather of an increase in valuation which for the reason above stated is bad in law the Quarter Sessions had jurisdiction to hear the appeal. It follows that, the appeal being to a Divisional Court after notice of appeal to quarter sessions, under the little-used sect. 11 of the Quarter Sessions Act, 1849, the Divisional Court has also jurisdiction. It may be noted that it is a matter of doubt whether leave is required to appeal from the Divisional Court to the Court of Appeal under this Act.

AS TO AMENDMENT OF VALUATION LISTS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para. 913; and FOR CASES, see DIGEST, Supp.; Rates and Rating, Nos. 1147a-1161a.

FOR THE RATING AND VALUATION (POSTPONEMENT OF VALUATIONS) ACTS, 1938 and 1940, see HALSBURY'S STATUTES, Vols 31 and 33, pp. 614, 615 and 361, 362 resp.]

Cases referred to:

- * (1) *Hulme v. Bucklow Area Assessment Committee*, [1940] 2 K.B. 255; [1940] 3 All E.R. 79; Digest Supp.; 109 L.J.K.B. 644; 163 L.T. 243. A
- * (2) *Stirk & Sons, Ltd. v. Halifax Assessment Committee*, [1922] 1 K.B. 264; 38 Digest 581, 1157; 91 L.J.K.B. 258; 126 L.T. 338.
- * (3) *R. v. Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 K.B. 408; Digest Supp.; 157 L.T. 41; sub nom. *R. v. Worthing Borough Council and Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 All E.R. 681; 106 L.J.K.B. 810.
- * (4) *R. v. Cornwall County Valuation Committee, Ex p. Falmouth Rating Authority*, [1937] 2 K.B. 222; [1937] 2 All E.R. 266; Digest Supp.; 106 L.J.K.B. 703; 157 L.T. 157. B
- * (5) *Murphy Radio, Ltd. v. Welwyn Garden City Rating Authority*, [1943] 2 All E.R. 16; 168 L.T. 427. C

SPECIAL CASE STATED for the opinion of the High Court by consent of the parties under an order of COHEN, J., after notice given of appeal to quarter sessions, pursuant to the Quarter Sessions Act, 1849, s. 11. The facts and arguments are fully set out in the judgment of BIRKETT, J. C

F. W. Beney, K.C., Gerald Howard and Gilbert Dare for the appellant.

A. S. Comyns Carr, K.C., and Harold B. Williams for the respondents. D

OLIVER, J.: LEWIS, J., who presided in this court, indicated yesterday that he had had an opportunity of reading the written judgment BIRKETT, J., is about to deliver, and that he entirely agreed with it. I have the same to say. I have nothing to add to it. It says everything that I desire to say.

BIRKETT, J.: This is an appeal by one Walter James Pratt, by way of case stated pursuant to the provisions of the Quarter Sessions Act, 1849, s. 11. The respondents are two, the North-West Norfolk assessment committee, and the county valuation committee for the county of Norfolk.

On Aug. 17, 1942, the county valuation committee made a proposal to amend the current valuation list for the parish of Heacham in the Docking rural rating area by raising the gross value of the appellant's hereditament from £14 to £20, and the rateable value from £8 to £12. On Dec. 8, 1942, the appellant made his objection in writing to the proposal, and on Dec. 18, 1942, the North-West Norfolk assessment committee heard the said proposal and the objection, but determined to raise the gross value and the rateable value by the amounts already stated. E

The appellant gave notice of appeal to quarter sessions on Jan. 5, 1943; but, by consent of the parties, and by an order made by COHEN, J., (as the statute permits) a special case was stated, the parties agreeing that judgment in conformity with the decision of this court should afterwards be entered at the court of quarter sessions. F

The case stated, which it would be well to read in full, concludes with these words in para. 13: G

The question for the opinion of the court is whether or not upon the facts stated herein the said proposal is a valid and legal proposal. If the said proposal is a good and valid proposal, then the gross of £20 determined by the said assessment committee will be confirmed. If the said proposal is illegal and invalid, then the gross value of £14 as stated in the current valuation list will stand unaltered.

It was, therefore, with some surprise that this court heard the first submission of counsel for the respondents, which was that this court was without jurisdiction to entertain this appeal, or to give any judgment upon it. All the matters dealing with the controversy are fully stated in the case and were agreed in the form in which we have it, in order that a clear decision might be made to decide the opposing contentions. H

But it is said that the court of quarter sessions was without jurisdiction to hear the appeal for the reasons stated by counsel for the respondents and that this important point had been overlooked when the agreed procedure, by way of case stated, was being followed. It is perhaps proper here to say that had we

come to the conclusion that the point as to jurisdiction was a good point, we should, without hesitation, have ordered the respondents to pay the costs of this appeal having regard to the circumstances in which the parties have come to this court.

It is necessary, of course, for this court to give the most careful consideration to this first submission as to jurisdiction, for no consent of the parties can give jurisdiction if, in fact, none exists. It will be necessary, therefore, as I have said, to read the agreed case in full, and it will be convenient to do so now, in order that the grounds of this first submission may be fully understood and appreciated and the nature of the controversy between the parties made plain.

The case, in para. 1, begins :

The said parish of Heacham and the parishes of Snettisham, Dersingham and Ingoldisthorpe hereinafter referred to are part of the rating area consisting of 29 parishes for which the Docking rural district council (hereinafter called "the rating authority") is the rating authority. The first-named respondents are the assessment committee for an area which includes (*inter alia*) the said rating area and the second-named respondents are the county valuation committee for the county of Norfolk, established pursuant to the Rating and Valuation Act, 1925, s. 18 (hereinafter called "the Act of 1925"). (2) By sect. 19 of the 1925 Act, it was provided that a new valuation list should be made for every rating area so as to come into force on Apr. 1, 1928, or Apr. 1, 1929, and a second new valuation list should be made so as to come into force for every such area on Apr. 1, 1932, 1933 or 1934, and thereafter new valuation lists should be made from time to time so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively come into force should be a period of five years. (3) By the Rating and Valuation (Postponement of Valuations) Act, 1938, s. 1, the third new valuation list was directed to be made so as to come into force on Apr. 1, 1941; and by the Rating and Valuation (Postponement of Valuations) Act, 1940, s. 1 (3), the making of the third new valuation list was further indefinitely postponed by the substitution in the 1938 Act of a reference to Apr. 1 in the "prescribed year" for the reference to Apr. 1, 1941. By reason of these provisions the second new valuation list for the said Docking Rural Rating Area which came into force on Apr. 1, 1934, was the valuation list in force at all material times. (4) By sect. 37 of the 1925 Act any person, including the county valuation committee, who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force may make a "proposal" for the amendment of the list. The proposal to increase the gross value of the appellant's said hereditament from £14 to £20 and the rateable value from £8 to £12, which is the subject of this appeal, was made by the second-named respondents by virtue of this provision. (5) The total number of hereditaments in the said rating area is 6,410, of which number the four parishes specifically referred to contain respectively, Heacham parish, 987; Snettisham parish, 669; Dersingham parish, 591; Ingoldisthorpe parish, 137; making a total there of 2,377. Each of the said parishes appears in a separate division of the valuation list in accordance with the Rating and Valuation Act, 1925, s. 21 (2). (6) On Aug. 26, 1940, the rating authority made proposals to increase the assessments of certain houses in the parish of Ingoldisthorpe. In or about the month of December, 1940, the second-named respondents, being of opinion that the general level of the existing assessments in the said rating area was too low, made proposals to increase the assessments of 22 houses in Ingoldisthorpe, 17 in Heacham, and 5 in Dersingham, in respect of which houses and 5 others in Ingoldisthorpe, the rating authority had already made proposals to increase the assessments but at lower figures. The first-named respondents on Nov. 14, 1941, approved the proposals of the second-named respondents. Between Dec., 1941, and Dec., 1942, the second-named respondents made proposals relating to 577 hereditaments, [which were situated in the respective parishes as set out in the case] . . . The assessments of all these hereditaments, with the exception of 8, two of which stand adjourned, were increased by the first-named respondents. (7) In addition to making the proposals referred to in para. 6 hereof, the acting county valuation officer, on behalf of the second-named respondents prior to Dec., 1942, inspected 618 further hereditaments in the said parishes, [they are set out and particularised in the case] . . . No proposals in respect of these hereditaments have been made pending the result of this appeal, except that on Mar. 8, 1944, 8 further proposals were made by the second-named respondents to increase the gross and rateable values of certain hereditaments in the parish of Heacham. The said proposals were approved by the first-named respondents on Mar. 31, 1944. (8) On July 20, 1942, the following minute was entered by the Docking rural district council in their minute books: Proposals by county valuation officer. A further list of proposals made by the county valuation officer acting on behalf of the Norfolk county council was before the rating committee. Arising from this matter the Heacham parish representative stated there was considerable concern in the parish regarding what appeared to be the omission or delay by the acting county valuation officer in submitting proposals regarding the larger properties and it

is recommended that Mr. Chapman be requested to give his observations on this matter. The said Chapman was the acting county valuation officer. (9) On Sept. 11, 1942, the said acting county valuation officer wrote to the Docking rural district council a letter in which he stated: "There are a small number of larger properties which have not yet been dealt with by me as I have not had time to do so, but I have endeavoured throughout to value all properties without regard to size. Any properties which have been omitted will be revalued in the near future and proposals made if necessary . . ." (10) In Dec., 1942, the acting county valuation officer, on behalf of the second-named respondents, was actively continuing a systematic inspection and re-valuation of all the hereditaments in the said rating area with a view to the making of further proposals so as to raise the general level of the existing assessments in the said rating area.

Those are the agreed facts which are contained in the case which is now before this court. Then in para. 11 are set out the appellant's contentions:

The appellant will contend that the second-named respondents though proceeding by separate proposals in respect of each hereditament are in effect carrying out a revaluation (of which the proceedings in respect of the appellant's said hereditament are a part) of the whole of the said rating area; and that the proposal which is the subject of this appeal is invalid and illegal, in that it is one of a series of proposals which are not proposals for amendments of the valuation list in force but together amount to a proposal for an entirely new valuation list contrary to the provisions of the Rating and Valuation Act, 1925, and the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940.

In para. 12 are set out the respondents' contentions:

The respondents will contend (a) that the second-named respondents have no power or duty to prepare a new valuation list, and are not in fact or in the result preparing such a new valuation list; (b) that the second-named respondents have a statutory duty under sect. 18 of the 1925 Act to take such steps as they think fit for promoting uniformity in the principles and practice of valuation and a statutory power under sect. 37 of the 1925 Act to make proposals for the amendment of the valuation list; (c) that the first-named respondents are bound to hear and determine any such proposal and there has been no appeal on *quantum* against their decision in 569 cases; (d) that the Act of 1925 and the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, in no way limit the right of a person aggrieved by the incorrectness or unfairness of any matter in the valuation list (including the second-named respondents) to make a proposal or proposals for the amendment of the valuation list:

Then in para. 13 is set out the question for the opinion of the court, which I have already read.

The history of this matter is there set out, and the contentions of the parties are clearly stated. The main contention of the appellant was that the proposed increases approved by the respondent assessment committee ought not to be given the force of law because the provisions of the Rating and Valuation Act, 1925, and the postponement Acts of 1938 and 1940 had been disregarded, and the proposal in respect of the appellant's hereditament was, therefore, illegal and invalid. It will not be necessary for me to read the whole of the sections, but I must just refer to sect. 19 of the Act of 1925. Subsect. (1) of that section reads:

A new valuation list shall be made in accordance with this part of this Act for every rating area so as to come into force either on the first day of April, nineteen hundred and twenty-eight, or the first day of April, nineteen hundred and twenty-nine, and a second new valuation list shall be so made so as to come into force for every such area on the first day of April, in the year nineteen hundred and thirty-two, the year nineteen hundred and thirty-three, or the year nineteen hundred and thirty-four, and thereafter new valuation lists shall be made from time to time so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively come into force shall be a period of five years.

Then there is a proviso which I do not think it necessary for my purpose to read. Subsect. (2) enacts:

Subject to the provisions of any such order as aforesaid, every new valuation list shall come into force on the first day of April next following the date on which it is finally approved by the assessment committee, and shall, subject to the provisions of this Act (including the provisions with respect to the alteration of and the making of additions to the valuation list), remain in force until it is superseded by a new valuation list.

Then the sections which follow deal with the valuation list and the ascertainment of the rateable value. Sect. 31 (1) provides:

Any person who appeared before the assessment committee on the consideration of an objection made before the committee under this part of this Act may, if he is aggrieved by the decision of the committee on the objection, appeal against the decision, in manner provided by this part of this Act, to the court of quarter sessions for the county or place where the hereditament to which the objection related is situate.

Sect. 31 (4) provides :

A On an appeal under this section the court shall, as it thinks just, either confirm the valuation list or alter the valuation list to give effect to the contention of the appellant so far as that contention appears to the court to be well founded.

Subsect. (5) provides :

B On the determination of an appeal under this section any party to the appeal may, if dissatisfied with the decision of the court as being erroneous in point of law, make an application in writing at any time within twenty-one days after the date of the decision to have a case stated for the opinion of the High Court on the point of law, and the court shall, unless it is of opinion that the application is frivolous, state a case accordingly.

Then there are provisions by which the court is enabled to lay down conditions. I think those are the relevant sections following upon sect. 19 which it is necessary for me to read. Then I ought to refer to sect. 37 (1) :

C Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list (in this section referred to as "a proposal"), and there a rating authority in pursuance of the provisions of this Act make any amendment in a rate other than the correction of a clerical or arithmetical error, or the correction of an erroneous insertion, omission, or misdescription, the authority shall forthwith make a proposal for any necessary amendment of the list.

D Then sect. 37 (7) says :

The assessment committee shall hear and determine any proposal as if it were an objection to a draft list, and all the foregoing provisions of this part of this Act relating to the hearing and determining of such an objection shall apply accordingly.

Then sect. 18 is the only other section that I need read :

E For the purposes of this part of this Act there shall be established in every county a committee of the county council (to be called "the county valuation committee") consisting of such number of persons, being members of the council of the county, as the council may think fit to appoint and of a representative of the assessment committee for each assessment area which, or any part of which is comprised in the area of the county to be nominated by the assessment committee.

F Then subsect. (2) says :

G It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conferences.

H Sect. 19 of the Act empowers the rating authority to make the valuation list and prescribes the periods in which it is to be in force. The postponement Acts of 1938 and 1940 do not permit the making of a new valuation list at the material times in this case. Sects. 37 and 18 are operative all the time the valuation list made under sect. 19 is in force. They enable amendments and corrections to be made to the valuation list as the circumstances demand.

The county valuation committee has a duty to act, if amendment or correction is thought to be necessary, and if separate proposals are made in respect of each hereditament, it matters not, it is said by the respondents, that the number of separate proposals is very large, or indeed that the proposals covered every single hereditament in the rating area.

The submission of the appellant was that, on the facts of this case, there was here no ordinary use of sect. 37 to amend or correct in accordance with statutory

duty, but a usurpation of the powers of the rating authority to make a new list, and that at a time when the rating authority was precluded by law from doing so. In the appellant's submission, the true situation was that the valuation list of 1934 was the only valuation list which could be considered, and the emergency of the European war, having prevented the making of a new list in 1939, and the date when a new list could be made being still undetermined and indefinite, this method of using sect. 37 was undertaken designedly to do that which could only be done under sect. 19 and to bring into being a new valuation list in fact. They relied on para. 6 of the agreed case, and particularly upon the agreed sentence :

In or about the month of Dec., 1940, the second-named respondents, being of opinion that the general level of the existing assessments in the said rating area was too low, made proposals . . . [for an increase].

They relied also upon paras. 7-10, and in particular they relied in para. 9 upon the letter of the acting county valuation officer :

There are a small number of larger properties which have not yet been dealt with by me as I have not had time to do so, but I have endeavoured throughout to value all properties without regard to size. Any properties which have been omitted will be revalued in the near future and proposals made if necessary.

They relied also upon the agreed statement in para. 10 :

In Dec., 1942, the acting county valuation officer on behalf of the second-named respondents was actively continuing a systematic inspection and revaluation of all the hereditaments in the said rating area with a view to the making of further proposals so as to raise the general level of the existing assessments in the said rating area.

In these circumstances, the first point taken by counsel for the respondents, that this court is without jurisdiction, must be considered. He relied upon *Hulme v. The Bucklow Area Assessment Committee* (1). The headnote to that case, at p. 255, reads in this way :

On an appeal by a person who is aggrieved by the decision of an assessment committee on an objection made by him to a draft valuation list the jurisdiction of quarter sessions is confined to considering whether the valuation list should be confirmed or whether effect should be given to the objection and the list altered. Quarter sessions cannot entertain an appeal on the ground that the inquiry before the assessment committee was conducted irregularly.

It is important to look at what the facts were in that case :

On Feb. 11, 1938, the respondents . . . the rating authority, gave notice of a proposal to insert a hereditament occupied and owned by the appellant . . . Hulme in the valuation list at £40 gross, and £30 rateable, value. On Mar. 2 the appellant lodged a notice of objection with the respondents, the Bucklow area assessment committee. On Mar. 10 the assessment committee met to determine the objection, fifteen members of the committee being present. The rating authority gave evidence in support of the proposal and the appellant in support of the objection and the assessment committee then adjourned the hearing for a sub-committee of four of their members (which sub-committee had been appointed in the absence of the appellant) to visit and inspect the hereditament. On Mar. 22 the sub-committee inspected the hereditament, the appellant being present and raising no objection. On Mar. 31 the assessment committee received (in the absence of the appellant and without his knowledge) a report from the sub-committee on their inspection, and then approved the proposal. The appellant gave notice of appeal to quarter sessions, but it was agreed between him and the assessment committee that the appeal should be withdrawn and the matter reheard *de novo*. On July 5 the rating authority made a fresh proposal in the terms of the former proposal, and on July 15 the appellant lodged an objection thereto. On Aug. 8 the rating authority appointed one Postlethwaite, who was employed by the Cheshire county valuation committee as part time valuation officer, to act on behalf of the rating authority on the hearing by the assessment committee of the proposal and objection. The county valuation committee subsequently instructed Postlethwaite to assist the rating authority with regard to the objection. On Sept. 2, 1938, the fresh proposal and objection were heard by the assessment committee, Postlethwaite appearing for and giving evidence on behalf of the rating authority after the assessment committee had overruled an objection by the appellant to his doing so. The assessment committee approved the fresh proposal. The appellant thereupon appealed against the decision of the committee to Cheshire quarter sessions, on the grounds that (a) it was *ultra vires* the assessment committee, or a sub-committee thereof, to enter and inspect the hereditament; and (b) that the county valuation committee had been allowed to appear and be heard through the county valuation officer, although no

notice had been given to him (the appellant) under the Rating and Valuation Act, 1925, s. 18 (3). Quarter sessions held that they had no jurisdiction to hear an appeal on these grounds and they dismissed the appeal, subject to the opinion of the High Court whether they had come to a correct decision in point of law.

It is not necessary for me to read the judgments in full. The court, consisting of CHARLES, J., and HUMPHREYS, J., dismissed the appeal. CHARLES, J., said this, at p. 258 ([1940] 3 All E.R., at p. 81) :

A The jurisdiction which quarter sessions has on an appeal such as that in the present case is set out in sect. 31 of the Rating and Valuation Act, 1925. [Then he read the section.] What is to be considered by the assessment committee on an appeal under that sub-section is, aye or no, shall this house be entered in the valuation list, and, if so, at what figure ? [Then he reads sect. 31 (4), and says] That is the limit of the authority of quarter sessions, and if the appellant wanted to attack the propriety, the regularity, or the conduct of the inquiry before the assessment committee, the proper way for him to do it would be to apply to this court for a writ of *mandamus* directing the committee to hear and determine in accordance with law.

B HUMPHREYS, J., said, at p. 259 ([1940] 3 All E.R., at p. 83) :

All they [quarter sessions] could do was to hear, as the statute requires them to do on the appeal, evidence on the issue whether they should confirm the valuation list or alter it, in other words, in the present case, whether they should uphold the suggested assessment of £40 gross and £30 rateable or whether they should alter it. In my view, quarter sessions were right in saying that they could not decide on the matters complained of, although no doubt the High Court could have done so on a proper proceeding if there had been any substance in them.

C A further case was referred to by junior counsel for the appellants [Mr. Dare], *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (2). That case was before the Act of 1925, and dealt with the Union Assessment Committee Act, 1862. It is not necessary for me to read it in full, but the point of that case was, at p. 264 :

D An assessment committee passed a resolution to the effect that a supplemental valuation list should be made, and that in such list the gross and net values for certain classes of property, in which residential property was not included, should be increased by the addition of 25 per cent. to the gross and net values in the existing list, and that this order should be sent to the overseers. A supplemental valuation list was drawn up in accordance with this resolution, no individual valuation being made, and a rate was made and served upon the respondents (among others) as occupiers. On a case being stated by the court of quarter sessions : *Held*, by the Divisional Court, that the quarter sessions were entitled to find (1) that no supplemental valuation had been made within the Union Assessment Committee Act, 1862, and (2) that the list which purported to be a valuation list was unfair, unequal and bad in law.

E SANKEY, J. (as he then was), said it was a case in which Messrs. Stirk & Sons, Ltd., had appealed to quarter sessions on these grounds : (a) no proper and separate valuation of the hereditament in question had been made at all ; (b) that the resolution and supplemental valuations were a violation of the principles of the Parochial Assessment Act, 1836 ; (c) that the supplemental valuation list and the rate based thereon were bad in law, for that the supplemental valuation list was bad as not having been made in accordance with the Union Assessment Committee Act, 1862, ss. 25, 26. SANKEY, J., said, at p. 269 :

F The question for the opinion of this court is whether the court of quarter sessions were right in allowing this appeal, and [he concluded, at p. 274] I am of opinion, therefore, that in this particular case there was evidence upon which the quarter sessions could find (1) that the valuation was unfair and unequal, and (2) that no individual valuation had in fact been made of any of the hereditaments concerned for the purpose of the supplemental valuation list ; and there being evidence that there was no individual valuation made of any of the hereditaments, the quarter sessions were entitled to say that this was not a proper supplemental valuation list within the meaning of the Act. For both those reasons—first of all, that there was no supplemental valuation list within the meaning of the Act, and, secondly, that the list which purported to be a valuation list was unfair and unequal, I hold that the quarter sessions were right, and that Messrs. Stirk & Sons were entitled to the relief claimed, and that this appeal should be dismissed.

G BRANSON, J., agreed with that decision.

H In the present case before this court, there is no suggestion, as I understand it, of irregularity in the procedure at the inquiry, as was alleged in the case of *Hulme* (1). Indeed, it appears to be agreed that in form the provisions of sect.

37 were scrupulously observed, in that the proposals were made in respect of separate hereditaments. The hereditaments were severally inspected, and in para. 9 of the case it is agreed that the acting county valuation officer, acting for the county valuation committee, who were entitled to invoke the provisions of sect. 37, had endeavoured to value all properties without regard to size, and that in due course any properties omitted would be revalued and proposals made if the circumstances warranted that course being taken. In the light of all this, I do not think that the decision in *Hulme's* case (1) applies to the particular facts of this case. There was no complaint of irregularity of procedure at the inquiry which would oust the jurisdiction of quarter sessions and call for the procedure of the prerogative writ. Rather was there a grievance which went much deeper and was more fundamental; that the increase, of which complaint was admittedly made, was bad in law. A

The essential complaint to quarter sessions was not that the forms of law and procedure enjoined by the 1925 Act had been improperly or irregularly followed in the things done, but that that which was done was not permitted by law, and was, therefore, invalid and not binding on the appellant. I am of opinion that this was a perfectly sound point to take, if the facts warranted it, and that in any event the quarter sessions were not debarred from entertaining it, and their jurisdiction extended to hearing it and determining it. If I am right in this, it follows that this court has jurisdiction to hear this appeal, for the lack of jurisdiction in this court is said to arise wholly and solely from the lack of jurisdiction in the court of quarter sessions. B C

I now proceed to discuss the question raised in para. 13 of the case stated: Is the proposal of which the appellant complains a valid and legal proposal?

It is necessary to consider, but I think not at great length, some of the cases which have been cited to us, in so far as they bear upon the point we have to decide. Great reliance was placed upon the case of *R. v. Horsham and Worthing Assessment Committee* (3). The headnote of that case is, at p. 408: D

A county valuation committee notified a borough rating authority in the county that in the opinion of the committee the quinquennial valuation list for the borough, which had recently come into force, was not in accordance with the Rating and Valuation Act, 1925, in the matter of gross values. After a conference with the county valuation committee, the rating authority were satisfied that a very large number of assessments of shops, houses and flats in the borough were incorrect, and ought to be increased. They accordingly made many thousands of proposals for the amendment of the valuation list, and a large number of objections fell to be decided by the assessment committee. It was sought to quash the assessment committee's decision on one such objection on the grounds (a) that no such proposal for the amendment of a valuation list could lawfully be made under the Rating and Valuation Act, 1925, s. 37; (b) that sect. 37 of that Act did not empower the rating authority to make a general revaluation of their district to take effect during the currency of a quinquennial valuation list; and (c) that the rating authority could not be "aggrieved" within the meaning of that section: *Held*, that since the rating authority were merely correcting existing inaccuracies in the valuation list, and were not making a new valuation on the ground of any alleged general increase in values, they were not, in truth any more than in form, making a new valuation list, and were acting within sect. 37, though on a large scale, and that the rating authority might well be aggrieved both as a local authority and as a ratepayer by the acceptance of incorrect values by the assessment committee in the quinquennial valuation list. E F

I have read that headnote in full because it is exceedingly important to appreciate what the particular facts in that case were. LORD HEWART, L.C.J., said, at p. 416 ([1937] 2 All E.R., at p. 684): G

The real pith of the criticism directed against what is done is the proposition that under the pretext or form of making individual corrections in an existing valuation list, the authorities referred to in this rule in fact contrived, contrary to the provisions of the Act, to produce a new valuation list within the quinquennium. H

Then, at p. 419 ([1937] 2 All E.R., at p. 687), LORD HEWART, L.C.J., said:

Next it is said, not only are these proposals many in number, but in kind they are of such a nature as to involve, taken all together, the creation of a new valuation list. But why? To repeat what I indicated a moment ago, nowhere is it suggested that something had happened to increase the gross value of any of these hereditaments. Nowhere is it suggested that some general and comprehensive principle should now be applied. All that is said is that when one looks at the facts it appears that the gross value for the purposes of the Rating and Valuation Act, 1925, has been incorrectly

ascertained and stated. That is not a question of far-reaching principle. It is a question of precise, specific and particular detail. It seems to me that to revise the errors traceable to that source is removed by the whole width of the heavens from the making of a new valuation list, a process which, if it were undertaken, would require the fulfilment of the very particular provisions enacted by the statute.

Then, at p. 421 ([1937] 2 All E.R., at p. 688), LORD HEWART, L.C.J., says :

A In my opinion, on a fair view of what has happened here, notwithstanding the number of hereditaments which within one period have been dealt with, it is wrong to say that there has been an attempt, successful or not, to make a new valuation list. There has been undoubtedly on a large scale a correction of a former incorrectness, but, I think, in the circumstances, and for the reasons, contemplated by this statute. I see nowhere any sign of excess or usurpation of jurisdiction.

Then SINGLETON, J., at p. 424 ([1937] 2 All E.R., at p. 690), said :

B The argument that what took place was the making of a new valuation within the quinquennial period fails on the facts. No new list was made, but a very large number of amendments was made to the current list. If something was done which was in fact the making of a new list, it might well be said to be contrary to the spirit of the Act, and in particular to sect. 19, but that did not take place. There is no need to consider such a case unless and until it arises, and it may then turn out really to be a question of fact.

C The case of *R. v. Cornwall County Valuation Committee and Others, Ex p. Falmouth Rating Authority* (4) was also referred to. In that case it was held, at p. 222, that on the true construction of the provisions of sects. 18 and 37 of the 1925 Act, which I have read :

D . . . the county valuation committee, in carrying out the duty imposed upon it by sect. 18 (2), of promoting uniformity of valuation in the county, were not bound to make proposals for the correct valuation of all the hereditaments in the county at the same time, but might in the exercise of their discretion proceed by instalments and make proposals for the correct valuation of the hereditaments or some of them in parts of the county in succession ; and consequently : Where in several areas of a county the prevailing valuations were too low, and the county valuation committee made proposals for the correct valuation of a large number of hereditaments in one of the areas only, and the assessment committee determined many of these proposals and in particular made an order increasing the gross and rateable value of one hereditament : *Held*, that the rating authority for that area was not entitled to obtain either a writ of *certiorari* to quash the order of the assessment committee, or a writ of prohibition to prevent the county valuation committee from making or the assessment committee from determining and enforcing any other such proposal, on the ground that any such proposal made by the county valuation committee in regard to part only of the county must be made in disregard of its statutory duty to promote uniformity of valuation in the county.

F It is important to notice in that case that the second quinquennial valuation for the rating area of the borough of Falmouth, in the county of Cornwall, came into force on Apr. 1, 1934, and the third list would come into force on Apr. 1, 1939. But the county valuation committee in this particular case acted in the year 1935. They passed a resolution :

G . . . approving the report of a sub-committee stating that in ten rating areas in the county many valuations appeared to be too low, and expressing the opinion that, in order to obtain more uniformity of valuation, it was essential that the work of increasing these valuations should be done as soon as possible.

I do not know that I need make any lengthy quotation from the judgments in that case, but LORD WRIGHT, M.R., at p. 234 ([1937] 2 All E.R., at p. 271), said, having detailed the facts :

H In those circumstances it seems to me that what the valuation committee have been doing in this case is simply, according to the best of their judgment, to fulfil the duties under the various sections which I have stated. There is no suggestion that they are not acting *bona fide*, and there is no suggestion that any of the actual valuations which they have made so far, or which have been proposed to, or settled by, the assessment committee are in themselves wrong. The whole gravamen of the complaint on the part of the Falmouth council is that nothing can be done in these matters, unless that which is done is done simultaneously over the whole county of Cornwall . . . The whole gravamen of his complaint, as I understand it, is based on the time factor.

Incidentally, LORD WRIGHT, M.R., at p. 236 ([1937] 2 All E.R., at p. 272), referred to the case of *Stirk & Sons, Ltd. v. Halifax Assessment Committee* (3), with which I have already dealt.

Having dealt with the facts and reviewed them, ROMER, L.J., says, at p. 240 ([1937] 2 All E.R., at p. 275) :

That being so, and seeing that the county valuation committee are the body to determine what steps are to be taken for the purpose of securing uniformity, and that they have acted *bona fide* in reaching their decision, it is impossible, I think, for this court to interfere, even if the court came to the conclusion—I will not say that I have come to that conclusion—that the steps advocated by Sir Herbert Trustram Eve would have been better or more practical in the circumstances.

The headnote to *Murphy Radio, Ltd. v. Welwyn Garden City Rating Authority* (5), reads, at p. 16 :

The appellants were the lessees and occupiers of premises which had been assessed in 1936 at a net annual value of £340. In consequence of a report made in 1939 by the county valuer that the rents being paid by the appellants were greatly in excess of the assessment figure, the respondent rating authority made a proposal to amend the valuation list with respect to that property. It was contended for the appellants that the effect of the Rating and Valuation (Postponement of Valuations) Act, 1938 and 1940, was to preclude the authority from amending the valuation list during the currency of those acts.

It was there held that the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940 :

... dealt merely with the extensions of the period of validity of the valuation list and did not affect the powers given to a rating authority by sect. 37 of the Rating and Valuation Act, 1925, to make amendments thereto. In this case the amendment of the existing valuation list was well within the powers of the respondent, and was not open to objection.

The only passage I would venture to read is not from the main judgment of CHARLES, J., which follows the headnote which I have just read, but for the purposes of the present case a passage from the judgment of STABLE, J., at p. 19. Having agreed with the decision of CHARLES, J., STABLE, J., said :

Sect. 37 of the 1925 Act provides the machinery for amending the list during the life of the current list. Whether the duration of that life is 5 years or less or more is immaterial. The Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, have extended the duration of the life of the lists without in any way affecting the powers to make amendments thereto, or the machinery for making amendments thereto, during that life. As regards the second point, if the appellants had been able to say that what was done here was to alter the valuation because of what has been described as some general economic or social change, the result might—I do not say that it would—have been different. Whether what was done here comes within that category or not, in my judgment, is essentially a question of fact. There are no facts found in this case to support the contention that what really happened was that a fresh valuation was being made piecemeal and that what was done was a colourable attempt to make a fresh valuation and not to deal with errors or omissions that were apparent on the face of the valuation when it was made.

Therefore, it is important to keep in mind what is the precise question to be decided in this case. It was no doubt a most unfortunate thing that the old valuation list of 1934 was the current list ; and it may very well be that a new valuation list in 1939 would have raised the gross and rateable values of all the hereditaments very considerably. The county valuation committee may well have taken the view that it was a great pity that the statutes forbade making a new valuation list in those circumstances. They were clearly of opinion that in the year 1940 the general level of the existing assessments in the rating area was too low, and the proposals to increase the assessments on a very wide scale were admittedly made on that basis.

It is clear that if they were making use of their undoubted powers under sect. 37 to make necessary corrections and amendments, the mere fact that they made a great many would not affect the question. By doing that, they would not be making a new valuation list, which they had no power to do, and any idea of doing so they disclaim. They assert that they did not invoke some general principle, such as a percentage increase on all assessments, but they gave separate consideration to each proposal ; and if, in the result, there was virtually a new valuation, this was by no means the same thing as a new valuation list.

The appellants submit that if all the circumstances are considered, it is plain that under the guise of acting in accordance with sect. 37 of the 1925 Act, the county valuation committee was really doing what sect. 19 empowered only the rating authority to do.

I am of opinion that the decision in this case before this court is really a question of fact. That question can be stated in this way. On the agreed facts in this case including the genesis of the proposals in 1940, that the general level of the assessments in the rating area was too low, the fact that no new valuation list could be made to remedy that situation until some future and indeterminate time, the fact that the acting valuation officer undertook a systematic examination of all the assessments in the rating area, large and small alike, that out of 577 proposals made between Dec., 1941, and Dec., 1942, by the county valuation committee the assessment committee increased them all save eight, two of which stand adjourned, that a further 618 hereditaments were inspected before Dec., 1942, by the acting county valuation officer on behalf of the valuation committee, and proposals in respect of them were withheld until the result of this appeal was known, that only considerations of time had prevented the valuation officer from inspecting more properties; on all these facts, was the action of the county valuation committee a considered attempt to do that which could only be done under the powers of sect. 19 by the rating authority, or is it to be regarded as a normal and justifiable use of the powers of the valuation committee under sect. 13 or sect. 18 of the Act?

It is difficult to resist the conclusion that what was done here was done because the new valuation list was postponed by law, and a situation had arisen which made the absence of a new and revised valuation list a most regrettable thing. Looking at the matter fairly and with unprejudiced eyes, it is really impossible to say that all that was done here was the routine work of amendment or correction or the seeking of mere uniformity. It is equally impossible to say that what was done in 1940 onwards was the ordinary fulfilment of the statutory duty of the county valuation committee. It seems to me that the true view of the matters in controversy is that because a new valuation list, due in 1939 in the ordinary course of events, could not be brought into being, and that a new valuation list was thought to be most desirable, the methods employed were designed to bring about the same end.

In a word, the view I have formed is that what could only be done under sect. 19 of the 1925 Act, when Parliament permitted it to be done, was sought in effect to be done under sect. 37 of the 1925 Act. In my view, that was not a proper method of dealing with the position, and it had no sanction in law.

For these reasons, I am of opinion that this appeal should be allowed, on the answer to the question in para. 13 of the case, that this proposal against which the appellant appeals is not a valid and legal proposal.

Appeal allowed with costs.

Solicitors: *Metcalfe, Copeman & Pettefar* (for the appellant); *Vizard, Oldham, Crowder & Cash*, agents for *Mills & Reeve*, Norwich (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

G. T. STOODLEY v. H. D. THOMAS & SONS, LTD. AND G. COOKSEY.

[KING'S BENCH DIVISION (Atkinson, Wrottesley and Tucker, JJ.), May 1, 1945.]

Sale of Goods—Short deliveries of milk—Customer subsequently overcharged in monthly account—Overcharge not made at time of delivery, no application of a false trade description—Merchandise Marks Act, 1887 (c. 28), s. 2 (2).

A milk roundsman employed by the respondent company overstated in a customer's monthly account book the quantities of milk he delivered at the customer's premises daily for a certain period. On presentation of this account book at the end of the monthly period the customer paid for the quantities of milk shown in the book as having been delivered. An information was preferred under the Merchandise Marks Act, 1887, s. 2 (2), charging the respondents with having unlawfully sold certain goods, namely, milk, to which a false trade description applied. The magistrate found that there was no offence by the respondents under sect. 2 (2) unless the false

trade description did exist and was applied to the goods at the time of the sale:—

HELD: the decision of the magistrate was correct. Since the overstatement of the quantities of milk as delivered, sold and accepted was not made at the time of the actual sales, it did not amount to a "sale . . . to which any . . . false trade description" was applied within the meaning of sect. 2 (2).

Budd v. Lucas (1) and *Coppen v. Moore* (No. 2) (2) distinguished.

[EDITORIAL NOTE.] This is a short point relating to the construction of sect. 2 (2) of the Merchandise Marks Act, 1887, the question being whether, in order to constitute an offence, a false trade description must be applied at the time of the delivery of the goods. The two cases cited, *Budd* (1) and *Coppen* (2) related to invoices and turned upon the question of attachment to the goods, but they appear to accept the necessity for description and delivery being contemporaneous, and it is so held here, where the false description was contained in an account rendered subsequently to delivery.

AS TO "FALSE TRADE DESCRIPTION," see HALSBURY, Hailsham Edn., Vol. 9, p. 422, note (m); and FOR CASES, see DIGEST, Vol. 43, pp. 241, 242, Nos. 852-861.]

Cases referred to:

* (1) *Budd v. Lucas*, [1891] 1 Q.B. 408; 43 Digest 244, 876; 60 L.J.M.C. 95; 64 L.T. 292.

* (2) *Coppen v. Moore* (No 2), [1898] 2 Q.B. 306; 43 Digest 244, 877; 67 L.J.Q.B. 689; 78 L.T. 520.

APPEAL by way of case stated from a decision of the magistrate sitting at Mansion House, dismissing an information preferred against the respondent company under the Merchandise Marks Act, 1887, s. 2 (2), for unlawfully selling certain goods, namely, milk, to which a false trade description was applied. The facts are fully set out in the judgment of ATKINSON, J.

W. Arthian Davies and *John Thompson* for the appellants.

The respondents did not appear.

ATKINSON, J.: This is an appeal by way of case stated by the Chief Inspector of Weights and Measures of the corporation of the City of London against a decision given in favour of Messrs. H. D. Thomas & Sons, Ltd., and their milk roundsman, George Cooksey.

The question raised for our consideration is this. Messrs. Thomas & Sons, Ltd., are milk salesmen to customers in London, and one of their customers was the Guardian Assurance Co., Ltd., King William Street. Cooksey was their roundsman. They made substantial deliveries of milk every day to this particular customer. The case finds that a can or cans of milk were deposited at the premises of the customer in the usual way and taken in by them, that Thomas & Sons, Ltd., the respondent company, kept a milk account book, and a photostatic copy is annexed to the case. In that book they have a series of dates with figures "16" written opposite, which obviously is intended to mean 16 quarts. Then at monthly intervals they presented this book to the customer, which purported to show the daily amounts of milk delivered, and on the presentation of the book the purchaser paid.

It is alleged that on the four days which had been selected to be the subject of this prosecution, on May 23, instead of 16 quarts, only 14 quarts 34 fluid ounces were delivered; on May 24, instead of 16 quarts only 15 quarts 3 fluid ounces; on May 25, instead of 16 quarts only 14 quarts 30 fluid ounces; and on May 26, 14 quarts 30 fluid ounces instead of 16 quarts. When the milk was delivered there was nothing to indicate how much milk was in the cans, but on June 6, this book was presented, and at that time there was written against each of these dates the number "16," which represents 16 quarts, and the milk bill was paid.

On that, these summonses were taken out under the Merchandise Marks Act, 1887, s. 2 (2), and the wording of the summonses is this, that on these dates the respondents "unlawfully did sell certain goods, namely, milk to which a false trade description was applied."

The words in sect. 2 (2) are:

Every person who sells . . . any goods . . . to which any . . . false trade description is applied.

commits an offence. I have no doubt that the 16 quarts as applied to something

less than 16 would be a false trade description, but the point that was taken and which the alderman who decided the case accepted, was that there was no offence under this subsection unless the false trade description did exist and was applied to the goods at the time of sale.

A The case of *Budd v. Lucas* (1) was cited to him, and he had the guidance of that case and one other case, *Coppen v. Moore* (2). He would see, as we see, that in *Budd v. Lucas* (1) there was a sale of six casks of beer, and that the beer he left at the appellant's house an invoice which described the casks as six barrels. A barrel, it was proved, meant in the trade something that contained 36 gallons, and these casks did not contain 36 gallons, so there was plainly a false trade description. The point taken was that the description was not physically attached to the goods sold, and, therefore, it could not be said that the false trade description was applied to the goods sold. But this court, B consisting of POLOCK, B., and CHARLES, J., said this, at p. 412 :

No doubt, the description must be used in connection with goods ; but I think we should be cutting down the intention of the Act if we were to hold that the delivery of an invoice or other description of goods, at the time of, or immediately after, the delivery of the goods themselves, was not a use in connection with the goods within the meaning of the section.

C Then CHARLES, J., said, at p. 412 :

To the question whether the delivery of the invoice along with the casks was an application of a false trade description within the meaning of the Act, we cannot, in the present state of the case, give a categorical answer. All that we can say is, that it may have constituted the offence with which the respondent is charged. No doubt there was not any physical application of a trade description to the goods ; but I do not think that that is necessary. To my mind, it is clear from the language of sect. 5 (1) (d), D that something more is contemplated than an actual physical connection. And if so, then I think that the delivery of the invoice with the goods might be a use of a false trade description of the goods delivered.

E *Coppen v. Moore* (2) threw no further light on that, though I think it was a stronger case. A man went into a shop to buy Scotch ham and was told that certain articles there were Scotch ham ; so he said he would have one, and one was wrapped up and he was given an invoice which had not the words " Scotch ham " on it. The invoice was handed back for completion and the words " Scotch ham " were written in, and having got that, he paid for it ; but it was all done at one and the same time and, following *Budd v. Lucas* (1) the court had no difficulty.

F To my mind, I think it is impossible to say that on any of these days there was a sale of goods to which a false description was applied. It seems to me it is quite impossible to say, because 10 days or a fortnight later in an invoice the quantity of goods was overstated, that that false trade description was applied in any sense at the time of the sale and, in my judgment, the alderman took the right view and the appeal fails.

G WROTTESELEY, J. : I agree. In particular I agree with what the alderman said in expressing his opinion ; he said he was of opinion " that a false trade description referring to the goods in an account given to the purchaser several days after sale and delivery and acceptance of the goods did not make the sale a selling of goods to which a false description was applied." There are doubtless transactions, discreditable transactions, the supplying of short measure of milk, which would not be covered by the section in question. There are also thousands of dishonest transactions which it will cover, and I think on this occasion the alderman came to a right conclusion.

H TUCKER, J. : I agree, and have nothing to add.

Appeal dismissed.

Solicitor : City Solicitor, London (for the appellant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

SHERWOOD v. COX. SHERWOOD v. DAY.

[KING'S BENCH DIVISION (Atkinson, Wrottesley and Tucker, JJ.), May 4, 1945.]

Food and Drugs—Milk—Certificates of analysis—“Any certificate of analysis . . . shall be served with the summons”—Only the certificates in respect of the article which is the subject matter of the prosecution need be served—Food and Drugs Act, 1938 (c. 56), s. 80 (3).

On July 17, 1944, the appellant bought from each of the respondents, Cox and Day, a pint of milk which was submitted to analysis. On July 19, 1944, the appellant took a sample from the milk delivered at the respondents' premises which was also analysed. On Aug. 14, 1944, the respondents were served with a summons for selling on July 17, 1944, to the appellant a pint of milk which was not of the nature, substance and quality demanded, contrary to the Food and Drugs Act, 1938. With the summons was served a copy of the certificate of analysis in respect of the milk bought on July 17, but not a copy of the certificate in respect of the sample taken on July 19. At the hearing the summons was dismissed on the ground that the requirements of sect. 80 (3) of the Act had not been complied with, because the respondents had not received with the summons every certificate of analysis made. On appeal by way of case stated:—

HELD: upon the true construction of the Food and Drugs Act, 1938, s. 80 (3) the prosecutor is only required to serve with the summons the certificate or certificates of analysis in respect of the article which is the subject matter of the prosecution.

[EDITORIAL NOTE. It is provided by the Food and Drugs Act, 1938, s. 80 (3), that a summons in respect of an article sampled must be accompanied by a copy of “any certificate of analysis obtained on behalf of the prosecutor.” It is argued that this refers to every certificate of analysis which may have been obtained, but the court holds that there must be read into the Act some such words as “in respect of the article which is the subject matter of the prosecution.”]

AS TO SERVICE OF CERTIFICATES OF ANALYSIS WITH SUMMONS, see HALSBURY, Hailsham Edn., Vol. 15, p. 169, para. 280; and FOR CASES, see DIGEST, Vol. 25, pp. 106-107, Nos. 309-312.]

APPEALS by way of case stated by the justices of the peace sitting at Faringdon, on Nov. 30, 1944. Both cases raised the same question of the construction of the Food and Drugs Act, 1938, s. 80 (3). The facts are fully set out in the judgment of ATKINSON, J.

R. C. Hutton for the appellant.

S. Cope Morgan and Phineas Quass for the respondents.

ATKINSON, J.: These are two cases stated by the justices of the peace, sitting at Faringdon, and they both raise the same questions as to the construction of the Food and Drugs Act, 1938, s. 80 (3).

Cox was summoned for selling, on July 17, 1944, a pint of new milk which was not of the nature, substance and quality demanded by the appellant, the same being deficient in milk fat to the extent of 5 per cent. The summons was heard on Aug. 29. Day was summoned for similarly selling a pint of new milk which was not of the nature, substance and quality demanded, it being deficient in milk fat to the extent of 4.7 per cent., and in milk solids other than fat to the extent of 3.3 per cent.

On July 17, the pint of milk which was bought in each case was bought with the intention of its being submitted to analysis, and both purchases were dealt with in accordance with sect. 70 of the Act, that is to say that the purchase was divided into three parts in each case. I do not know whether the first parts were actually given to the two purveyors, but at any rate, if required so to do, the appellant was bound to deliver one part to the seller, to retain one part for future comparison, and, if he thought fit, to have an analysis made by submitting one part to the public analyst.

Two days afterwards, on July 19, in Cox's case, the appellant took a sample from the milk delivered at Cox's premises, and that was done under sect. 70 (2), which provides:

A person taking a sample of any food while it is in transit, or at the place of delivery to the purchaser, consignee or consumer shall, if he intends to submit it to be analysed

by a public analyst, deal with it in the manner provided by the preceding subsection, except that he shall retain the first-mentioned part of the sample unless the name and address of the consignor appear on the container containing the article sampled, in which case he shall forward that part of the sample to the consignor . . .

Prima facie, that sample is one which does not affect the purveyor ; it is one which is more concerned with the original supplier. In Day's case a second sample was also taken on the 19th, but apparently that was not a sample of milk as delivered, it was simply that, as the case states, the appellant took a further sample of the respondent's milk.

All these four samples were sent to the public analyst, and on July 25 he issued four certificates. The certificate relating to the milk in respect of which Cox was prosecuted was certificate No. 7582, and it certifies that there was only 2.85 percentage of fat. The certificate of the sample taken on July 19 was No. 386.

In Day's case the certificate relating to the sample taken on July 17 was No. 7581, showing only 2.86 percentage of fat, and the one taken on July 19 was No. 384.

On Aug. 14, Cox was served with the summons which I have described, that is to say a summons for selling a particular pint of milk on July 17, and with the summons was served a copy of the certificate of analysis obtained from the public analyst, No. 7582. He was not served with a copy of the certificate No. 386, which related to the sample which had been taken two days later, on July 19. The respondent obviously knew that this second sample had been taken, and he at once complained that he had not received a copy of the certificate of that sample, and thereupon the appellant sent by registered post on Aug. 17 a copy of certificate No. 386 to the respondent.

Day similarly was served on Aug. 14 with a summons, together with a copy of certificate No. 7581, and neither he nor his solicitor made any complaint then about his not having a copy of the second certificate ; but in fact by registered post on Aug. 21 a copy of certificate No. 384, that is the second certificate, was sent to him.

I do not know that anything really turns upon what precisely happened at the hearing, but in Cox's case the solicitor opened the case, and he stated that he proposed to adduce in evidence both the certificates. At once the respondent objected that he had not received a copy of the second certificate with the summons, and that point was argued, and the justices took the view that he was entitled to and ought to have been served with a copy of that certificate along with the summons.

In Day's case the point arose in a slightly different way. Before anything was done, as soon as the case was called on, Day's solicitor took the objection that a copy of the certificate No. 384 had not been served upon him along with the summons. The appellant's solicitor at once said : " I do not propose to use that certificate." Nevertheless, the point was argued, and in both cases the justices took the view that the respondents ought to have been served with copies of the two second certificates of analysis along with the summonses. The point submitted is whether that construction of sect. 80 (3) is correct.

The wording of that subsection is :

In any proceedings under this Act in respect of an article sampled, the summons shall not be made returnable less than fourteen days from the day on which it is served, and a copy of any certificate of analysis obtained on behalf of the prosecutor, and of any certificate given by a justice under proviso (a) to subsect. (1) of this section . . . shall be served with a summons.

That is to say, a copy of " any certificate of analysis " shall be served with the summons ; and the contention of the respondent is that " any " means " every " certificate of analysis. There the submission ends. Analysis of what, and within what limitation, I know not. But the appellant says that the obvious meaning of those words is this, that it means : " Any certificate of analysis of the article sampled, of that which you are speaking about, the subject matter of the section." And in my view the argument of the appellant is unanswerable.

It seems to me that some limitation must be put upon the words " any certificate of analysis." If it is not limited in that way, where is the line to be drawn ? Is it any certificate of analysis of any milk at any time purchased that is not even relevant to the article sampled ? If it had been meant to go beyond the analysis relating to the article sampled, surely there would have been

some words indicating the class or the limits within which the certificates to be served must come.

There is one little indication of the meaning of those words which has been pointed out. I do not know that it goes to very much, but it is perhaps just worth something. Sect. 80 (3) relates to everything dealt with under the Act ; but, in the case of milk, sect. 71, which is headed : "Special provisions as to the sampling of milk and proceedings subsequent thereto," provides :

The provisions of this Act relating to the procuring of samples by sampling officers, and proceedings in connection therewith, shall, in relation to milk, have effect subject to the provisions of the Third Schedule to this Act. A

When one comes to Sched. III, that provides, putting it shortly, that when the milk is bought and a sample is taken in the way which I have related, the purveyor has this right, that within sixty hours after the sample has been procured from him he can serve a notice on the officer of the county council, in this case, telling him where the milk was bought, giving him the name and address of the consignor from whom he received the milk, and can call upon him to take a sample of milk from a corresponding milking in the course of transit or delivery to himself from the seller or consignor, and that then the inspector is bound to do that, and when it is done, subsect. (5) of this schedule provides that :

If proceedings are taken against the purveyor, a copy of the certificate of the result of the analysis of every sample so procured in the course of transit or delivery shall be furnished to him, and every such certificate . . . C

and so on, shall be admissible at the trial.

The point that counsel for the appellant makes is this, that if sect. 80 (3) really applied to every conceivable certificate having any bearing whatever on the case, it would have been quite unnecessary to put in that provision, because obviously, on the argument of counsel for the respondent, that would have been a relevant certificate which would have had to be served with the summons. But the provision there is not that it should be served with the summons, or anything of that sort, it is that a copy of it shall be furnished. That does not mean served with the summons. D

The view I have formed is that the appellant's contention is right, and that the only way to give "any certificate of analysis" in sect. 80 (3) any meaning is to confine it to the certificate of analysis of the article concerned, which in this case was the pint of milk purchased on July 17. E

For those reasons, I think the appeal should succeed.

WROTTESELEY, J. : I agree that what is meant by the words "any certificate of analysis" is any certificate of analysis of the article sampled, and, therefore, to that extent of the article which is the subject of the information. Such analysis would not necessarily be confined to the sample, because, except where an article is purchased as for instance here, namely a pint of milk, where the whole of the pint of milk becomes the sample, you may have cases where the sample is of a bulk, and in that event it seems to me that the article sampled would not be the sample itself but would include the bulk, and therefore other analyses taken of the bulk would appear to me to fall within the words "any certificate of analysis obtained on behalf of the prosecutor," and it would also be "of the article sampled," referred to in sect. 80 (3). F

So far as the word "any" is concerned, again, for the reasons that have been given, I think it is the appropriate word, because it does not follow that in every case of a prosecution or information the analysis would be reduced into the form of a certificate. G

I agree with the judgment of ATKINSON, J., for the reasons which he gave.

TUCKER, J. : I agree, although I do not think the point is perhaps quite so clear as do the other members of the court, for this reason, that I think some words have to be read into sect. 80 (3) whichever interpretation is placed upon them. H

I think it would suffice the argument of counsel for the respondents if one read in the words "any certificate of analysis obtained on behalf of the prosecutor for the purposes of such proceedings." On the other hand, I think that some words have to be read in if counsel for the appellant is right ; and I think the words which have to be read in in that case are "in respect of the article which is the subject matter of the prosecution." And the question, to my

mind, is which of those alternative sentences should be read in.

On the whole, I have come to the conclusion that the words which should be read in are "in respect of the article which is the subject matter of the prosecution." When one reads the whole of sect. 80, I think that is what is envisaged. Generally speaking, what is envisaged is the taking of one sample, no doubt for the purpose of the prosecution, although there may conceivably be cases in which two samples might be taken in respect of the article which is the subject matter of the prosecution. If that was so, then no doubt service of both analyses would have to be made on the seller.

I am glad to think that this interpretation cannot possibly work any hardship upon anybody, because if an analysis is taken and a certificate is obtained, it cannot be put in evidence except under the provisions of sect. 81 (1), which, so far as is material, reads as follows :

In any proceedings under this Act, the production by one of the parties of a document purporting to be a certificate of a public analyst in the prescribed form . . . shall be sufficient evidence of the facts stated therein, unless . . . the other party requires that the analyst shall be called as a witness.

And subsect. (3) provides, leaving out the words which are not material to this case :

If a defendant intends . . . under subsect. (1) of this section to require that the public analyst shall be called as a witness . . . notice of his intention . . . shall be given to the other party at least three clear days before the day on which the summons is returnable, and, if this requirement is not complied with, the court may, if it thinks fit, adjourn the hearing on such terms as it deems proper.

It seems to me, therefore, to follow that if a prosecutor has an analysis made and obtains a certificate afterwards which he intends to use at the proceedings, he does so at his peril if he has not served a copy on the defendant in sufficient time to enable the defendant to comply with the requirements of subsect. (3). If he does not, the court will no doubt grant an adjournment and the prosecution very likely will be penalised in costs.

I agree with the judgments which have been given.

Cases remitted to the justices to hear and determine.

Solicitors : *Peacock & Goddard*, agents for the Clerk to the Berkshire County Council (for the appellant) ; *J. & P. J. F. Chapman-Walker*, agents for *Lemon, Humphreys & Parker*, Swindon (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re FERODO, LTD.'S APPLICATION.

[CHANCERY DIVISION (Evershed, J.), May 16, 1945.]

Trade Marks—"Defensive trade mark"—*Application for defensive registration*
—*Character of evidence required*—"Connection in the course of trade"
—*Trade Marks Act, 1938 (c. 22), s. 27 (1).*

The applicants, Ferodo, Ltd., had for many years carried on a business for the manufacture and sale of brake and clutch blocks and linings and similar articles for use in motor cars and other machinery, and they also manufactured certain domestic articles such as stair covers. Under the Trade Marks Act, 1938, s. 27 (1), the applicants applied for registration of their trade mark consisting of the invented word "Ferodo" as a defensive trade mark in respect of all goods comprised in class 5 (pharmaceutical substances, etc.) and class 34 (tobacco, smokers' articles and matches). The applicants gave evidence as to the nature and extent of their business, the kind of goods manufactured by them in relation to which the trade mark had been registered and used, and the character and volume of the advertisement of their goods and trade mark over a period of years. The number of the applicants' customers (both trade buyers and members of the public) was about 60,000. As a means of advertising their goods, the applicants had distributed as gifts, *inter alia*, matches bearing their trade mark. It was contended by the applicants that on this evidence the court ought to find that the use of the word "Ferodo" in relation to any of the goods comprised in classes 5 and 34 would be likely to be identified by persons seeing the word so used as the applicants' trade mark, and that the requirements under the subsection had, therefore, been satisfied :—

HELD: (i) the evidence tendered did not justify defensive registration in classes 3 and 5. The evidence did not show that the invented word had become so well known in its application to the goods of the applicants that its use in relation to the "other goods" in respect of which defensive registration was sought would lead persons buying or obtaining those "other goods" to suppose that they too originated from the persons who made and marketed the actual goods bearing the trade mark.

(ii) the language of sect. 68 of the Act referring to "a connection in the course of trade", which had been incorporated into sect. 27 (1) involved no departure from the old-established conception of indication of origin (*Aristoc, Ltd. v. Rysta* (1) followed); the subsection required a knowledge in the prospective purchaser of the kind of goods to which the trade mark had been applied by the manufacturer and distributor as an indication of origin.

(iii) the phrase "a connection in the course of trade" did not cover advertising *media* such as the distribution as gifts of articles bearing the trade mark of the applicants.

[EDITORIAL NOTE.] This is the first reported case on the construction of sect. 27 (1) of the Trade Marks Act, 1938, indicating the evidence necessary in an application under that subsection for the registration as a defensive trade mark of an invented word registered as a trade mark by the applicant. It is held that the knowledge of the word referred to in the subsection must be knowledge of it in its application to goods of a specific kind, such that persons seeing the word attached to the new class of goods would assume that they originated from the proprietor of the mark. Each case will depend upon its own facts, but the nature of the goods both in respect of which it is registered and in respect of which application is made for defensive registration is an important factor. The reference in the subsection to a "connection in the course of trade" is construed to mean that the production and marketing of the goods in question is part of the applicant's trade. This is held to follow from the *Aristoc* case (1) where it was decided that a trade mark still is, as it has always been, an indication of origin, and the phrase would not, therefore, cover the distribution of goods entirely different from those normally marketed, purely as advertising *media*. The judge indicates the desirability of expert evidence from witnesses experienced in the trades involved and suggests the type of evidence to be given by such witnesses for the assistance of the court.

AS TO DEFENSIVE TRADE MARKS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 555, 556, para. 860.

FOR THE TRADE MARKS ACT, 1938 s. 27, (1), see HALSBURY'S STATUTES, Vol. 31, p. 773.]

Case referred to:

* (1) *Aristoc, Ltd. v. Rysta, Ltd.*, [1945] A.C. 68; [1945] 1 All E.R. 34; 114 L.J.Ch. 52; 172 L.T. 69.

MOTION by way of appeal from a decision of the Assistant-Comptroller. The facts are fully set out in the judgment.

G. H. Lloyd-Jacob for the applicants.

H. O. Danckwerts for the Comptroller-General of Patents, Designs and Trade Marks.

EVERSHED, J.: This is an appeal from a decision of the Assistant-Comptroller dated May 15, 1944, refusing an application under the Trade Marks Act, 1938, s. 27 (1), by Ferodo, Ltd., for registration in their name of their trade mark consisting of the invented word "Ferodo" as a defensive trade mark in respect of all the goods comprised in class 5 ("Pharmaceutical . . . substances," etc.), and class 34 ("Tobacco . . . smokers' articles; matches.") The Assistant-Comptroller held on the evidence before him that the appellants had failed to satisfy the onus laid upon them by the subsection. He was of opinion, however, that on the evidence submitted the appellants would be entitled to registration under the subsection in respect of such goods (if any) falling within the two classes 5 and 34 as could properly be said to be of the same description as "goods in respect of which" the appellants' mark is already "registered and . . . used"; and he gave leave to the appellants to file further evidence for this purpose or to add to their evidence with a view to establishing their wider claim to registration in respect of all the goods comprised in both classes. The appellants have not so far availed themselves of these opportunities. As this appears to be the first case which has arisen under sect. 27 (1) since its addition to the trade marks legislation in 1938 the

appellants have prosecuted this appeal with a view to obtaining the opinion of the court on the construction of the subsection and particularly on the nature of the onus imposed upon an applicant thereunder and the character of the evidence required in support of such an application. It is conceded by counsel for the Comptroller-General that my decision on the appeal if adverse to the appellants will not prejudice their right, under the liberty already afforded to them, to bring the matter again before the Comptroller-General upon such further evidence as they may be advised or be able to tender.

- A Before reading the subsection it will be convenient for me to refer briefly to the evidence filed by the appellants in support of their application. The main point to be observed in regard to this evidence (which was analysed by the Assistant-Comptroller in the course of his careful decision) is that it is confined to evidence of the appellants themselves, proving the nature and extent of their business, the various kinds of goods manufactured by them in relation
- B to which the mark has been registered and used, and the character and volume of advertisement of their goods and mark undertaken by the appellants over a period of years. Thus it is proved that the business of the company which has been carried on continuously and on an increasing scale for nearly 40 years consists in the main of the manufacture and sale of brake and clutch blocks and linings and similar articles for use in machines of various kinds including
- C motor cars, but it also extends to cover a few more domestic articles, namely stair and step treads and covers. During the period of ten years from 1932 to 1941 the annual value of the appellants' sales rose from somewhat over half a million to more than a million pounds sterling. During the same period the average annual expenditure by the company upon advertising was over £26,000, the advertising matter including insertions in the daily press and periodical magazines as well as technical papers and comprehending also display signs on
- D roadsides, bridges, garages and the like. The number of the appellants' customers, both trade buyers and members of the public, is approximately 60,000. On this evidence, and on this evidence alone, it is contended by counsel for the appellants that the court ought to find as a fact such a degree of notoriety established by the appellants for the use of their invented word "Ferodo" as a trade mark that the use of the word in relation to any of the goods comprised
- E in classes 5 and 34 (and in relation to any other goods than those in respect of which the mark is now registered and used) would be likely to be recognised and identified by persons seeing the word so used as the appellants' mark; and that accordingly the necessary requirements of a successful application under the subsection have been satisfied.

Sect. 27 (1) of the Act is as follows :

- F Where a trade mark consisting of an invented word or invented words has become so well-known as respects any goods in respect of which it is registered and in relation to which it has been used that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first-mentioned goods, then, notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods . . .
- G the trade mark may, on the application in the prescribed manner of the proprietor registered in respect of the first-mentioned goods, be registered in his name in respect of those other goods as a defensive trade mark . . .

- The word "Ferodo" is beyond doubt an "invented" word, having been invented by the appellants' predecessors, owners of the appellants' business, about the year 1906. Being an invented word, the goodwill attached to its use has been wholly built up by the work and energies of the appellants and their predecessors. It is accordingly urged on the part of the appellants that there
- H is at least a strong moral case for justifying the grant of monopolistic rights in regard to that which is the exclusive creation of the applicants or, conversely, that the court should not be slow to prevent other persons obtaining for themselves the advantages attaching to a well established trade word in respect of goods, however different in kind from those marketed by the inventor of the word. And, no doubt, on grounds such as these the new section has been enacted, and its scope confined to the case of invented words. But however cogent may be the moral argument, my duty is to construe the words used in the subsection. The appellants invite me to hold that, if the invented word

is sufficiently well known, it does not matter that the persons who know the word should not also know the goods, or the kind of goods, with which it has been associated by the inventor, or should not know who are the persons entitled to use the word as a trade mark; or, at least, to hold that the reference to a likelihood of an indication of a connection in the course of trade between the goods in respect of which a defensive registration is sought and a person entitled to use the trade mark means no more than that the court should infer a likelihood that persons seeing the word used in relation to such goods will identify the word as a trade mark already well known to them.

In my judgment these contentions fail to do justice to the limitations imposed by the phrase "as respects any goods," etc., which immediately follow the words "so well known"; or to give proper weight to the later requirement that the assumed use of the word would be likely to be taken as indicating a trade connection with a person entitled to use the trade mark. In my judgment the earlier phrase which I have mentioned requires that the knowledge of the word should be knowledge of it in its application to goods of a specific kind; and the conclusion to be reached by the court or the Comptroller-General must be the inference, in the light of all the known facts, including the general knowledge of the word in its application to the specific goods mentioned, that persons seeing the mark attached to the new class of goods would assume that they originated from the proprietor of the mark or a registered user. Thus, in the present case, it is in my opinion necessary to show that the word "Ferodo" has become so well known in its application to goods of a specific kind, *i.e.*, brake and clutch linings and the like (originating in fact from the appellants), that its use in relation to "other goods" in cl. 5 and 34—*e.g.*, when applied to a bottle of aspirin tablets or a packet of cigarettes—would be likely to lead persons buying or observing those "other goods" to suppose that they too originated from the same persons who made and marketed Ferodo brake or clutch linings, namely, the appellants. In reaching a conclusion on this matter it is obvious that the nature of the goods "in respect of which" the trade mark "is registered and . . . used" is an important factor, for, generally speaking, the more special in character those goods are and the more limited their market, the less likely will be the inference required by the subsection to be drawn in relation to goods of a very different kind. If "Ferodo" were a mark which had achieved notoriety in connection, say, with a paint or a dye-stuff used by the domestic householder, the required inference would be much more easily drawn from its application to pharmaceutical products.

In this connection reference was made in the course of the arguments to an observation of a former Registrar of Trade Marks to the effect that some trade marks (Bovril and Kodak being given as examples) are so well known in one particular field that their use by any person other than the proprietor in respect of any goods whatsoever would *prima facie* suggest an association of such goods with the proprietors of the marks. For myself I am not persuaded of the soundness of this proposition. Words do not become known as words without any significance or without appreciation of the things which they indicate. And so far as trade marks are concerned it may well be that the better known the words become the more closely are they associated in the public mind with the class of article to which they are in the course of trade applied. I do not intend to pass judgment on any case not now before the court, but if, for example, Bovril is well known to the great majority of the population of this island and if it is so known as indicating a particular kind of foodstuff then, on that very ground, the application of the word to, say, a typewriting machine might well be held not to be in the least degree likely to lead to the indication referred to in the subsection. To take as another illustration a word which does not happen to be an invented word (for the principle seems to me for present purposes to be the same), the events of the past five and a half years have, for the whole British people, save to very small infants and a few idiots, made the word "Spitfire" familiar in their mouths as a household word, but familiar as a description of an aeroplane. If a manufacturer of toothpaste were to describe one of his products as "Spitfire toothpaste," I should find it difficult to suppose that to any purchaser of the toothpaste the name would indicate a connection in the course of trade between the toothpaste and the aircraft manufacturers. On the other hand if the mark has been registered and used in respect of a wide variety

of goods required by the common man, its application to other goods even of a very different kind might fairly lead to the inference of trade connection; and the example of Kodak may well illustrate the latter kind of case.

A Each case will be decided upon its own facts. It will suffice for me to say in regard to the word "Ferodo" that I agree with the Assistant-Comptroller that the somewhat narrow and special field of manufacture to which the mark has been applied and become known increases the difficulty of establishing as a matter of fact that the adoption of the word "in relation to" goods of a widely different character would be likely, according to the standard of common sense, to lead to an inference of common origin.

B In the last sentence I have intimated my answer to another point stressed by counsel for the appellants. The reference in the subsection to an indication of "a connection in the course of trade" is a reflection of the definition of a trade mark in sect. 68 (1) of the Act. This language, according to the argument, imports a conception distinct from the conception implicit in the well-known phrase "likely to deceive or cause confusion" which is used in sects. 11 and 12. It is, therefore, urged that the obligation imposed upon an applicant under sect. 27 (1) is satisfied by something less than proof of likelihood of deception or confusion between the goods in respect of which defensive registration is sought and the goods in respect of which the mark has been registered and used. The argument adds that the reference to "a person entitled to use the trade mark in relation to the first mentioned goods" instead of to the "proprietor of the trade mark" supports the view that knowledge of the origin of the goods to which the mark has been applied is unnecessary; in other words, that it is sufficient that persons assumed to see the word in its application to the new class of goods should identify it with a trade mark already observed and known to them even though they are ignorant of the nature and origin of the goods to which it had been applied. The argument in my judgment involves too great a nicety of language. Since, *ex hypothesi*, the applicant's trade mark has not been and may never be used in respect of the goods for which registration under the subsection is sought, it may well have been thought that the test of confusion would be inappropriate. But if an inference were drawn, and falsely drawn, of a connection in the course of trade, the result would nevertheless have been a form of deception. I do not, therefore, think that any great significance can be attached to the distinction in this respect between the wording of sect. 27 on the one hand and that of sects. 11 and 12 on the other. Moreover the decision of the House of Lords in *Aristoc, Ltd. v. Rysta, Ltd.* (1) has made it clear that the language of the present definition section referring to "a connection in the course of trade," etc., which has been incorporated also in sect. 27 (1) involves no departure from the old-established conception of indication of origin. The use of the phrase "person entitled to use the trade mark" instead of "proprietor" is no doubt attributable to the introduction contemporaneously with sect. 27 of sect. 28 providing for the registration of users as well as proprietors. But though I do not say that the notoriety required by sect. 27 (1) must involve exact knowledge of the identity of the registered proprietor or registered user, I think it does require knowledge of the kind of goods to which the mark has been applied by their manufacturers and distributors as an indication of origin.

G It is not uncommon today for manufacturers of or traders in goods of a specific class to advertise their wares by the distribution as gifts of goods, *e.g.*, pencils or matches, bearing their name or trade mark though such last mentioned goods are wholly different in character from their own goods; and it is in evidence in the present case that the appellants, Ferodo, Ltd., have in fact adopted this practice in regard, *inter alia*, to matches. A member of the public seeing H goods of the character of those comprised in classes 5 or 34 bearing the name "Ferodo" might suppose that such goods were being distributed as part of an advertising campaign. He would not, however, suppose that, being so distributed, the manufacture or distribution of the goods formed any part, save for advertising purposes, of the business of Ferodo, Ltd. In my judgment it follows from the *Aristoc* case (1) that the phrase "connection in the course of trade," etc., does not cover advertising *media* of this kind. In other words I think that by "a connection in the course of trade" is meant (as regards the present case) that the production and marketing of the goods in question is a part

of the appellants' business or trading enterprise.

In my judgment the conclusion I have reached upon the construction of the subsection does not so confine its scope as to render unsubstantial any advantage given by the subsection to the proprietor of the trade mark additional to the advantages conferred by older sections of the Act. I am content, without further analysis, to note the real and obvious benefit attached to the position of being first in the field.

I add finally before leaving this part of the case that I agree with the Assistant-Comptroller that the "other goods" mentioned in sect. 27 (1) cannot be confined to goods of the same description (as that phrase is used in sect. 12 (1) of the Act) as the goods in respect of which the mark has been registered and used. No doubt and for obvious reasons an applicant under sect. 27 (1) would be able more easily to establish a claim to defensive registration in respect of a class of goods which were of the same description as goods in relation to which his mark had been registered and used. But it is to my mind reasonably plain (and counsel for the Comptroller-General has not argued to the contrary) that there is no reason for construing the phrase "other goods" in a limited sense or otherwise than in accordance with its ordinary meaning.

There remains the question of the character of the evidence to be tendered in support of an application under sect. 27 (1) of the Act. This matter I approach with considerable caution since it cannot be the function of the court to advise applicants under the subsection generally, or the present appellants in particular on the evidence properly to be given in support of an application; nor would it be right for me in reference to the particular circumstances of the present case to lay down rules applicable to other cases, the determination of which would depend upon their own particular facts. Subject, however, to these qualifications and in deference to the arguments addressed to me, I make the following two observations: (i) In addition to the evidence of the appellants themselves in the present case it seems to me desirable that there should be available for the assistance of the court some evidence from persons concerned and experienced in the trades affecting the classes of goods in respect of which defensive registration is sought. In the first place it should be proved that the word "Ferodo" has not in fact already been used and applied to any goods falling within those classes. Secondly, it might well be important for the court to be informed of the significance within those trades of the use of brand names. Thus, as regards aspirin tablets, purchasers of such goods may, by reason of the multiplicity of brand names applied to goods which are in quality substantially identical or for other reasons, pay little or no regard to the proprietary name but be content when they ask for and obtain "aspirin" of whatever origin or manufacture. On the other hand, it may equally be that a buyer of a packet of cigarettes will attach great importance to the brand or source of manufacture and will, therefore, pay particular regard to the name on the packet. Thirdly, I think it would be both legitimate and useful for witnesses of the kind I have mentioned to state what, having regard to their own business experience, would be the effect on their own minds of seeing, say, "Ferodo" aspirins or "Ferodo" cigarettes. These witnesses could not properly give in evidence their opinion upon what others might think on the hypothesis that the brand name were applied to aspirins or cigarettes; for the conclusion of that matter is the function of the court or the Comptroller-General. But there would be some value in statements by these trade witnesses themselves of what would be their assumptions on the hypothesis mentioned and what would be their reasons. (ii) On the other hand, the production of a sheaf of affidavits sworn by members of the public each stating what he or she would think on seeing a bottle of Ferodo aspirins or a packet of Ferodo cigarettes and why, in my judgment be of negligible value. Twenty-five such statements might appear impressive in weight of paper but would represent so slight a fraction of the whole population as to be no guide to popular opinion and no reliable measure of the notoriety of the mark.

The result, therefore, is that the appeal fails and must be dismissed with costs.

Motion dismissed with costs.

Solicitors: Coote & Co. (for the applicants); *Solicitor to the Board of Trade* (for the Comptroller-General.)

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

Re DANIEL, JONES v. MICHAEL.

[CHANCERY DIVISION (Vaisey, J.), May 4, 1945.]

Wills—Construction—Residuary gift—Direction to divide equally—Whether division referred to distribution per capita or per stirpes.

A A testatrix by her will bequeathed a number of pecuniary legacies and directed the residue of her estate "to be equally divided between my sister M.A.M., should she predecease me her children to benefit in her share, the children of my deceased sister E.I., and the children of my deceased brother T.E." Her sister M.A.M., three children of the deceased sister E.I., and two children of the deceased brother T.E., survived the testatrix. The question for the determination of the court was whether the direction in the will required a division of the residuary estate into six equal parts or into three equal parts:—

B HELD: *prima facie* a direction for equal division between a number of persons meant a division *per capita*. As the one share to be taken by the living sister, M.A.M., was to be divided among her children if she predeceased the testatrix, the residuary estate was, on a proper construction, divisible into three equal parts.

Re Alcock, Bonser v. Seville (1) distinguished.

C [EDITORIAL NOTE. In this case a residuary gift equally between a surviving sister and the children of a deceased brother and a deceased sister is construed as a provision for division *per stirpes*, notwithstanding the recent decision in *Re Alcock* (1). The share of the living sister was to be divisible among her children in case she predeceased the testator, and this is held to indicate an intention for stirpital division.

AS TO DISTRIBUTION PER CAPITA AND PER STIRPES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 356-359, paras. 402-405; and FOR CASES, see DIGEST, Vol. 44, pp. 991-1003, Nos. 8490-8605.]

D Case referred to:

* (1) *Re Alcock, Bonser v. Seville*, [1945] 1 All E.R. 613.

ADJOURNED SUMMONS to determine the question, arising under the will of a testatrix dated Nov. 6, 1942, as to the distribution of residue. The facts are fully set out in the judgment.

F. Baden Fuller for the plaintiff.

I. J. Lindner for the defendants, three children.

E VAISEY, J.: In this case the testatrix made her will on Nov. 6, 1942. She died on Nov. 22, 1942, and the question which now falls to be decided is as to the proper construction and effect of the residuary gift in the will.

F After a number of pecuniary legacies, including one of £100 to her sister Margaret Ann Michael and a substitutionary gift in case that sister predeceased her, in which case the amount had to be equally divided between that sister's children, she then disposed of the residue of her estate in words which I shall now read:

Whatsoever remains to be equally divided between my sister Margaret Ann Michael should she predecease me her children to benefit in her share the children of my deceased sister Elizabeth Israel and the children of my deceased brother Thomas Evans all free of death duty.

G Now, the facts were that the deceased sister Elizabeth had five children of whom three survived the testatrix and the deceased brother, Thomas, had two children, who both survived the testatrix.

H The question which I have to resolve is whether the words the testatrix has used require a division into sixths between the surviving sister Margaret, the three children of the deceased sister Elizabeth, and the two children of the deceased brother Thomas; or whether the division is to be between the surviving sister Margaret as to one-third; the children of the deceased sister Elizabeth as to one-third; and the children of the deceased brother Thomas as to one-third.

This kind of language has very frequently engaged the attention of the courts, and there are a large number of authorities bearing more or less directly upon it, and I start with the undoubted presumption that *prima facie* and apart from the context or special circumstances, the division in such a case must be *per capita*. In other words, I must approach this will with the *prima facie* impression that where there is a direction for equal division between a number

of persons, each of those persons takes the same amount as each of the others. The most recent authority is that of EVERSHED, J., in *Re Alcock* (1), where it was held that the direction for equal division between the nephew of the testatrix and the four children of her cousin meant a division into five shares and not a division in which the nephew took one share and the children of the cousin took the other share between them. In that case the earlier authorities were referred to.

In the present case I have come to the conclusion that the testatrix has indicated that the division should be into one-third shares. It is to be observed that the share to be taken by the living sister Margaret was to be divided among her children in case she should have predeceased the testatrix, and as in that case the testatrix intended the children to take only one share between them, I think she must have meant the same thing to happen in the case of the children of the other sister and of the brother. It would be capricious to treat the children of one sister as being entitled only to one-sixth share between them and at the same time to treat all the other children as being entitled to the whole of one-sixth share each. I have come to the conclusion that the proper order for me to make in the present case is that the residuary estate is divisible into three equal shares, one of which should go to the testatrix's sister Margaret, another to the three surviving children of the deceased sister Elizabeth as joint tenants, and the remaining share to the two surviving children of the deceased brother Thomas as joint tenants. The costs of the application as between solicitor and client must be paid out of the estate.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Cecil-Williams & Co.*, agents for *Elfyn David & Hamblen*, Cardiff (for the plaintiffs); *Stikeman & Co.*, agents for *Phillips & Phillips*, Cardiff (for the defendants).

[Reported by A. E. BLACK, ESQ., Barrister-at-Law.]

Re WILLIAMS, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. WILLIAMS.

[CHANCERY DIVISION (Uthwatt, J.), February 28, 1945.]

Wills—Annuities—“Free of all deductions whatsoever and free from income tax at the current rate for the time being deductible at source”—Construction—Whether annuitants entitled to retain for own benefit all reliefs and allowances in respect of income tax.

By his will, dated Nov. 3, 1937, the testator directed his trustees, *inter alia*, to appropriate and set apart a sufficient sum to produce such a sum of money as would, when invested in trustee securities or securities authorised by his will, produce respectively the annuities given by his will or any codicil thereto. The annuities given by the will were to be paid “free of all deductions whatsoever and free from income tax at the current rate for the time being deductible at source.” The first schedule to the will provided for an annuity of £2,500 for the testator's widow during her life, weekly annuities of £4, £3 (two in number), £1 15s. 0d. for employees of a company in which the testator was interested, and for his chauffeur £2 15s. 0d. a week less wages or certain other emoluments which he might receive if in the employment of the testator's trustees or any member of his family. All the annuitants survived the testator. The question for the determination of the court was whether the annuitants were entitled to retain for their own benefit all the reliefs and allowances in respect of income tax or were bound to return any part of them to the plaintiff trustees:—

Held: all the annuitants were liable to account for a due proportion of their reliefs and allowances.

Re Pettit, Le Fevre v. Pettit (3) and *Re Eves, Midland Bank Executor and Trustee Co., Ltd. v. Eves* (4) followed.

[EDITORIAL NOTE.] This case follows *Re Pettit* (3) and *Re Eves* (4) in holding that the donee of an annuity given free of income tax is liable to account for a rateable

proportion of the reliefs and allowances claimed in respect of his total income including the income tax paid for his account. UTHWATT, J., points out the curious results which may follow from the possible variations in the actual burden on the paying hand, and suggests that the proper test should be, "Does the will to be construed show positively an intention directed to placing on the annuitant an obligation to account for any part of his reliefs and allowances?" He holds, however, that he is precluded by the decided cases from deciding otherwise than as above.

A AS TO EFFECT OF DIRECTION TO PAY ANNUITY WITHOUT DEDUCTION, see HALSBURY, *Haisham Edn.*, Vol. 28, pp. 214-216, paras. 386-388; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to :

(1) *Re Hooper, Philipps v. Steel*, [1944] Ch. 171; [1944] 1 All E.R. 227; 113 L.J.Ch. 89; 170 L.T. 90.

(2) *Re Tatham, National Bank, Ltd., and Another v. Mackenzie and Others*, [1945] Ch. 34; [1945] 1 All E.R. 29; 114 L.J.Ch. 9; 172 L.T. 14.

B *(3) *Re Pettit, Le Fevre v. Pettit*, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491.

*(4) *Re Eves, Midland Bank Executor and Trustee Co., Ltd. v. Eves*, [1939] Ch. 969; Digest Supp.; 108 L.J.Ch. 374; 161 L.T. 270.

*(5) *Inland Revenue v. Cook*, [1944] S.L.T. 361.

ADJOURNED SUMMONS to determine questions arising under the will of Sir Howell Jones Williams. The testator died on Aug. 15, 1939, and his will was proved on Sept. 16, 1939. The summons was taken out by the trustees of the will on Nov. 23, 1944.

The facts and arguments are sufficiently set out in the judgment.

C. V. Rawlence for the plaintiff trustees.

Geoffrey Cross for the annuitants.

Wilfrid M. Hunt for the infants.

D *G. D. Johnston* for the residuary legatees.

UTHWATT, J. : By his will dated Nov. 3, 1937, Sir Howell Jones Williams, after appointing executors, made, *inter alia*, the following provision :

E Cl. 5. I give to the several persons named in the First Schedule hereto the several annuities and pensions therein mentioned and I declare that such annuities and pensions shall be paid in addition to any other legacies and benefits given to any of the said persons by this my will and save where otherwise specifically provided shall be paid free of all deductions whatsoever and free from income tax at the current rate for the time being deductible at source and unless otherwise provided shall be paid quarterly the first payment to be made within three months after my death.

F By cl. 6 the testator empowered his trustees to set aside a fund sufficient in the opinion of his trustees to meet by its produce the annuities given by his will or any codicil and empowered his trustees to purchase annuities from an insurance company and to commute annuities for a fair capital sum.

The first schedule provided for an annuity of £2,500 for the testator's widow during her life, weekly annuities of £4, £3 (two in number) £1 15s. 0d. for employees of a company in which he was interested and for his chauffeur £2 15s. 0d. a week less wages or certain other emoluments which he might receive if in the employment of his trustees or any member of his family.

G The testator died on Aug. 15, 1939, and his will was proved on Sept. 16, 1939. All the annuitants survived the testator. One annuity has been commuted for a capital sum; as regards the others an annuity fund has been set aside for their payment.

H The question raised by this summons is whether the annuitants are entitled to retain for their own benefit all the reliefs and allowances in respect of income tax or are bound to return any part of the same to the executors and trustees of the testator's will.

In *Re Hooper* (1) I stated the general position of annuities given free of income tax and observed that gifts of annuities free of income tax do not fit in at all comfortably with the provisions of the Income Tax Acts. I do not propose to go over the same ground again. Nor do I propose to go through the authorities—a number of which were considered by EVERSLED, J., in *Re Tatham* (2)—dealing with the construction of gifts of annuities given in one form or another free of income tax. The same question of construction arises whether the gift of an annuity is in the general form : "Such a sum as after deducting income

tax leaves £x," or, as in the present case, in the form of "£x free of income tax." According to the authorities that question is in substance whether the reference to income tax is a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will or whether the provision as to income tax merely indemnified the annuitant against such part of the annuitant's income tax (other than sur-tax) which is properly referable to the annuity. If construed in the former sense, the actual income tax ultimately suffered by the owner of the annuity does not enter into the picture. Tax at the standard rate is deducted from the gross amount resulting from the calculation, and the annuitant receives £x in cash, and the income tax referable to the gross amount is paid for his account.

If construed in the latter sense, complete effect cannot be given to the bequest by payment to the annuitant. The provisions of the Income Tax Acts compel the paying hand, in order that £x, tax paid, may reach the hand of the annuitant, in the first instance to make an overpayment, for the tax attributable to the gross amount resulting in the payment of £x is still a payment for the account of the annuitant. The practice of the court has been to assume that the annuitant is entitled to treat as his income for the purpose of calculating his reliefs and allowances the whole of the income tax paid for his account: and on that footing it has been held that the annuitant is bound to claim reliefs and allowances, in respect of his total income—he is indeed declared a trustee of this right to claim them—and to account to the paying hand for a rateable proportion of the sum received. The net result is that the annuitant receives only his indemnity. He cannot complain. The paying hand receives back as his property a sum which owes its existence to the annuitant's statement that it forms part of the annuitant's total income. He too cannot complain.

The results where the second construction applies are curious. An addition to the annuitant's family increasing his allowances, the loss of his other income, the assignment of the annuity to a pauper or to a charity will work to the advantage of the paying hand. Its assignment to a rich man or to a non-resident not possessing the qualifications, entitling him to claim reliefs and allowances, will work to his disadvantage. A spinster would be liable to account but I do not know, and express no opinion on the question, whether, if she marry, her husband is liable to account in respect of reliefs and allowances he obtains in respect of his total income into which for income tax purposes his wife's annuity enters, or whether indeed, in the case of an annuity given to a married woman, the words "free of tax" add anything. She, it will be recalled, while living with her husband, is not liable to income tax, though tax is deductible on payment of an annuity to her. The general result is that the actual burden on the paying hand can never be predicted and may vary from time to time, and that the second construction works capriciously.

The point was formally taken in argument that *Re Pettit* (3) was wrongly decided. The point may be put this way. It is not right to suppose that, where a gift was made free of tax, the testator could have had in contemplation the subjection of his beneficiary to the burden of tedious calculations and small repayments and the subjection of his trustees to an obligation to enquire into the annuitant's total income and that in construing the phrase regard should be had to these consequences. The natural assumption is that the testator is referring only to income tax as a rate in the £ deducted on payment. A testator may indeed impose on a gift any condition permitted by law, and no doubt a condition as to repayment of any sum however ascertained may be made on a gift of an annuity. But was any condition intended by the words "free of tax"? There are three possible conditions. The first is that a testator intended to impose on an annuitant an obligation to include as part of his total income, a sum, the whole of which did not truly enter into it and account for part of that sum. If as a matter of law the annuitant is not entitled to do this, the second alternative is that, where for his own purposes the annuitant makes out his total income, he is to be driven, in computing his gross annuity, also to compute for himself his expected allowances and reliefs and enter the gross amount of his annuity accordingly—a task beyond the powers of many annuitants. Its performance works only to the advantage of the Revenue, for the overpaid tax is irrecoverable. The remaining alternative is that the gross sum referable to the annuity as paid enters into the annuitant's total

income but that such total income is subject to a charge for the payment of a rateable amount of the reliefs and allowances claimable—from which on payment, as this would be an annual sum, income tax would presumably be deductible. None of these alternations, it is argued, could have been intended. “An annuity,” Mrs. Dashwood observed, “is a very serious business.” An annuity free of tax cannot have been intended to be as serious as this. With much of this I agree, but it is not open to me to form an opinion upon the matter, however much I share the view that the proper test is “Does the will to be construed show positively an intention directed to placing on the annuitant or other the owner for the time being of the annuity an obligation to account for any part of his reliefs and allowances?” Were that the test, I should in the case of this will answer the question in the negative.

In this case applying the test which I conceive to be laid down by the authorities and following *Re Eves* (4) in particular, I am of the opinion that all the annuitants are liable to account for a due proportion of their reliefs and allowances on the lines laid down in *Re Pettit* (3). I cannot distinguish between the various annuities. The provisions relating to an annuity fund, and for the purchase and commutation of annuities do not in my opinion afford any ground for distinguishing this case from the decided authorities.

There is only one further observation which I need make. In *I. R. v. Cook* (5) the question is raised whether in the case of an annuity given free of tax the annuitant is right in including the gross amount, necessary after meeting tax deducted on payment to produce the stated amount, as entering into her total income. It appears to be conceded, as I understand the matter, that the gift is to be read as indemnifying the annuitant against a due proportion of her actual income tax. The Court of Session has decided that the course adopted by the annuitant is correct. The case is now under appeal to the House of Lords. If the Revenue succeed in their appeal the position will be established that nothing can be obtained for which an annuitant in this class of case is liable to account. The only result in this event is that there will be no subject matter on which the declaration I propose to make will operate. There is, therefore, no reason why on account of the pendency of the appeal, I should delay dealing with this case.

Declaration accordingly. Costs as between solicitor and client to be paid out of the testator's estate.

Solicitors: *T. D. Jones & Co.* (for the plaintiffs, the annuitants and residuary legatees); *Barton & Hanning* (for the infants).

[Reported by A. E. BLACK, ESQ., Barrister-at-Law.]

F

R. v. GEORGE THOMAS JOHNSON.

[COURT OF CRIMINAL APPEAL (Singleton, Wrottesley and Tucker, JJ.),
April 23, 1945.]

Criminal Law—Prevention of crime—Prisoner with previous conviction charged in one count with being found in two separate places waiting for an opportunity to commit an offence—Whether indictment bad for duplicity—Prevention of Crimes Act, 1871 (c. 112), s. 7.

The appellant was convicted under the Prevention of Crimes Act, 1871, s. 7, with being “. . . found in certain public places, namely, Elm Tree Road and Circus Road . . . waiting for an opportunity to commit an offence . . .” The two roads named adjoined one another. On appeal it was contended (i) that the indictment was bad for duplicity in that it was alleged in one count that the appellant had committed two offences, one in Elm Tree Road and the other in Circus Road, (ii) that there was no evidence to convict the appellant, and (iii) the jury had been misdirected in that they had been directed that a person who was engaged in an attempt to commit an offence was at the moment of and during the duration of the attempt waiting for an opportunity to commit the offence :—

HELD: (i) the form of the indictment did not in the circumstances prejudice or cause embarrassment to the defence, therefore the indictment

was not bad for duplicity.

(ii) the jury had not been misdirected and there was ample evidence upon which they could convict.

(iii) in framing an indictment it is desirable to follow the words of the statute creating the offence and not to use words which go beyond it.

(iv) where a person may be charged with two offences, one of which requires proof of his bad character while the other does not, the prosecution should give careful consideration to the desirability of selecting the latter as the charge to be made.

[EDITORIAL NOTE.] This is an appeal against a conviction under the Prevention of Crime Act, 1871, s. 7, the charge being that of being found in certain public places waiting for an opportunity to commit an offence. It is argued that the indictment is bad for duplicity in that the particulars allege that the accused was found in two separate places. In *Goodwin's* case (1) HUMPHREYS, J., drew attention to this as a possible ground of objection in the case of an indictment drawn in similar terms, but the court here, while deprecating the terms of the charge, refuse to hold the indictment bad, since the two roads adjoined or ran out of one another. Even if it were, it would have been a case for the application of the proviso to sect. 4 of the Criminal Appeal Act.

With reference to charges under sect. 7, the court repeat and strongly emphasise the warning given by HUMPHREYS, J., in *Goodwin's* case (1) that the appalling prejudice which must arise in such cases makes it most desirable that where a charge may be made which does not involve proof of bad character rather than one which does, the former should be selected.

FOR THE PREVENTION OF CRIMES ACT, 1871, s. 7, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 4, pp. 673, 674; and FOR CASE, see DIGEST, Vol. 14, p. 183, No. 1621.]

Cases referred to:

* (1) *R. v. Goodwin (William)* (1944) 30 Cr. App. Rep. 20; [1944 1 K.B. 518; [1944] 1 All E.R. 506; 113 L.J.K.B. 476; 171 L.T. 14.

* (2) *R. v. Thompson* (1914) 9 Cr. App. Rep. 252; [1914] 2 K.B. 99; 14 Digest 223, 2061; 83 L.J.K.B. 643; 110 L.T. 272.

APPEAL from a conviction at the London Sessions of an offence under the Prevention of Crimes Act, 1871, s. 7. The facts are fully set out in the judgment of the court delivered by SINGLETON, J.

Alban Gordon for the appellant.

Sir Reginald Blaker for the Crown.

SINGLETON, J. [delivering the judgment of the court]: The appellant, George Thomas Johnson, was indicted with another man named Robert St. John McFarlane at the County of London Sessions on a charge of waiting for an opportunity to commit an offence contrary to the Prevention of Crime Act, 1871, s. 7. The particulars of offence alleged in the first place that each of the two men had been convicted previously after a previous conviction for crime, and then the indictment continues in the particulars:

... and the said Robert St. John McFarlane and George Thomas Johnson were within seven years immediately after the expiration of the sentences passed upon them respectively for the last of such respective crimes, to wit, on Dec. 28, 1944, found in certain public places, namely, Elm Tree Road and Circus Road in the county of London waiting for an opportunity to commit an offence punishable on indictment, to wit, housebreaking with intent to steal.

That charge, as appears from the indictment itself, is based on the Prevention of Crime Act, 1871, s. 7, which provides:

Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances, or any of them . . . If he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction.

The case was heard before the chairman at the London Sessions on Jan. 30 of this year, and upon the hearing of the case, after certain witnesses had given evidence of previous convictions, detective Thomson gave evidence that he was

in plain clothes about 4 o'clock on the evening of Dec. 28, in Grove End Road, N.W., and that he watched the appellant and McFarlane turn into a block of flats in Elm Tree Road and go upstairs. He said that he listened and he heard the rattle of keys, followed by footsteps coming down a few moments later, so he hid and then he followed the men a little along the road to No. 41, Elm Tree Road, where he saw the appellant fumbling at the lock of the front door of that house. The officer added that a little later they came out again and went

- A into another block of flats in Circus Road, so he spoke to a police sergeant who was in uniform. As he was so doing, the appellant and McFarlane came out and turned towards them, but when they saw the uniformed officer they hurried away in the opposite direction away from the officers. They broke into a run and then hailed a taxi-cab and got into the taxi-cab, but the officers were apparently fairly fleet of foot, or, at any rate, enough to join them in the taxi-cab before the taxi-cab moved off. Then they had a conversation with the
- B appellant, and he said he had been visiting friends in Abbey Lodge. He was asked where that was and he said it was in Abbey Road. When it was pointed out to him that it was nowhere near it and that they would be arrested, he said: "All right, guv, we've had it." He had in his pocket twelve skeleton keys, a piece of celluloid, which was said to be handy material for opening locks, and some gloves. McFarlane had some more keys, including two skeleton keys,
- C and two pairs of gloves and an odd glove. McFarlane a little later (although it may not have been evidence against the accused, of course it was given in the course of the case) said to the officer: "We were going to do a job all right, but you were too quick." The officer who had followed the accused did not know them at the time. His evidence was given and the evidence of the uniformed sergeant was also given and the case for the prosecution was closed. Then counsel, appearing at that time for the other prisoner McFarlane, raised a
- D question as to the indictment. He submitted that the indictment was bad because it alleged two separate offences in a paragraph. I suppose he meant the count. Then he read the indictment or the material part of it and said:

That surely should be the subject of two separate counts. A person might have been in Elm Tree Road with a certain intention and in Circus Road with an entirely different intention. My client pleaded to that indictment, so I suppose technically I have no right to object to it now.

- E In fact, as has been said in this court more than once, this objection can be taken at a later stage, although the usual time for it to be taken is before an accused man has pleaded, when application is made to quash the indictment. The chairman, having heard counsel's argument, said: "I do not think there is anything in your point, Mr. Gordon," and nothing more was said. Neither
- F of the appellants were called in the court below and the chairman directed the jury. The jury convicted both the appellant and McFarlane and each received a sentence of 12 months imprisonment. The appellant was given leave to appeal by this court a week ago, and he now appeals.

There are three grounds of appeal. The first is that to which I have already alluded, that the indictment was bad for duplicity in that it alleged two separate offences in one count. That raises a somewhat difficult matter. It is highly technical and it would seem to be a matter for regret, if the appellant was proved

G to be guilty, that still the indictment had to be quashed on this ground. It is still more to be regretted, or it would be if that took place, because of what took place in this court only twelve months ago. In April, 1944, this court had before it the appeal of one William Goodwin, under the same section of the Prevention of Crime Act, 1871, the main difference being that in that case the material part of the charge was that the appellant was found in certain public or private places, to wit, Portsea Hall and Clifton Court in the county of London,

H in such circumstances as to satisfy the court before which he was brought that he was about to commit an offence punishable on indictment, namely, larceny. In the course of the judgment of the court, in that case (*Goodwin's case* (1)) HUMPHREYS, J., at p. 123 ([1944] 1 All E.R., at p. 507), said:

No point was made at the trial and no point or objection was raised on this appeal regarding the fact that the appellant seems to be charged in that indictment with two offences, inasmuch as it is alleged that he was found at two separate places, in each case in such circumstances as to satisfy the court that he was about to commit an offence.

The evidence in *Goodwin's case* (1) was that the appellant, who was known

to the police, was watched by police officers; that he was seen to go to a block of flats called Portsea Hall where he went up to the second floor, examined the locks of two of the doorways there, and came down again; that having left Portsea Hall he went to Maida Vale and examined the locks and door of a block of flats called Clifton Court, and that he was arrested very soon after reaching the street on leaving that block. It would seem from the report of the facts in that case that the two places, Portsea Hall and Clifton Court, were a considerable distance apart. The appellant having left Portsea Hall went into another area and another parish altogether, into Maida Vale, and there went to Clifton Court. The places were quite distinct and separate, and HUMPHREYS, J., drew attention to this very point, but notwithstanding that, the indictment in the present case is in the same form in this respect, in that it charges that the appellant was found in certain public places, in the plural, namely, Elm Tree Road and Circus Road, waiting for an opportunity to commit an offence punishable upon indictment. A

Now as I have said, it is to be regretted that attention was not paid, when this indictment was settled, to those words of HUMPHREYS, J. If it had been, this point would never have arisen, but as it is, time and expense has been incurred upon the matter in order to have an argument as to whether or not in the circumstances of this case the objection is a good one. B

Now the objection was taken after evidence had been given, and it is clear—indeed, it is undisputed and the chairman heard the evidence—that Elm Tree Road and Circus Road adjoin each other. The argument of counsel on behalf of the appellant is that this indictment is bad in that the two offences are contained in one count, and he argues or submits that the words “found in certain public places, namely, Elm Tree Road and Circus Road” show that there has been charged one offence in Elm Tree Road and one offence in Circus Road. Having regard to the situation of the two roads, that they adjoin each other or one runs into or out of the other, we think it very doubtful indeed whether upon the facts of the case that objection taken to this indictment can be held to be good. C

But over and above that, it is to be remembered that the offence which is charged is being found in certain public places waiting for an opportunity to commit an offence. It has been said on behalf of the Crown that all the time while the appellant is seen or found in Elm Tree Road and Circus Road, he is waiting for an opportunity to commit an offence; he is found waiting. It matters not, it is submitted, that two places are named because the offence is that he is found waiting, and it is right to say, so it seems to us, that if the indictment charged the offence as taking place in St. John's Wood or in the neighbourhood of the Lords Cricket Ground, no such objection could have been taken. D

The Indictments Act, 1915, Sched. I, r. 9, provides: E

Subject to any other provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to. F

No objection could have been taken to the indictment if it had charged the offence as having been committed in St. John's Wood or in the neighbourhood of Circus Road, or something of that kind, but whoever settled the indictment has preferred to use words of his own without reference either to the terms of the statute creating the offence or to the words of HUMPHREYS, J., in *Goodwin's* case (1). G

None the less, we think it right to say that we are not satisfied that this indictment is bad for duplicity. We observe that which was said by HUMPHREYS, J., in *Goodwin's* case (1). HUMPHREYS, J., did not say that in the circumstances of that case the indictment would have been bad but on somewhat different circumstances it may be that that result might have followed. H

On the whole we are not satisfied that this objection ought to prevail. If we were so satisfied, we should still think it right to have regard to the proviso to the Criminal Appeal Act, 1907, s. 4 (1).

In *Thompson's* case (2), which was a case heard by a full court of five judges, the headnote says:

An objection to a count as bad for duplicity, or to the number of counts as embarrassing, must be based on the ground that the defence is likely in fact to be prejudiced by such counts, and this is a matter for the discretion of the judge, subject

to the revision of this court, which, if that discretion is improperly exercised, will quash a conviction, whatever view it takes of the merits of the case.

In that case, after dealing with the time at which such an objection could or should be taken, ISAACS, L.C.J., said at p. 260 :

If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form we should have felt bound to quash the conviction whatever our views might be as to the merits of the case.

- A It must not be thought that we are deciding that such objections should not be allowed to prevail either at the trial or in this court. An indictment so framed might undoubtedly hamper the defence, and if it did we should give effect to the objection. There are also other objections to an indictment which must be held good at any time, as, for example, an objection on the ground of want of jurisdiction. One of the objects of sect. 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the legislature was that justice
- B should be done in spite of a wrong decision and that the court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice.

Accordingly, in that case the court, finding there had been neither embarrassment nor prejudice, declined to quash the conviction, even though it might be said that the indictment was bad upon the face of it. That case has been

C cited before this court on different occasions, and even if we had been satisfied that this indictment was bad for duplicity, still we should have thought it right in the circumstances of this case to apply the proviso to sect. 4, because it is as clear as anything to-day that not the slightest embarrassment or prejudice has been caused in this case. Indeed, as I have said and as counsel for the appellant seemed to be inclined to agree in the course of his argument, if it would have been sufficient to charge this offence as taking place in St. John's

D Wood, the prosecution was going out of its way in naming two streets, part of St. John's Wood, where it is said the offence took place, the offence of being found waiting for an opportunity to commit an offence.

For these reasons we think that the objection on the ground of duplicity fails.

The second ground and the third ground in the notice of appeal can be taken together. The second ground is :

- E That there was no evidence that the appellant committed the particular offence or offences named in the indictment.

The third ground is :

That the learned chairman misdirected the jury by directing them to the effect that a person who is engaged in an attempt to commit an offence is, at the moment of and during the duration of the attempt, waiting for an opportunity to commit the said offence.

- F The argument of counsel for the appellant with regard to this was that these men, or the appellant in particular, cannot be said to have been waiting to commit an offence, or to have been found waiting to commit an offence, because he was in fact doing something else ; on the evidence he had gone beyond that stage. The evidence of the police officer was that the men went to two or three different places in this immediate area. It would appear that at times one was
- G trying to open a door, and the natural inference if two men are together is that the other is waiting by his side at that time. The fact that a man may get beyond the stage of waiting does not, it seems to us, prevent him being indicted for that if in fact that offence had been proved. HUMPHREYS, J., in *Goodwin's* case (1) said at pp. 26 and 27 ([1944] 1 All E.R., at p. 509) :

- H As I have already observed, sect. 7 is an unusual section in that it requires that the jury shall know that the prisoner before them is a criminal and so a person likely to commit the crime with which he is being charged. In most cases it is precisely that matter about which the greatest possible care is taken to prevent the jury knowing anything. Accordingly, whenever a charge is brought against a person under sect. 7, the presiding judge and everybody concerned in the case should be meticulously careful to see that the prisoner is convicted, not as the result of the appalling prejudice which must in such circumstances be brought against him, but on clear and unmistakable evidence that he committed the particular charge named in the indictment, quite irrespective of whether he has committed any other offence. I mention that because there is another offence with which the appellant might alternatively have been charged under the third paragraph of sect. 7. Following on the words that the accused person

must be found in such circumstances as to satisfy the court that he was about to commit an offence are the words "or was waiting for an opportunity to commit . . . any offence punishable on indictment or summary conviction." It may be in this case that there was ample evidence that the appellant was in all probability waiting for an opportunity to commit some such offence as stealing, but he was not charged with that.

Indeed it is right to say upon the facts in *Goodwin's* case (1) HUMPHREYS, J., in this court pointed out that there might well be ample evidence that the appellant was waiting to commit the offence which is the charge in the present case.

The chairman of London Sessions at the conclusion of his address to the jury said :

If you have any doubt about it that these people were waiting for an opportunity to commit the offence of housebreaking, if you have any doubt at all that a person who stands in a door trying a number of keys in the lock in order to try and break into a house is waiting an opportunity to break into the house if the keys will fit, then, of course, they are entitled to be acquitted. If you have no doubt about it whatever it is equally your duty to convict. Will you consider your verdict and tell me what it is.

In the view of this court there was evidence for the jury and the jury were so directed, and the jury found both the appellant and McFarlane guilty. There can be no reason for this court interfering with that verdict. I should add that neither the appellant nor McFarlane gave evidence in the court below.

Now there are two matters that I think it right to refer to. One I have already mentioned. The first is the desirability of those responsible for settling indictments following the words of the statute creating the offence and not using something which goes beyond that when it is quite unnecessary so to do. The second is this. We think it most desirable to repeat that which HUMPHREYS, J., said at the conclusion of his judgment in *Goodwin's* case (1). Counsel for the Crown has said already that he would bring to the notice of those instructing him that which has been said. It is not very helpful, I am afraid. HUMPHREYS, J., with all his experience in these matters, expressed a decided view upon the use of this section when he gave the judgment of this court, on Apr. 3, 1944. He said, at p. 28 ([1944] 1 All E.R., at p. 510) :

The court would add, without making any general observation about this section, that they think that the police and those who have to deal with these matters, including courts of justice, would do well to remember that, if the facts of a case are such that a man may equally be charged with two offences, one of which involves proof to the jury that he is of bad character, and the other requires no such proof, it is always desirable that the latter should be selected as the charge to be made against him. Once a jury know that a man is given to committing a particular class of crime, it must be extremely difficult for them to treat him in the same fair and impartial way as they would if they knew nothing whatever about him.

That case was widely reported at the time, and we only say that we think those words of HUMPHREYS, J., deserved the very careful consideration of the police and of prosecuting authorities. They were not said lightly; they were meant to be followed. We regret that they were not followed in the circumstances of this case.

The appeal is dismissed.

Appeal dismissed.

Solicitors : *Edward Davis, Nelson & Co.* (for the appellant); *Solicitor to the Metropolitan Police* (for the Crown).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

WESTMINSTER BANK, LIMITED v. RICHES.

[COURT OF APPEAL (du Parc and Morton, L.JJ., and Cohen, J.), June 22, 1945.]

Money—Interest—Agreement to divide equally profit of share transaction—Fraud—Death of fraudulent party—Action for account against judicial trustees of fraudulent party's estate—Judgment for admitted half share of profit made—Exercise of court's discretion in favour of defrauded party—Award of "interest"—"Element of wrongdoing"—Interest so awarded not damages—Merger—Whether interest merged in judgment debt—Interest liable to income tax—Civil Procedure Act, 1833 (c. 42), ss. 28, 29—Income Tax Act, 1918 (c. 40), Sched. D, para. 1 (b), All Schedules Rules, r. 21—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3.

In an action against the respondents in their capacity as judicial trustees of the will of one Ridsdel, deceased, the appellant established a claim to a sum of £36,255, being the half share of the profits realised by Ridsdel pursuant to a previous agreement with the appellant. Ridsdel had paid the appellant a sum much less than that to which he was entitled, and £36,255 was the balance due. A plea of accord and satisfaction failed because the appellant's acceptance of the smaller sum had been induced by the fraudulent representation of Ridsdel. In giving judgment for the appellant for the sum of £36,255, the judge in the lower court exercised his discretion in favour of the appellant by awarding to him an additional sum of £10,028, being the equivalent of interest at 4 per cent. per annum from June 14, 1936 to May 14, 1943. The respondents then paid over to the appellant the principal amount due under the judgment. As regards the amount of £10,028 included in the judgment as interest, the respondents paid over £5,014, or one-half only, claiming that the sum of £10,028 was "interest of money" within the meaning of the Income Tax Act, 1918, Sched. D, and that, in the circumstances, they were bound to deduct tax therefrom at the standard rate in force for the year 1943-1944. The questions on appeal were: (i) whether the sum of £10,028, awarded as interest, was "interest" on which tax was chargeable under Sched. D; (ii) if so, whether the respondents were entitled to deduct from that sum the tax due on it at the time of payment:—

HELD: (i) "interest" awarded under the 1934 Act, s. 3, was to be regarded as "interest of money" for the purposes of taxation and was, therefore, within the description of Sched. D, para. 1 (b). Interest, payable as such under a statute, did not lose its quality as interest because it was awarded as compensation for loss or delay; its non-recurrence did not exclude it from the wide words of the taxing Act, because the order was retrospective and covered "interest of money" in respect of a period up to the date of the order.

Re National Bank of Wales, Ltd. (1), Moss' Empires, Ltd. v. Inland Revenue Comrs. (7) explained. London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co. (9) explained and distinguished. Simpson v. Maurice's Exors. (2) distinguished.

(ii) All Schedules Rules, r. 21, is mandatory, its object being to ensure the collection of income tax. The first opportunity which the respondents had of obeying the direction in r. 21 came when they satisfied the judgment debt.

Allchin v. Coulthard (8) applied.

(iii) if no part of the judgment debt had been paid, execution could have been levied for the total amount of the judgment, though the right of the Crown to tax would not have been affected thereby.

Re Cooper (4) applied.

(*per DU PARCQ, L.J.*): when a statute is repealed and replaced with a new enactment in different terms, it is generally a salutary rule that such case law as had accumulated round the repealed statute should be regarded as having expired with it.

Decision of EVERSLED, J. ([1945] 1 All E.R. 466) affirmed.

[**EDITORIAL NOTE.** The Court of Appeal here affirm the court below, holding that

interest awarded on a judgment under the Law Reform (Miscellaneous Provisions) Act, 1934, is "interest of money" within the Income Tax Act, 1918, Sched. D, para. 1 (b), and the tax thereon is deductible by the judgment debtor. The court rejects the argument that such interest is in fact damages for loss or delay in payment and refuses to accept the quality of non-recurrence as a ground for excluding the sum from liability to tax.

On the question of the duty of the judgment debtor to deduct tax, *DU PARCQ*, L.J., agrees, with considerable hesitation, since the liability to pay interest merges in the judgment debt. This merger however, operates between the parties only, and the rights of third parties, including the Crown, are not affected. *DU PARCQ*, L.J., therefore comes to the conclusion that the point is too technical, especially in view of the mandatory character of r. 21. Execution could, of course, be levied for the whole sum, but *MORTON*, L.J., suggests that the creditor would not thereby escape the liability to tax, the deduction of which he would, if payment had been made direct, have had to allow under rules 19 and 21.

The rule suggested by *DU PARCQ*, L.J., that case law which has accumulated round a repealed statute should be regarded as having expired is in accordance with the words of *JESSEL*, M.R., in *Re Toomer* (1883), 23 Ch.D. 254: "I think the proper course is to read the section of the Act and to ascertain its meaning and not to trouble ourselves about decisions upon the former Act."

AS TO INTEREST ON MONEY, see *HALSBURY*, Hailsham Edn., Vol. 23, pp. 174-180, paras. 253-260; and FOR CASES, see *DIGEST*, Vol. 35, pp. 177, 178, 182-185, 190, 191, Nos. 64-74, 117-142, 188-193.

AS TO INCOME TAX PAYABLE ON INTEREST, see *HALSBURY*, Hailsham Edn., Vol. 17, pp. 178-180, 232-236, paras. 372-376, 471-475; and FOR CASES, see *DIGEST*, Vol. 23, pp. 63, 64, Nos. o.t., *Digest Supp.* Income Tax, 373a, 428a.]

Cases referred to:

- (1) *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629; 28 *Digest* 71, 373; *sub nom. Re National Bank of Wales, Cory's case*, 68 L.J.Ch. 634; *on appeal, sub nom. Dovey v. Cory*, [1901] A.C. 477.
- (2) *Simpson v. Maurice's Exors. (as executor of Edward Kay)*, (1929) 14 Tax Cas. 580; *Digest Supp.*; 45 T.L.R. 581.
- (3) *King v. Hoare* (1844), 13 M. & W. 494; 21 *Digest* 218, 538; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174.
- (4) *Re Cooper*, [1911] 2 K.B. 550; 28 *Digest* 71, 374; 105 L.T. 273; *sub nom. Re Cooper, Ex p. Debtor*, 80 L.J.K.B. 990.
- (5) *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378.
- (6) *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.*, [1922] S.C. (H.L.) 112; *Digest Supp.*; 12 Tax Cas. 427.
- (7) *Moss' Empires, Ltd. v. Inland Revenue Comrs.*, [1937] A.C. 785; [1937] 3 All E.R. 381; *Digest Supp.*; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264; [1937] S.C. (H.L.) 35.
- (8) *Allchin v. Coulthard*, [1943] A.C. 607; [1943] 2 All E.R. 352; *sub nom. Allchin v. South Shields County Borough*, 169 L.T. 238.
- (9) *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co.*, [1893] A.C. 429; 35 *Digest* 183, 123; 63 L.J.Ch. 93; 69 L.T. 637.
- (10) *Cook v. Fowler* (1874), L.R. 7 H.L. 27; 35 *Digest* 177, 67; 43 L.J.Ch. 855.
- (11) *Webster v. British Empire Mutual Life Assurance Co.* (1880), 15 Ch.D. 169; 35 *Digest* 184, 140; 49 L.J.Ch. 769; 43 L.T. 229.
- (12) *Schulze v. Bensted (Surveyor of Taxes)* (1915), 7 Tax Cas. 30; 28 *Digest* 63, q.
- (13) *Sweet v. Macdiarmid (or Henderson)* (1920), 7 Tax Cas. 640; 28 *Digest* 63, r.
- (14) *Inland Revenue Comrs. v. Barnato*, [1936] 2 All E.R. 1176; *Digest Supp.*; 155 L.T. 211; 20 Tax Cas. 455.
- (15) *Inland Revenue Comrs. v. Ballantine* (1924), 8 Tax Cas. 595; 28 *Digest* 63, t.
- (16) *Lees' Trustees v. Dun*, [1912] S.C. 50.

APPEAL by the defendant from a decision of *EVERSHED*, J., dated Mar. 28, 1945, and reported [1945] 1 All E.R. 466, where the facts are fully set out.

F. Grant, K.C., and *N. E. Mustoe* for the appellant.

Terence N. Donovan and *H. Parrish* for the respondents.

DU PARCQ, L.J.: The All Schedules Rules of the Income Tax Act, 1918, r. 21 (1), provides that:

Upon payment of any interest of money . . . charged with tax under Sched. D . . . the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment.

Under para. (2) of the rule, provision is made for assessment to tax of the person who is bound to deduct tax under para. (1). Under Sched. D, tax is to be charged on "all interest of money . . . not specially exempted from tax." For the

purposes of the present case, at any rate, there is nothing in the relevant legislation to qualify the generality of this provision.

A In an action brought by the appellant against the Westminster Bank, Ltd., the respondents in their capacity of judicial trustees of the will of one Ridsdel deceased, the appellant established a claim to a sum of £36,255. He had justly claimed to be entitled to a half share of the profits realised by Ridsdel in a certain transaction. Ridsdel had paid him a sum much less than that to which he was entitled, and £36,255 was the balance which remained due. A plea of accord and satisfaction failed because, as the judge found, the consent of the appellant to take the smaller sum had been induced by the fraudulent misrepresentations of Ridsdel.

After giving judgment, the judge exercised in favour of the appellant the discretion given to him by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), which is as follows :

B In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment . . .

C The judge awarded interest at 4 per cent. per annum, from June 14, 1936, to May 14, 1943. The formal judgment, as it was finally drawn up after some discussion at the Bar, expressed the decision of the judge as follows :

It is . . . adjudged that the plaintiff recover from the defendant £36,255 with £10,028 interest, making together the sum of £46,283.

An appeal from that judgment to this court was dismissed. [[1943] 2 All E.R. 725.]

D The action in which the judgment now under appeal was given, was brought by the bank for (i) a declaration that the bank had satisfied the judgment in the earlier action by paying the amount adjudged to be due less £5,014, the latter sum representing the income tax on the interest awarded, (ii) an injunction to restrain the appellant from levying execution. EVERSHERD, J., made the declaration, and the bank did not insist on its prayer for an injunction. Two questions of importance now arise for our decision. First, is the sum of £10,028 which was awarded as interest, "interest" on which tax is chargeable under Sched. D ? Secondly, if the answer to the first question is in the affirmative, was the bank bound or entitled to deduct from that sum the tax due on it, at the time of payment ? It may be stated here that it was agreed that r. 19 of the All Schedules Rules had no application to the present case, since the interest in question was not payable wholly out of profits or gains brought into charge to tax.

F The question whether interest awarded under the 1934 Act is subject to tax has never been judicially decided. There is, therefore, no authority which is precisely in point. On principle, and apart from authority, I see no reason why it should not fall within the words of Sched. D. When the legislature authorises the court to award interest, it is a reasonable assumption that it intends what it calls interest to be regarded as interest for the purposes of taxation. If, indeed, there were something in the context of the statutes to show that the word was used with one meaning in the 1934 Act, and with another in the taxing Acts, such an assumption would be negatived. I can find nothing to suggest that in the 1934 Act the word "interest" has so special a meaning that it falls outside the description "all interest of money." If the Act provided that damages might be awarded to the appellant and should be based on a calculation of interest, a different result might follow, but that is not the language of the Act. The provision that the interest awarded is to be "included in the sum for which judgment is given" seems to me to carry the matter no further. Nor can I attach importance to the fact that the interest awarded is in the nature of damages or compensation. Interest, payable as such under a statute, is none the less interest because it is awarded to compensate the appellant for what he has lost through the debtor's delay in paying a just debt. Finally, I am by no means persuaded that this interest is excluded from the wide words of the taxing Act because, as was said, it is non-recurrent. What the judge does in a case like this is, first, to find that at a given date a

certain sum was in fact due. It is then open to him to say, if he thinks fit, that, as the sum ought to have been paid at that date, it is right that it should bear interest as from that date. The order is retrospective, but I see no reason to think that a right to receive interest, in the sense in which that word is used in Sched. D, may not come into being as the result of a retrospective order. If we were dealing, not with a statute, but with a contract which resulted in an analogous position, I think that there could be little doubt about the matter. Suppose, for instance, that A lends £1,000 to B to be repaid at the end of three years with such interest, if any, as C (an impartial friend acting as arbitrator) may in his discretion think it fair and just, in all the circumstances, that B should pay. If A received interest under C's award, it could hardly be doubted, I think, that it would be interest subject to tax. So far as this particular point is concerned, I see no distinction in principle between that case and the one before us.

So far I have dealt with the matter apart from authority, but I believe that I have said nothing which conflicts with the many authorities cited to us in so far as they afford us guidance. Citations from cases referring to the Civil Procedure Act, 1833, ss. 28, 29, are, in my opinion, of doubtful assistance. Indeed, I am of opinion that when the legislature has repealed a statute and has not re-enacted it, but replaced it with a new enactment in different terms, it is in general a salutary rule that such case law as has accumulated round the repealed statute should be regarded as having expired with it. With regard to the other authorities cited, there is little that I wish to say. The two which seemed to me most helpful to the argument of counsel for the appellant were *Re National Bank of Wales* (1), and *Simpson v. Kay's Executor* (2). The latter case is, in my opinion, distinguishable from the present. The sum awarded by the Mixed Arbitral Tribunal had been reached by a calculation of interest, but, under the relevant article of the treaty, that tribunal had no power to award interest as such. If that article had provided in terms for the payment of interest, the decision of the court might well, I think, have been in favour of the Crown. The view expressed by WRIGHT, J., in *National Bank of Wales* (1) seems to have been approved by LAWRENCE, L.J., in *Simpson v. Kay* (2) (see at p. 606), although other judges have somewhat pointedly declined to express approval of it. As I have said, neither it, nor, indeed, any reported decision, is directly in point, because the precise question before us comes up for decision for the first time. I propose to express no opinion on any but that precise question, and I do not find it necessary on this occasion to approve or disapprove the view expressed by WRIGHT, J. For the reasons which I have given, I am of opinion that the interest awarded to the appellant was subject to tax.

The second question seems to me to be one of some difficulty. It follows necessarily from the language of sect. 3 of the 1934 Act that the sum awarded by way of interest is included in the judgment debt. Throughout the argument I felt, and I fear that I too often expressed, a doubt whether a defendant, who is required by the order of the court to pay a judgment debt for a fixed sum (which includes interest), can be said to be making a payment of interest when he pays that sum. As between himself and the judgment creditor, there is no longer a liability to pay the interest which is included in the judgment debt. That liability is superseded by, or merged in, the judgment debt. If the judgment debtor fails to pay the judgment debt, he cannot be made liable in a further action for interest, but he is technically liable to be sued on the judgment. This is trite law, and no authority need be cited for it. Suffice it to say that the principle was stated by PARKE, B., in *King v. Hoare* (3), at p. 504, and that some of the relevant cases are collected in BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS, 9th Edn., at p. 21.

Counsel for the respondents did his best to dispel my doubts, and counsel for the appellant said nothing to encourage them. Both counsel contended that, if, indeed, the interest merged in the judgment debt, the result would be that the Crown would lose its right to income tax, since the interest debt would be merged for all purposes. I do not agree with this contention. The doctrine of merger, though it has many important consequences, does not operate to effect a mystical metamorphosis, binding on all the world, of all debts which together constitute the judgment debt. No one would suggest that a plaintiff who obtains a judgment against his debtor for arrears of interest

(no allowance having been made for deduction of tax in the statement of claim or claimed in the defence) could defeat the right of the Crown by a plea that his debtor had paid him, not interest, but a judgment debt. It is only as between plaintiff and defendant that there is a merger, and the rights of third parties are not affected. My doubt was not as to the right of the Crown to demand tax, but as to the duty of the debtor to deduct it. A similar doubt was entertained by this court in *Re Cooper* (4), but unfortunately it was not then necessary to resolve it. The relevant sections at that time were sects. 102 and 103 of the Income Tax Act, 1842. The court held that tax was not deductible at all because the interest payable was not "yearly interest", and only touched upon the question whether, if it had been deductible, it could have been deducted from a judgment debt. (See per COZENS-HARDY, M.R., at p. 554, and per BUCKLEY, L.J., at p. 555). Although that question was left in doubt, it may be said that COZENS-HARDY, M.R., and the Lords Justices did not rule out the possibility of deducting tax from a judgment debt, if certain conditions were fulfilled. I must add that, while I was considering this judgment I learned that CASSELS, J., sitting as vacation judge during the Long Vacation of 1944, had held that a judgment for an amount which included interest (payable on money for which persons acting in a fiduciary capacity were accountable) was satisfied by payment of the total amount of the judgment less income tax on that part of it which consisted of interest. The judgment was given on the hearing of a summons which was adjourned into court, but it apparently escaped the notice of the reporters. The judgment debt in question was that which the House of Lords decreed to be due in *Regal (Hastings), Ltd. v. Gulliver* (5). We are obliged to CASSELS, J., for furnishing us with a copy of his written judgment.

After full consideration, I am bound to say that the doubt which I have expressed seems to me to have a sound logical foundation and has not been wholly removed. When OLIVER, J., awarded interest he, at the same time, *uno flatu*, included it in the judgment debt. It ceased, therefore, to be due as interest, and I find some difficulty in saying that payment of a judgment debt is payment of interest, even when an examination of the record shows that the debt includes interest. Since interest as such is not due and owing, it is difficult to see how what the debtor pays can be called interest. I confess that I was the more attracted by this view of the matter because of the inconvenience of deciding a question of liability to income tax in proceedings in which the Crown is not a party, and the desirability of the determination of such a question by the tribunals designated for the purpose of the legislature. In the end, however, I have come to the conclusion that the view which at first attracted me is too technical. The law is not always completely logical. It is our duty to give effect to the intention of Parliament, as expressed in the relevant statutes, and, on the whole, I am prepared to concur in the opinion that Parliament intended the deduction of tax to be obligatory on the payor under r. 21, even when the interest payable was included in a judgment debt. That rule is mandatory, and it seems plain that its object is to ensure the collection of income tax, and so to protect the interests of the Crown. The judgment, on its face, orders the payment of £10,028 as interest, and the first, and, indeed, the only, opportunity which the respondents had of obeying the direction contained in r. 21 came when they satisfied the judgment debt. It is not, I think, in doubt that the respondents complied with r. 21 (2) and have been, or will be, duly assessed.

On the whole, therefore, I do not dissent from the view which my brethren are, I know, about to express, that the respondents must be regarded as having paid the total amount of the interest and of the judgment debt, to the appellant. I would add that I am clearly of opinion that, if no part of the judgment debt had been paid, execution could, and should, have been levied, for the total amount of the judgment, though the right of the Crown to tax would not, of course, have been affected thereby. I am confirmed in this view (which, indeed, was not contested at the Bar) by the judgment of COZENS-HARDY, M.R., in *Re Cooper* (4).

In the action against the respondents, the judge directed that the final judgment should be so drawn as to make it clear that a specific sum was awarded as interest. In similar cases I think it will be well that this precedent should be followed. I only desire to add that nothing that I have said in this judgment is intended as a criticism of the arguments addressed to us, and that I wish to

express my personal indebtedness to the counsel for their assistance.

The appeal must be dismissed with costs.

MORTON, L.J. : The facts of this case have been so fully and clearly stated by the judge that I need not restate them. Was the further sum of £10,028 awarded by OLIVER, J., "interest of money" within para. 1 (b) of Sched. D to the Income Tax Act, 1918? In my view it was. If one asks "was the sum interest"? the answer would seem to be "Yes." Judgment was given for this sum under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, which empowers the court, in any proceedings for the recovery of any debt or damages, to give : A

... interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment ...

Thus, that which the statute empowers is the giving of interest, and the sum in question was rightly described as "interest" in the order of OLIVER, J. B

Again, if one asks the question "Of what was it interest?" or, to use a more modern expression, "On what was it interest?" the answer would seem to be : "It was interest on money, i.e., on the debt of £36,255 which Ridsdel owed to the appellant and ought to have paid to the appellant in 1936. More particularly described, it was interest on that debt at the rate of 4 per cent. per annum, from June 14, 1936, to May 14, 1943." It may be that neither the use of the word "interest" in the Act, nor the use of the same word in the order, is conclusive of the matter, but it is difficult to see how the sum in question could be more accurately described than by calling it "interest on money" or "interest of money." I may add that if a sum awarded under this section as interest on a debt is not liable to income tax, certain curious results would follow. For instance, if the debt for which judgment was given happened to be instalments of an annuity payable to the plaintiff, and the judge awarded interest at 4 per cent. on each instalment from the date on which it became payable, the debt itself would be subject to income tax, and yet interest on the debt would not. I have limited my observations to cases, such as the present case, where interest is awarded upon a debt, but I doubt whether any distinction can be drawn, as regards the liability to tax, between such interest and interest awarded, under the same section, or damages for which judgment is given. C

On these short and simple grounds, I agree with EVERSHED, J., that the sum of £10,028 was subject to income tax, but I think I ought to explain, briefly, why I reject the able argument of counsel for the appellant. Counsel's first point was that this sum is not interest of money because it is a payment of damages or in the nature of damages. He asks us to arrive at this conclusion by three stages : (a) Sums awarded under the Civil Procedure Act, 1833, ss. 28, 29, were awarded as damages and not as interest ; (b) The quality of sums awarded under sect. 3 of the 1934 Act is the same as the quality of sums awarded under sect. 28 or sect. 29 of the 1833 Act ; (c) There are cases which show that when a sum is awarded as damages, or as a payment in the nature of damages, it is not "interest of money" within the Income Tax Act, 1918, even if the award describes it as "interest." As to (a), in my view sums awarded under sect. 28 of the 1833 Act were interest. I do not think it is necessary to discuss this matter at length, as the court is not construing that section, but there is, to my mind, a very clear and significant contrast of language between sect. 28, which is concerned with "debts or sums certain" and gives power to allow "interest to the creditor," and sect. 29, which is concerned with actions of "trover or trespass *de bonis asportatis*," and speaks of "damages in the nature of interest." A careful study of all the cases which were cited to us by counsel for the appellant leads me to the conclusion that in none of them was it decided that interest awarded under sect. 28 was not interest properly so called. As to (b), I agree that the quality of sums awarded under sect. 3 of the 1934 Act is the same as the quality of sums awarded under sect. 28 of the 1833 Act, but, in my view, sums awarded under sect. 29 of the earlier Act are on a different footing. As to (c), I think the true view is that a sum awarded as interest does not lose its quality of interest because it is awarded as compensation to the plaintiff for being deprived of the use of his money. On the other hand, a sum awarded as damages does not cease to be damages because it is arrived at by calculation of interest on a D

particular sum, at a particular rate for a particular period. As LORD BUCKMASTER said in *The Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.* (6) at p. 115:

... there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test.

A Counsel's second point is that it is one of the essential characteristics of "interest of money" that it should have the quality of being recurrent or of being capable of recurrence. This sum of £10,028, he says, has not got this quality; there was no right to it until judgment was given by OLIVER, J., and that judgment was the beginning and the end of it. Counsel bases this argument upon a *dictum* of LORD MAUGHAM in *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (7). LORD MAUGHAM, referring to r. 21 of the General Rules of the Income Tax Act, 1918, which refers to "any interest of money, annuity, or other annual payment," said this, at p. 795 ([1937] 3 All E.R., at p. 386):

B In r. 21 "annual" must be taken to have, like interest on money or an annuity, the quality of being recurrent or being capable of recurrence.

C I do not understand LORD MAUGHAM as saying that nothing can be interest on money unless it is in fact recurrent or capable of recurrence. No doubt interest on money ordinarily has the quality of being recurrent, but I cannot see why a sum of money should be excluded from the description of "interest of money" or "interest on money" merely because it comes into existence for the first time under an order of the court and is interest on money in respect of a period up to the date of the order, and no further.

D Finally, counsel argues that as there is a judgment for £46,283, that judgment cannot be satisfied by payment of a lesser sum. He relies upon the words in the order of OLIVER, J., "such sum of money and costs to be levied on the goods and chattels, etc.," and says that if execution were to be levied, the sheriff would be right in retaining the whole of the sum of £46,283. I think it is true to say that if execution were levied, the sheriff would be free to retain £46,283, but I am far from thinking that by these means the appellant could escape the payment of tax. However that may be, the answer to counsel's argument lies in the concluding sentence of General Rule 19 (1):

E The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such payment shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid.

F In the present case the deduction was made under General Rule 21, in which this sentence does not appear, but it was conceded before us that this sentence must be implied in r. 21 also. This concession was rightly made in view of the observation of VISCOUNT SIMON, L.C., in *Allchin v. Coulthard* (8), at p. 619 ([1943] 2 All E.R. 354):

The requirement that the recipient must allow the deduction and treat the payer as acquitted of liability in respect of this amount is not repeated in r. 21, but must be implied.

G Thus the respondents, having made the deduction in respect of tax, are in the same position as if the whole sum had been actually paid.

The result is that, in my view, the decision of the judge was correct in all respects, and this appeal must be dismissed with costs.

H Since writing this judgment, I have had the advantage of reading the written judgments of my brethren. As we are in agreement, I need only add that I agree with the observations which COHEN, J., is about to make in regard to *Re National Bank of Wales, Ltd.* (1).

COHEN, J.: Like MORTON, L.J., I find it unnecessary to add to the full and clear statement of the facts contained in the judgment in the court below. EVERSHED, J., heard arguments from the parties, and also from the Attorney-General and Mr. Hills as *amici curiae*, and by a reserved judgment delivered on Mar. 28, 1945, found in favour of the respondents, and made a declaration that the judgment obtained against them in the King's Bench action as judicial trustees of the will of the late Ridsdel had been satisfied. From this judgment the defendant now appeals.

Before considering the arguments addressed to us, it will be convenient to refer to the relevant provisions of the Income Tax Acts. I need not read them in full, as they have been stated by DU PARCQ, L.J., Suffice it to say that, although r. 19 (1) of the General Rules is not directly applicable to the present case, since it is common ground between the parties that the judgment debt was not satisfied out of profits or gains brought into charge to tax, it has been held that, although the second paragraph thereof is not included in r. 21, a similar provision binding the recipient to treat the payer as acquitted of liability in respect of the amount deducted must be implied. See *Allchin v. Coulthard* (8), per VISCOUNT SIMON, L.C., at p. 619 ([1943] 2 All E.R. 354). A

The question, therefore, on which the decision of this appeal rests is whether the sum of £10,028 included by OLIVER, J., in the order of the King's Bench Division, under the discretion vested in him by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, is interest of money within para. 1 (b) of Sched. D of the Income Tax Act, and r. 21 of the All Schedules Rules. The material portions of sect. 3 of the 1934 Act have been stated by my brethren. I shall, therefore, not re-read them, but I would say that I agree with EVERSHED, J., ([1945] 1 All E.R., at p. 470), that : B

If the matter rested merely upon the language of the 1934 Act, s. 3, I confess I should feel no difficulty in concluding that the language used meant what it said, that "interest" meant interest and that the sum awarded, being interest on the principal sum of £36,255 at 4 per cent. per annum from June, 1936, to May, 1943, was interest of money within the meaning of the Income Tax Act, Sched. D, para. 1 (b), and the All Schedules Rules, r. 21. C

But counsel and junior counsel for the appellant have argued that (a) notwithstanding the language of the section, this sum of £10,028 is a payment of damages or a payment in the nature of damages, and the decisions in the Income Tax Acts establish that where a sum, even if described as interest, is awarded as damages or as a payment in the nature of damages, it is not interest of money within Sched. D. Alternatively (b) the sum in question is non-recurrent and not capable of recurrence, and, for this reason also, it is not interest of money within Sched. D. D

The second point was apparently treated as subsidiary in the court below, and it will be convenient to deal with it first. It is based on a *dictum* of LORD MAUGHAM in *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (7). This *dictum* is as follows, at p. 795 ([1937] 3 All E.R., at p. 386) : E

In r. 21 "annual" must be taken to have, like interest on money or an annuity, the quality of being recurrent or being capable of recurrence.

In that case LORD MAUGHAM was dealing with annual payments and had not to direct his mind to the specific point of "interest of money"; but assuming that he did intend to lay down that payment must have the essential characteristic of recurrence if it is to be interest of money within r. 21, I agree with EVERSHED, J., that an award of interest under sect. 3 of the 1934 Act possesses this characteristic. In making such award, the judge has to determine the amount of the debt on which interest is to be calculated, the rate at which it is to be calculated, and the period over which it is to run. In my view, such interest must be deemed to have accrued during the whole of the period so specified, notwithstanding that it only becomes payable in one sum by reason of the exercise by the judge of the discretion conferred on him by the section. F

I turn to the first point. Counsel for the appellant argues that (i) the quality of sums awarded under sect. 3 of the 1934 Act is the same as the quality of sums awarded under the Civil Procedure Act, 1833, ss. 28, 29, which were repealed by subsect. (2) of sect. 3 of the 1934 Act, and (ii) interest awarded under sect. 28 of the 1833 Act has been held to be damages, or in the nature of damages, and, accordingly, interest awarded under the 1934 Act has the same quality. Counsel cited no authority in support of the first of these propositions, and, speaking for myself, I feel considerable doubt whether we should be justified in placing an artificial meaning on the word "interest" in the 1934 Act, because a similar artificial meaning was placed on the word "interest" in sect. 28 of the 1833 Act, but I will assume in his favour that the word "interest" bears the same meaning in both Acts. G H

Sects. 28 and 29 of the Civil Procedure Act, 1833, are in the following terms so far as relevant. Sect. 28 is :

Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue . . . may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment ; provided that interest shall be payable in all cases in which it is now payable by law.

Sect. 29 provides :

The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act.

Counsel for the appellant says that " interest " in sect. 28 must mean interest in the nature of damages. He says that interest in the ordinary sense is only payable under contract or by custom, and cannot be given merely for the wrongful detention of money. (See per LORD HERSCHELL, L.C., in *London, Chatham & Dover Ry. Co. v. South-Eastern Ry. Co.* (9), at p. 437). Accordingly, when sect. 28 purports to authorise a jury to award interest, it is really allowing them to award damages under the guise of interest. This argument seems to ignore the contrast between the language of sect. 28 and that of sect. 29, but counsel for the appellant says that its correctness is established by the decision of the House of Lords in *Cook v. Fowler* (10), and of this court in *Webster v. British Empire Mutual Life Assurance Co.* (11). The former case had, as EVERSLED, J., pointed out ([1945] 1 All E.R., at p. 471), nothing to do with sect. 28 of the Civil Procedure Act, 1833, and I agree with him that in that case a general principle was stated in regard to interest not being limited to the application of the Civil Procedure Act, that the House of Lords were explaining that the principle on which courts of equity allow interest in cases where it would not have been allowed at common law is compensation, but that they were not purporting to alter the quality of interest so awarded or to distinguish, so far as relevant to the present enquiry, interest so awarded, as, for example, in the case of a mortgage silent as to interest after the redemption date, from the interest in terms stipulated in a contract, for example, stipulated interest up to the redemption date in a mortgage.

I also find myself in complete agreement with the two final observations of EVERSLED, J., ([1945] 1 All E.R., at p. 478 and at p. 473), when dealing with this case, (i) that the element of " wrongdoing " in the debtor is *prima facie* irrelevant to the question of the quality of the sum awarded for interest, though it may well be relevant to the question whether, in equity, the claimant is entitled to any " interest " or " compensation," and (ii) that sect. 28 of the Civil Procedure Act, 1833, introduced no new principle affecting the quality of " interest " awarded in respect of money claims, though it enlarged the class of cases in which it was competent for a jury to award interest.

In *Webster v. British Empire Mutual Life Assurance Co.* (11), sect. 28 of the Civil Procedure Act, 1833, was relevant to the point at issue, and there are passages in the judges' judgments which at first sight appear to support the argument put forward by counsel for the appellant, in particular the passage in the judgment of COTTON, L.J., at p. 175, where he says :

The question we have to consider is, whether interest has been properly given as against the defendants. The instrument sued upon was a policy of assurance. It contained no stipulation whatever that the company should, under any circumstances, pay interest. Interest, therefore, is no part of the debt or of the sum stipulated by the contract to be paid. If it can be recovered, it must be in the nature of damages. I say so because, whether it comes under sect. 29, where it is clearly to be granted, if granted at all, in the nature of damages, or under sect. 28, where the language is different, in both cases it comes as damages and is referable to the principles upon which damages can be given. In the case of a policy of assurance subsequently to the Act, as much as in a case before the Act as regards other instruments, where no stipulation appears for payment of interest but where it was left to the jury that they might grant interest or not as they thought fit, they would grant it by way of damages.

I think, however, that these observations were directed merely to showing the principle on which interest is awarded in such cases, and that their Lordships' minds were not directed to the quality of the interest in the hands of the recipient. They were concerned to show that the underlying principle on which the jury were to award interest under sect. 28, or damages in the nature of interest under sect. 29, was in each case compensation, but I do not think they were holding that, although sect. 28 authorised the award of interest, what the jury awarded under that section was in fact damages. I think the true contrast is between an award of interest by way of compensation for the detention of a sum of money and an award of damages, the damages being ascertained as a matter of convenience by an interest calculation.

This distinction is a fine one, but it is recognised in the tax cases to which counsel for the appellant called our attention. On the one side of the line fall *Schulze v. Bensted* (12), *Sweet v. Macdiarmid* (13), and *Inland Revenue Comrs. v. Barnato* (14). In *Schulze v. Bensted* (12) the income on which tax was claimed was interest at the rate of $3\frac{1}{2}$ per cent. on a sum which a negligent trustee had failed to get in to the trust. In *Sweet v. Macdiarmid* (13) it was interest on balances of *jus relictæ* recovered by the respondent from the trustees of her deceased husband's estate; in *Inland Revenue Comrs. v. Barnato* (14) it was compound interest recovered by the defendant from two gentlemen who had been trustees of two wills under which he was interested, and who had for a short time been partners with him in business; the interest being recovered as the result of an order of the court. In all these cases it was held that the interest was taxable income.

On the other side of the line fall *Inland Revenue Comrs. v. Ballantine* (15), and *Simpson v. Kay's Executors* (2). In *Inland Revenue Comrs. v. Ballantine* (15) a firm of contractors claimed "additional costs and damage" against a railway company, and the arbitrators to whom the claim was referred awarded a certain sum mainly as damages together with interest thereon at 5 per cent. The Revenue claimed tax on the amount of such interest, but the Court of Session rejected the claim. Their reasons are conveniently summarised in a sentence from the judgment of the LORD PRESIDENT (CLYDE), where he says, at p. 612:

... if the decree was substantially one of damages, the interest ordered to run on it was just part of the damages and not, therefore, chargeable to income tax.

In *Simpson v. Kay's Executors* (2), the alleged income on which tax was claimed was compensation under art. 297 (e) of the Treaty of Versailles, which provided for compensation being paid to nationals of the allied and associated powers in respect of damage or injury inflicted upon their property, rights or interests. This compensation was awarded by the Mixed Arbitral Tribunal on the basis of interest at 5 per cent. on certain sums specified in the award. ROWLATT, J., rejected the claim for tax, and his decision was affirmed by the Court of Appeal. The reasons for the decision sufficiently appear from a passage from the judgment of LAWRENCE, L.J., at p. 605, where he says:

Art. 297 of the Treaty says nothing about the payment of interest, and the money paid under the direction of the Mixed Arbitral Tribunal was paid as compensation and not as interest.

On which side of the line does the present case fall? In my opinion it is governed by the principle on which *Schulze v. Bensted* (12) was decided. In that case, to quote the language of LORD JOHNSTON, at p. 34:

In these circumstances there was restored to the trust a principal sum which ought throughout to have been in the trustees' hands and bearing interest, and there was also restored to the trust a sum representing that interest at the rate of $3\frac{1}{2}$ per cent. But this latter sum was so restored as at Nov., 1911, in one sum without reference to its accrual termly between 1902 and 1911, at a modified rate assumed to be the average return on the trust investments and without compound interest. When it reached the hands of the trustees it was a *surrogatum* for that which ought to have termly reached the hands of the trustees and have been applied by them as income, in which case it would have been subject to income tax, and when it did reach their hands I think they were equally bound to apply it in accounting with the beneficiaries as income, and I am unable to see any sound reason for holding that it did not become liable to income tax in the hands of the trustees when received.

So here the principal sum of £36,255, being the amount due to the appellant on taking the account of profits, ought to have reached his hands by June 14, 1936, and he could have invested it at interest. OLIVER, J., in his discretion awarded interest thereon at the rate of 4 per cent., and it may, I think, be taken that such rate of interest represents his estimate of the return which the principal sum would have earned had it been duly paid. Had the principal sum in fact been paid and earned interest, that interest would have been subject to income tax and, like LORD JOHNSTON, I can see no sound reason for holding that the substituted sum awarded by OLIVER, J., is not equally liable to tax.

A Counsel for the appellant suggested that the distinction is that in *Schultze v. Bensted* (12), there was no element of wrongdoing, whereas in the present case there was an element of fraud. As I have already said, I agree with EVERSLED, J., that the element of wrongdoing is irrelevant, but, in fact, I think it is clear from the report of the case in which the interest was recovered (*Lees' Trustees v. Dun* (16)) that the basis on which interest was awarded was that the late Dun had been negligent in the discharge of his duty as trustee.

B For these reasons, I find myself in complete agreement with the conclusion reached by EVERSLED, J., But counsel for the appellant says we cannot reach this conclusion without disregarding the decision of WRIGHT, J., in the *National Bank of Wales* (1). That was a case of misfeasance, it being alleged that the respondent had been party to the payment of dividends out of capital. C The judge found against the respondent and awarded a principal sum with what the judge called "penal interest" at 5 per cent. The respondent claimed that income tax should be deducted from the interest mentioned in the judgment, but the judge, notwithstanding orders in certain cases where interest had been directed to be deducted, rejected the claim. His decision on the question of misfeasance was reversed on appeal by this court and the reversal was upheld D by the House of Lords, but the point relevant to the present case was not discussed in the higher courts. I find myself unable to agree with the conclusion reached by WRIGHT, J., unless it can be explained on the ground suggested by LORD WRIGHT, M.R., in *Inland Revenue Comrs. v. Barnato* (14), at pp. 1193, 1194, that WRIGHT, J., was awarding damages for fraud and merely using interest as a convenient method of calculating the damages.

E In conclusion I should say a word about a point raised by the court in the course of the hearing. It was suggested that, whatever be the rights of the Crown against the appellant, the respondents were not entitled to deduct tax, since any right to interest had merged in the judgment, and the respondents were not paying interest but merely satisfying a judgment for the lump sum of £46,283. Counsel on both sides were agreed that this point was not well founded, and I think counsel for the respondents was correct when he said that, although F the appellant's only remedy after judgment was to enforce the judgment, the quality of the elements making up that judgment was not changed, and that, at any rate, for the purpose of determining whether income tax was chargeable on the payer or was deductible by the payer, interest retained its original quality. The opposite conclusion might well deprive the Crown, who are not parties to the litigation, of a vested interest. It is true that if the judgment had not been satisfied the duty of the sheriff would have been to levy execution G for the full amount of the judgment, but the only result would have been that r. 21 would never have come into operation, and the Crown would still have been able to claim tax from the appellant. The principal sum and interest less tax having been paid, the judgment is, in my opinion, satisfied, since the appellant is bound to acquit the respondents of the amount deducted. See *Allchin v. Coulthard* (8).

H I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Last, Riches & Co.* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NORTON v. NORTON AND SMITH.

NORTON v. NORTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Denning, J.), May 18, 1945.]

Divorce—Costs—Petition by husband on ground of wife's adultery—Denial of adultery by wife and co-respondent—Separate petition by wife charging husband with cruelty and asking for court's discretion in her favour on account of her adultery with co-respondent—Suits consolidated—Decree for husband—Costs in discretion of judge—Co-respondent to pay costs in both causes—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 50. A

A husband filed a petition for divorce against his wife on the ground of her adultery. The wife and co-respondent filed answers denying adultery. Before the husband's suit came on for hearing, the wife brought a separate petition for divorce against the husband charging him with cruelty and asking the court to exercise its discretion in her favour with regard to her adultery with the co-respondent. The court ordered the two suits to be consolidated. At the hearing the wife and co-respondent admitted adultery, the countercharge of cruelty failed and the husband was granted a decree *nisi* on the ground of the wife's adultery and was awarded damages against the co-respondent. On the question of costs it was contended by the co-respondent that the court had no jurisdiction to order him to pay any part of the costs on the wife's cross-petition :— B

HELD : (i) the decision in *Forbes-Smith v. Forbes-Smith* (2), that a co-respondent could not be made liable for the costs of the wife's suit because the suits could not, strictly speaking be consolidated, was no longer binding, because an order for consolidation might now be made wherever the second suit might from its start have been joined with the first suit. C

Horwood v. Statesman Publishing Co. (3) and *Bailey v. Curzon* (4) applied. D

Earl v. Earl (1) overruled.

(ii) the order for consolidation was properly made, with the result that both suits were part of the "proceedings" of which the costs were in the discretion of the court under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50.

(iii) the court, in exercise of its discretion, ordered the co-respondent to pay the costs of the husband in both causes before and after the order for consolidation, including sums provided by him for the wife's costs. E

EDITORIAL NOTE. An order for consolidation may now be made in the Divorce Division whenever the second suit might from the start have been joined with the first. Where, therefore, the wife makes a countercharge of cruelty by cross-petition instead of putting it in her answer, the court has power to consolidate the suits, making both suits part of the "proceedings" of which costs are in the judge's discretion, and to order the co-respondent to pay the husband's costs, including the costs of the wife's cross-petition. F

DENNING, J., expresses his disapproval of the practice whereby the respondent and co-respondent deny adultery solely in order to dispute damages.

AS TO COSTS BETWEEN PETITIONER AND CO-RESPONDENT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 764-767, paras. 1206-1209; and FOR CASES, see DIGEST, Vol. 27, pp. 472-477, Nos. 4964-5042.] G

Cases referred to :

* (1) *Earl v. Earl and Kyle*, *Earl v. Earl* (1926), 96 L.J.P. 23; Digest Supp.; 136 L.T. 383.

* (2) *Forbes-Smith v. Forbes-Smith and Chadwick*, [1901] P. 258; 27 Digest 473, 4985; 70 L.J.P. 61; 84 L.T. 789.

* (3) *Horwood v. Statesman Publishing Co.* (1929), 98 L.J.K.B. 450; Digest Supp.; 141 L.T. 54.

* (4) *Bailey v. Curzon of Kedleston (Marchioness)*, *Bailey v. Duggan*, [1932] 2 K.B. 392; Digest Practice 658, 2788 and Digest Supp.; 101 L.J.K.B. 627; 147 L.T. 269. H

ADJOURNED HEARING of consolidated petitions for divorce on the question of costs. The facts are fully stated in the judgment.

J. Scott Henderson for the husband.

Geoffrey C. Tyndale, K.C., and *T. J. L. Stirling Boyd* for the wife and the co-respondent.

DENNING, J. : In this case the parties married on Aug. 17, 1915. About 1939 the wife started a love affair with her brother-in-law. On Feb. 15, 1942, she left her husband and within three days started living with the brother-in-law, and she is still living with him. On May 22, 1942, the husband filed a petition for divorce against his wife on the ground of adultery, joining the brother-in-law as co-respondent and claiming damages and costs against him. On June 22, 1942, the wife and brother-in-law appeared by the same solicitors. On July 7, 1942, they filed answers in which they merely denied adultery. That denial was put in, not because they ever intended to contest adultery, but because it has been thought by some practitioners that in this Division, in order to dispute damages, a co-respondent who admits adultery must nevertheless file an answer denying it. I think that practice should be changed. If a co-respondent has no intention whatever of contesting the issue of adultery the proper pleading is for him not to admit that the petitioner has suffered any damage.

On Sept. 3, 1942, the husband set down the cause for trial ; but before it came on for hearing the wife, on Mar. 5, 1943, launched a separate petition for divorce against her husband, charging him with cruelty. In it she asked the court to exercise its discretion in her favour because she was living in adultery with her brother-in-law. There was no reason whatever why this charge of cruelty and this cross-prayer should not have been raised in the husband's suit. That was indeed the proper place for it, because it is by statute the duty of the court, in considering the husband's petition, to inquire into any countercharge which is made against him. It should have been raised by the original answer or by amendment of it. The additional delay, expense and inconvenience, caused by the separate petition, was no advantage to the husband or the wife. The only person whom it might advantage was the co-respondent, and that only because of certain decisions on costs, to which I will refer. On Oct. 6, 1943, the court ordered the suits to be consolidated. That meant that they ceased to be two separate suits, and became one. The effect of consolidation is not merely to link two suits side by side and cause them to be tried at the same time. It makes them one suit as effectively as if the wife's countercharge and cross-prayer had been raised by her answer. That is well illustrated by the order made on Jan. 28, 1944, in the consolidated cause. By it the husband was ordered to pay into court the sum of £25 10s. 3d., being the amount of the wife's taxed costs, and was further ordered to lodge in court or give a bond to secure another £30 estimated as sufficient to cover the wife's costs of and incidental to the hearing of the cause. That order treated the two suits as one. The £25 10s. 3d. was the wife's taxed costs in the two suits whilst separate and in the consolidated suit up to that time. The £30 was the estimated cost of the trial of the consolidated suit. The figures were not severed between the two suits. They were fixed for the one consolidated suit.

On Apr. 12, 1945, the consolidated cause came before me. The wife and the co-respondent were represented by the same counsel and solicitors. Whilst the husband's counsel was opening the case, counsel for the wife and co-respondent intervened to say that adultery was admitted, thus showing that the answers denying adultery were really only put in for the purpose of disputing damages, a practice which, as I have already mentioned, I think should be changed. Later, when addressing me on the question of damages, counsel for the co-respondent urged that the cruelty of the husband to the wife should be taken into account, citing an authority for the purpose, thus showing that the co-respondent was availing himself of the wife's countercharge. In the result I found that the countercharge of cruelty failed. I granted the husband a decree *nisi* on the ground of the wife's adultery and I awarded him £200 damages against the co-respondent. I allowed the wife her costs up to the amount of security, because that was really for the protection of her solicitor. But when I proposed to order the co-respondent to pay the costs to which the husband had been put, including the costs which he had to provide for his wife, counsel cited authorities to show that I had no jurisdiction to order the co-respondent to pay any part of the costs upon the wife's cross-petition. He conceded that if the wife had raised the countercharge and cross-prayer by her answer, instead of by cross-petition, I could have made the order, thus exposing the reason why she raised it by cross-petition.

I am satisfied that the co-respondent was the cause of the break-up of this marriage. All the costs of these proceedings, in both suits, were caused by his initial wrong-doing. I am also satisfied that the steps taken by the wife were due to the claim for damages and costs against the co-respondent. She acted in his interest. That is why she contested the suit, although she desired a divorce. That is why she put in an answer denying adultery when it was apparent to all concerned that she was guilty of it. That is why months later she made a countercharge of cruelty. That is why she put it in by way of cross-petition instead of in her answer. In these circumstances, if I have a discretion to order the co-respondent to pay the costs of it, I shall do so. A

The authority relied on by counsel for the co-respondent was *Earl v. Earl* (1). That was a decision of HILL, J., in 1926, who thought it was governed by what COLLINS, L.J., said in 1901 in *Forbes-Smith v. Forbes-Smith* (2), at p. 271. In *Forbes-Smith v. Forbes-Smith* (2) a wife brought a suit for judicial separation on the ground of cruelty, and the husband brought a cross suit for divorce on the ground of her adultery. There was an order for consolidation, but the Court of Appeal held that the co-respondent could not be made liable for the costs of the wife's suit because the suits could not "strictly speaking, be consolidated." This decision must now be read, however, in the light of the decisions of the Court of Appeal in *Horwood v. Statesman Publishing Co.* (3) and *Bailey v. Curzon* (4), which show that an order for consolidation may be made wherever the second suit might from its start have been joined with the first suit, and that the power to consolidate has increased in recent years with the changed practice as to joinder, thus rendering former cases obsolete. In 1901, if a wife brought a suit for judicial separation on the ground of cruelty, a husband was not allowed to file in that suit an answer claiming divorce on the ground of her adultery. That may explain the decision in *Forbes-Smith v. Forbes-Smith* (2). The practice has changed, however, and the husband in such a case would now be allowed to file an answer claiming divorce for adultery. In these circumstances, it seems to me that *Forbes-Smith v. Forbes-Smith* (2) is one of the cases to which SCRUTTON, L.J., referred in *Bailey v. Curzon* (4) when he said (at p. 399) that they had ceased to be binding authorities; and with it goes *Earl v. Earl* (1). B C D

Relieved of those cases, I am of opinion that in this case the order for consolidation was properly made and that its effect was to make both suits part of the "proceedings" of which the costs are in my discretion under the Judicature Act, 1925, s. 50. In the exercise of my discretion, I order the co-respondent to pay the costs incurred and to be incurred on behalf of the husband in these causes both before and after the order for consolidation, including the sums provided by him for the wife's costs. E

Solicitors: *Stoneham & Sons* (for the husband); *Goodman, Brown & Co.*, agents for *R. C. Garrod*, Harrow (for the wife and the co-respondent). F

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

Re MOXON.

[KING'S BENCH DIVISION (Tucker, J.), May 17, 1945.] G

Emergency Legislation—Compensation—Military service—Claim for pension in respect of disablement attributed to war service—Discharge from army on account of schizophrenia—Disability not noted on medical examination on enlistment—Onus of proof—Claim rejected by Minister—"Statement of the case"—Tribunal accepting Minister's findings as evidence—Advice of medical member of tribunal accepted as evidence during deliberations—Minister's findings insufficient—Necessity of supporting evidence—Advice of medical member no evidence—Onus of proof not discharged—Pensions Appeal Tribunals Act, 1943 (c. 39), s. 6 (4)—Pensions Appeal Tribunals (England and Wales) Rules, 1943 (S.R. & O., 1943, No. 1757), rr. 5, 12, 15 (3)—Royal Warrant concerning Retired Pay, Pensions, etc., Dec. 1943 (Cmd. 6489), art. 4. H

The appellant was called up for military service on Nov. 11, 1940, and

served from Dec. 12, 1940, to Feb. 2, 1942, with an anti-aircraft unit on the East Coast. On Feb. 9, 1943, he was admitted to hospital and diagnosed as suffering from simple schizophrenia. On account of this disability, which was not noted on his medical examination on enlistment, the appellant was, on June 8, 1943, discharged from the army. In support of his claim for a war pension, the appellant submitted a written statement in which he attributed his present mental debility and instability to the considerable strain and lack of sleep suffered by him while on duty as a gunner during incessant air-attacks. This statement was forwarded to the officer commanding the appellant's unit who stated that "there was no undue period of successive air-raids which would call for strain" while the appellant was under his command. The claim of the appellant was rejected by the Minister, and the appellant appealed to the tribunal. The relevant facts of the appellant's case as known to the Minister, including the appellant's medical history and the reasons for the Minister's decision were embodied in a "statement of the case" prepared by the Minister for the tribunal in accordance with the Pensions Appeal Tribunals Rules, 1943, r. 5. A copy of the "statement of the case" was supplied to the appellant who disputed the report of the commanding officer and reiterated that he had been subjected to undue strain during the period of his service. The "statement of the case" was not signed and the opinion contained therein was not supported by evidence, documentary or oral. No medical evidence was adduced to show that the disease could not have been caused or aggravated by the matters relied on by the appellant. No oral evidence was given before the tribunal, nor was the appellant present. At the hearing he was represented by counsel. The tribunal disallowed the appeal. Stating that they were not bound by the ordinary rules of evidence, the tribunal accepted the decision of the Minister, as embodied in the "statement of the case," in evidence, having been advised by their medical member that the reasons set out in the Minister's decision were acceptable in the light of his medical knowledge and experience and were, in his opinion, correct. The questions for the determination of the court were (i) whether the tribunal was entitled to receive that part of the "statement of the case" which consisted of the Minister's reasons for his decision as evidence of any facts or matters of expert medical opinion contained therein and relevant to the issues before them; (ii) whether, apart from the minister's decision, the tribunal could have come to the same conclusion on the advice of their medical member given on the undisputed facts, such advice relating to a matter of medical science only, *i.e.*, to the characteristics of the disease in question; (iii) whether, if neither the Minister's decision nor the medical member's advice could be regarded as evidence, the remaining evidence was sufficient in law to discharge the onus imposed on the Minister by virtue of the Pensions Appeal Tribunals Act, 1943, s. 6 (4) and the Royal Warrant, 1943, art. 4, to rebut the presumption that the appellant was entitled to a certificate, since the disease which led to his discharge, was not noted in the medical report made on his enlistment:—

HELD: (i) statements of fact or expert opinion contained only in the decision under appeal and without any other support, oral or documentary, could not be regarded as any evidence of the correctness of such facts or opinions, and such statements were insufficient to shift the onus of proof which lay on the Minister.

Irving v. Minister of Pensions (1) explained. *Mitchell v. Minister of Pensions* (1) applied.

(ii) a quasi-judicial tribunal, such as the Pensions Appeal Tribunal, which was expressly required to have regard to the onus of proof in its adjudications, could regard as evidence only such oral statements or documents in writing as were made in the presence of, or communicated to, both parties before the tribunal reached its decision. The advice of the medical member, having been given during the deliberations of the tribunal, was, therefore, not to be relied upon as evidence.

(iii) the remaining evidence was insufficient in law to discharge the onus imposed on the Minister, and on the evidence adduced by the appellant, he was entitled to an award.

[EDITORIAL NOTE.] This case is concerned with the sufficiency of evidence adduced to a Pensions Appeal Tribunal. The onus of proof in such appeals is upon the Minister to satisfy the Tribunal that the claimant is wrong. It is held that this onus is not satisfied where the Tribunal accepts the decision of the Minister upon medical facts as evidence of the truth of such facts, nor is it satisfied by information given by the medical member of the Tribunal to his colleagues in the course of their deliberations. Although the forum is a quasi-judicial tribunal not bound by the ordinary rules of evidence, such information lacks the essential characteristic of evidence that it should be given in the presence of, or communicated to, the parties, before a conclusion is arrived at.

FOR THE PENSIONS APPEAL TRIBUNALS ACT, 1943, and THE PENSIONS APPEAL TRIBUNALS (ENGLAND AND WALES) RULES, 1943, see HALSBURY'S STATUTES, Vol. 36, pp. 480, 747.]

Cases referred to :

* (1) *Irving v. Minister of Pensions*, [1945] S.C. 21.

* (2) *Mitchell v. Minister of Pensions* (1945), unreported.

APPEAL of the applicant on a re-statement of the case by No. 6 Pensions Appeal Tribunal pursuant to an order of the court dated Dec. 18, 1944. The tribunal disallowed the appeal of the applicant, a gunner in the Royal Artillery, from the rejection by the Minister of Pensions of his claim for compensation in respect of a disease which led to his discharge from the army. The facts are fully set out in the judgment.

G. R. Mitchison for the appellant.

Hon. H. L. Parker for the respondent.

TUCKER, J. : This case comes before me on a re-statement of the case pursuant to my order of Dec. 18, 1944. It raises the question whether the Minister adduced before the No. 6 Pensions Appeal Tribunal evidence sufficient in law to rebut the presumption under art. 4 of the Royal Warrant of Dec. 4, 1943, that where a disease which has led to the discharge of a member of the military forces was not noted in a medical report made on that member on the commencement of his war service he is entitled to a certificate, unless the evidence shows that the conditions set out in the article are not fulfilled.

The following facts were found by the tribunal on evidence, the sufficiency of which is not in dispute :

(1) The appellant was called up on Nov. 11, 1940, and placed in Grade 2. Eleven days later he was placed in category B.1.

(2) He served as a gunner in the Royal Artillery until his discharge June 8, 1943.

(3) From Dec. 12, 1940, to Feb. 2, 1942, he served with an anti-aircraft unit on the East Coast and did duty during air raids.

(4) On Feb. 9, 1943, he was admitted to hospital and diagnosed as suffering from simple schizophrenia.

(5) The disability on account of which he was discharged on June 8, 1943, was schizophrenia.

(6) This disability was not noted on his medical examination on enlistment.

(7) Before joining the army he had not been absent from work except for minor ailments.

(8) Apart from his period of service on the East Coast there were no other conditions causing strain to the appellant, mental or otherwise.

With regard to his service on the East Coast the appellant had supported his claim by a written statement in which he said :

The whole reason for my present mental debility and instability is the nervous effect of my experiences during my army service. Previous to my army service I had not experienced any cause for anxiety or worry such as would lead to mental debility and instability which now disables me from work and previous to such army service I led a normal healthy and active life. For one period of army service I was stationed on the East Coast and there for some considerable time suffered considerable strain by reason of the duties which were necessary during air raid attacks. For some weeks my unit, a heavy anti-aircraft unit, was on duty day and night with very little rest and this subjected me to physical and mental strain such as I had never experienced or had contemplated in civilian life.

This statement was forwarded to the officer under whom the appellant had served on the East Coast and he was asked whether he could confirm it. His reply was as follows :

In so far as he would never experience the same in civilian life, most certainly. As to the strain caused, it is impossible to say. As an ordinary gun number he would man during air raids and when this manning a gun at night robbed a man of his sleep he would make it up during the day. There was no undue period of successive air raids which would call for strain whilst he was under my command.

As to this the tribunal find as follows :

A The report of the officer commanding the appellant's unit dated Mar. 21, 1944, is an accurate statement of the appellant's service duties and conditions.

B No oral evidence was given before the tribunal, nor was the appellant present. He was represented by counsel. All the above facts were found by the tribunal from the "statement of the case," or documents submitted therewith, prepared by the Minister under the Pensions Appeal Tribunals (England and Wales) Rules, 1943, r. 5, and sent by him to the Pensions Appeal Officer after copies had been supplied to the appellant. Under this rule the "statement of the case" must set forth :

(a) the relevant facts relating to the appellant's case as known to the Minister, including the medical history of the appellant, and (b) the Minister's reasons for making the decision against which the appeal is brought.

Under the same rule the appellant is entitled, but not bound to submit an answer indicating :

C (a) whether, and in what respect, the facts in the statement of the case are disputed ; (b) any further facts which in his opinion are relevant to the appeal ; and (c) his reasons for thinking that the decision of the Minister was wrong.

In this case the appellant put in an answer in these terms :

D (a) the facts in the statement of the case which I dispute are as follows : I dispute the statement of the commanding officer of my unit that there was any opportunity to make up lost sleep during the day and I say that I was subjected to undue strain during the period mentioned in my notice of appeal.

E There can be no doubt that under the Pensions Appeal Tribunal's rules—particularly r. 12—the tribunal was entitled to receive the "statement of the case" in so far as it consisted of a statement of the relevant facts as *prima facie* evidence of the facts so stated. Moreover, it could receive documentary evidence submitted by either party. In this case, however, a question arises as to whether the tribunal was entitled to receive that part of the "statement of the case" which consisted of the Minister's reasons for his decision as evidence of any facts or matters of expert medical opinion contained therein and relevant to the issues before them. The tribunal must, of course, give due weight to these reasons and will no doubt be guided by their medical member in technical medical matters arising therefrom, but that is, of course, a very different matter to treating the reasons as equivalent to a written and signed report by a medical expert. In this case the reasons for the Minister's decision as set out in his "statement of the case" were as follows :

G The appellant was grade 2 on examination for enlistment in Aug., 1940. He joined for duty in Nov., 1940, when his medical category was stated to be B.1, and served until Sept., 1941, when he was admitted to hospital for mild mastitis. Thereafter no incident is recorded until hospitalization in Feb., 1943, when he was admitted with a history of being extremely confused and disorientated for time and place. He was stated to have been inefficient at his army duties and was described as slow mentally and physically. Investigation established a diagnosis of schizophrenia, but little improvement could be effected, as he refused electric convulsive therapy and discharge from the service to the care of relatives was advised. Schizophrenia is a common mental disorder of constitutional origin, which characteristically manifests itself without regard to external circumstances. In the experience of the Ministry the disorder is no more prevalent amongst service personnel than amongst civilians. In this case it is claimed that the condition was brought about by duties during air raid attacks, but the report of the officer commanding unit on M.P.T. 23 does not indicate that undue stress was experienced during the period in question. He left the East Coast in Feb., 1942, and it was not until a year later that his mental illness became apparent. In the Ministry's view nothing occurred in service which can be held to have precipitated the condition or contributed to its worsening and the Ministry is unable to certify that Moxon's disorder was either caused or its progress accelerated by any war service factor.

H The tribunal deal with this decision as follows : Under para. 1 of the case stated they say :

Apart from the medical evidence in hospital reports which support the diagnosis of schizophrenia which we accept as correct, there is no medical evidence on the side of the Minister of Pensions to say that this disease could not be caused to aggravated by the matters relied on by the appellant. All that there is on that subject is contained in the decision of the Ministry and counsel for the appellant contends that that is not evidence. There is something to be said for this contention. The decision is not signed by anyone and its writer remains anonymous and the opinion given cannot be tested in the ordinary way and is unsupported by evidence documentary or oral. It is not evidence in the strict sense but Pensions Appeal Tribunals are not bound by the ordinary rules of evidence and evidence is not to be rejected because it would not be admissible in a court of law, and the decision being under review the reasons for it are also, and it is the duty of the tribunal to say whether they are correct, and this being purely a medical question the tribunal has the benefit of the wide experience of its medical member whose functions are not merely to explain the meaning of surgical and medical terms but to give his opinion generally. Reviewing that decision we are definitely of the opinion that the Ministry's decision is correct and that the matters relied on by the appellant did not and, in view of the nature of the disease, could not cause or aggravate the disease and accordingly the appeal must be disallowed.

Later on, when summarising their findings on this point, they say, under para. 3 (h) :

It [that is the tribunal] is entitled to regard the reasons given by the Ministry of Pensions in its decision, set out in the statement of the case, as no less evidence than are the comments of the Minister made under art. 15 of the rules.

They go on to refer to the case of *Irving* (1) in the Court of Session, and under para. (i) they say :

The medical member of the tribunal is charged with the duty to advise the tribunal on the question whether the reasons for disallowing the appellant's claim to a pension set out in the decision of the Ministry are acceptable in the light of his medical knowledge and experience. The tribunal was advised by its medical member that the reasons set out in the decision of the Ministry were in his opinion correct and that in his experience the disorder is no more prevalent amongst service personnel than amongst civilians and that there were no conditions in the service of the appellant that would render probable the contention that his service conditions caused or aggravated the appellant's disability and the tribunal accordingly disallowed the appeal.

Earlier in the case there is a finding of fact by the tribunal as follows :

3 (g) The conditions set out by the commanding officer in M.P.T.23 were insufficient to cause the appellant's disability and that it was due to constitutional causes and origin.

It is clear that the Tribunal's finding is based either on their acceptance of the Ministry's "decision" as "evidence" coupled with their medical member's advice thereon or on the advice of their medical member given on the undisputed facts as set out in the first part of the Minister's "statement of the case" dealing only with facts. Unless one or other of those bases for their decision can be justified it is in my view clear that the remaining material in the case would be insufficient to discharge the onus which lies on the Minister. It will, I think, be convenient at this stage to set out in full the relevant provisions of the Statute and Royal Warrant dealing with the onus of proof. The Pensions Appeal Tribunals Act, 1943, s. 6 (4), provides as follows :

In determining an appeal under this Act in respect of any claim or award, the tribunal shall be bound by the terms of the Royal Warrant, Order in Council, Order of His Majesty or scheme under which the claim or award purports to be made and of any enactment under which any such scheme is made, being terms relating to the issue before the tribunal.

Arts. 3 and 4 of the Royal Warrant so far as material to this case read as follows :

(3) *Basic condition of awards.* Under this Our Warrant awards (other than an award under art. 20) may be made when the disablement or death of a member of the military forces is due to war service.

(4) *Entitlement.* (1) The disablement or death of a member of the military forces shall be accepted as due to war service for the purposes of this Our Warrant provided it is certified that (a) the disablement is due to a wound, injury or disease which (i) is attributable to war service ; or (ii) existed before or arose during war service and has been and remains aggravated thereby . . . (2) In no case shall there be an onus on any claimant under this Our Warrant to prove the fulfilment of the conditions set out in para. (1) of this article and the benefit of any reasonable doubt shall be given to the claimant.

(3) Where an injury or disease which has led to a member's discharge or death during war service was not noted in a medical report made on that member on the commencement of his war service, a certificate under para. (1) of this article shall be given unless the evidence shows that the conditions set out in that paragraph are not fulfilled.

A Under art. 2 of the Royal Warrant, dealing with interpretation, it is provided that the certificate to be given by the Minister where it involves a medical question shall be in accordance with a certificate on that question of a medical officer or board of medical officers appointed or recognised by the Minister for the purpose.

B These provisions as to onus of proof are of the greatest importance to all applicants for pensions and must—one would suppose—be decisive in a large number of cases where the ascertainment of relevant facts is difficult or impossible. In this connection I should like to refer to two passages in the judgments of the LORD JUSTICE-CLERK (COOPER) in the cases of *Irving* (1) and *Mitchell* (2).

In *Irving* (1) he used this language, at p. 29 :

C It is of the utmost importance to keep in view that, under the new Royal Warrant which regulates the right to pensions, it is expressly provided, in contradistinction to the rule which formerly prevailed, that "in no case shall there be an onus on any claimant . . . to prove the fulfilment of the conditions . . . and the benefit of any reasonable doubt shall be given to the claimant." In every issue of disputed facts between two parties, the onus of proof must inevitably be either on the one or on the other, and the result of the provision I have quoted is that the onus of proof is on the Minister. This means that, if at the end of the day the considerations for and against the grant of a pension are so evenly balanced that the tribunal is in reasonable doubt whether to allow or to refuse the appeal, the claimant must succeed. The tribunal in dealing with an appeal are thus in much the same position as a jury in a criminal trial who, if left in reasonable doubt as to the guilt of the accused, are bound to acquit him. The doubt must of course be a reasonable doubt, and not a strained or fanciful acceptance of remote possibilities. Further, the mere fact that the case is one of complexity or great difficulty is perfectly compatible with a decision being reached without reasonable doubt. But in every pensions appeal, the question is not : Has the claimant satisfied us that he is right ? but has the Minister satisfied us that the claimant is wrong ?

In *Mitchell's* case (2) he said :

E On the first question I propose to say very little. In the recent case of *Irving v. The Minister of Pensions* (1), which we decided in Nov., 1944, I expressed views, in which my brethren concurred, with regard to the nature and effect of the onus of proof which arises under the Royal Warrant. To that statement I have nothing to add, and there I propose to leave the matter, because in his concluding speech the Solicitor-General made it abundantly plain that he had no quarrel with that formulation of the position. I shall accordingly proceed to the second issue raised in this case upon the footing that, under art. 4 para. (2), of the Royal Warrant, not only is there no onus of proof on the claimant to a pension, but the benefit of any reasonable doubt must be given to the claimant, and, therefore, the detriment arising from any reasonable doubt must be incurred by the Minister. I further have in view the speciality, which was not present in the case of *Irving* (1) that, by art. 4, para. (3) of the Royal Warrant, it is provided that "Where an injury or disease"—I read short—"which has led to a member's death was not noted in a medical report made on the member on the commencement of his war service, a certificate *shall* be given unless the evidence shows that the conditions . . . are not fulfilled." In that provision I find an added emphasis upon the outlook of the preceding provisions dealing with the duties in the matter of proof imposed upon the claimant and the Minister respectively.

G I respectfully concur in these observations and desire to adopt them as representing my views. As indicated earlier in this judgment, the tribunal in accepting the Minister's decision as evidence founded themselves on the decision of the Court of Session in *Irving's* case (1). That was a decision given under r. 15 which gives power to the tribunal to take the opinion of a medical specialist or other technical expert. After providing for copies of the specialist's report to be sent to the appellant and the Minister, r. 15 (3) reads :

H . . . together with a statement that the appellant or the Minister may comment thereon in writing, if he so desires and may address the tribunal thereon at a further hearing of the case . . .

In *Irving's* case (1) the Minister had submitted a lengthy report in writing with numerous quotations from medical textbooks, and it was argued that these "comments" were inadmissible under r. 15. The court held that the document

was admissible and that it was the duty of the tribunal to consider it. It is to be observed in that case that in the Minister's answer to the note for the appellant under para. xi his contention was stated thus :

The Minister having exercised his right to comment, it became the duty of the tribunal to take these comments into consideration, not as medical evidence in the case but as comments within the meaning of r. 15 (3) and that is what they did.

I do not read the judgment in *Irving's* case (1) on this point as intending to do more than accept the Minister's contention as set out above. A

However that may be, in my view the position under r. 15 is not comparable to that under r. 5 where the Minister is required to set out the reasons for his decision, that decision being the subject of the appeal. In my opinion it is impossible, even when dealing with tribunals which are not bound by the strict rules of evidence, to hold that statements whether of fact or expert opinion contained only in the judgment under appeal, and without any other support oral or documentary, can be regarded as any evidence of the correctness of such facts or opinions, much less as sufficient to shift the onus of proof which lies on the Minister. B

It remains to consider whether apart from the Minister's decision the tribunal could have come to the same conclusion on the advice of its medical member given on the undisputed facts, such advice relating to a matter of medical science, namely, the characteristics of a particular disease: It is no doubt true that the medical member is appointed for the express purpose of advising the other members of the tribunal on technical matters arising out of the evidence as to the proper medical inferences to be drawn from the facts established, but it is, I think, of the essence of "evidence" according to English ideas, when used with reference to judicial or quasi-judicial matters, that it should consist of oral statements or documents in writing which are made in the presence of or communicated to both parties before the tribunal reaches its decision. This is not in my view confined to judicial tribunals bound by legal rules of evidence, but is equally applicable to a quasi-judicial tribunal such as a Pensions Appeal Tribunal which is expressly required to have regard to the onus of proof in its adjudications. C

Information communicated by the medical member to his colleagues during their deliberations does not fulfil those requirements and cannot in my opinion be relied upon as evidence so as to turn the scale and thus enable the Minister to discharge the onus of proof imposed upon him by the Royal Warrant. I would venture to suggest for the consideration of the responsible authorities that where it is intended to lay before the tribunal expert medical evidence in documentary form it is desirable that such evidence should show the name and qualifications of its author. D

In the result I am of opinion that neither the Minister's decision nor the medical member's advice can be regarded as evidence and that the remaining evidence was insufficient in law to discharge the onus imposed on the Minister. On the evidence adduced the appellant was entitled to an award, and his appeal must be allowed and the question submitted to me in the case stated answered in the negative. E

Appeal allowed. F

Solicitors : *Waterhouse & Co.*, agents for *Few & Kester*, Cambridge (for the appellant); *Treasury Solicitor* (for the respondent). G

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

R. v. ARCHITECTS' REGISTRATION TRIBUNAL,

Ex parte JAGGAR.

[KING'S BENCH DIVISION (Lewis, Oliver and Birkett, JJ.), May 1, 2, 3, 1945.]

Registration of Architects—Applicant in control of architectural work of local authority—Refusal by admission committee to enter applicant's name in register—Appeal to tribunal of appeal—Quasi-judicial tribunal—Meaning of "practising as an architect"—Appeal tribunal receiving evidence regarding applicant's case—Tribunal declining to communicate substance of evidence to applicant—Certiorari—Architects (Registration) Act, 1931 (c. 33), ss. 6, 10—Architects Registration Act, 1938 (c. 54), ss. 2, 4.

The applicant held the post of borough engineer and surveyor at Huddersfield. He applied to the Architects' Registration Council to be registered as an architect, submitting the necessary details of his qualifications and specifying the works for which he had been responsible in the capacity of an architect. He also gave the names of two persons to whom reference could be made. The matter came before the admission committee who refused to register him. The applicant thereupon appealed to the Tribunal of Appeal. On Apr. 28, 1944, the tribunal dismissed the appeal. In arriving at their decision, the tribunal acted upon a test which had been laid down previously by them and which contained the following definitions: "An 'architect' is one who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him . . . to arrange for and supervise the erection of such buildings or other works calling for skill in design and planning . . . 'Practising' . . . means: Holding out for reward to act in a professional capacity in activities which form at least a material part of his business. A man is not practising who operates incidentally, occasionally, in an administrative capacity only, or in pursuit of a hobby." On a motion for an order of *certiorari* to quash the decision of the tribunal, it was contended on behalf of the applicant (i) that the tribunal adopted as the basis of their decision definitions of the terms "architect" and "practising" contrary to the Architects' Registration Act, 1938, since, instead of deciding whether the applicant, at the date of the passing of the Act, was or had been practising as an architect, the tribunal considered whether the applicant was a competent architect; (ii) that the tribunal received evidence relating to the applicant's case and improperly declined to communicate the substance thereof to the applicant, or to give him an opportunity of rebutting any adverse statements contained therein; (iii) that the person who acted as clerk of the admission committee and of the registration council, and who so acted when the applicant's original application was considered and determined by those bodies respectively, improperly acted as clerk of the appeal tribunal at the hearing and determination of the applicant's appeal:—

HELD: (i) there being no definition of the word "architect" in the Architects' (Registration) Act, 1931, it was left to the council of architects to determine the proper degree of skill and the qualifications required for a person to be admitted as a registered architect. The test laid down by the council, requiring "adequate skill and knowledge" was reasonable, since the ordinary meaning of the term "architect" connoted a certain amount of skill. The tribunal, therefore, adopted a proper test for their decision whether the applicant was practising as an architect within the meaning of the Act.

(ii) it was improper for the tribunal, which acted in a quasi-judicial capacity, to consider and give weight to evidence contained in documents the contents and source of which were not divulged to the applicant. It was not sufficient that the applicant was merely asked to explain certain information contained in such documents. Since the applicant was, therefore, not given a real and effective opportunity of meeting relevant allegations made against him, the motion to quash the decision of the tribunal must succeed.

R. v. Westminster Assessment Committee, Ex p. Grosvenor House (6) applied. *R. v. Canterbury (Archbp.)* (7) distinguished.

(iii) on the facts, no reasonable person could have suspected the clerk of not being impartial, either by reason of the positions he held or by his conduct, and the mere presence of the clerk, who took no part in the deliberations of the tribunal, did not vitiate their decision.

Re Lawson (4) followed.

[**EDITORIAL NOTE.** This is an important decision upon proceedings before the tribunal set up under the Architects' Registration Act, 1938, to determine appeals by those refused admission to the register of architects. The first point arises on the definition of "practising architect." The Act lays down no definition of architect, but the word as defined by standard dictionaries connotes some degree of skill. The court holds that the test for admission to the register adopted by the tribunal, namely, that the applicant should have adequate skill to originate, design and supervise, can properly be regarded as a test of whether he is a practising architect and not merely of whether he is competent.

The second point deals with the position of the appellate tribunal under the Act as a quasi-judicial tribunal having a duty to disclose to the applicant the contents of documents put in and upon which they propose to act. The court holds that an informal body such as the Admission Committee under the Architects' Registration Act, 1931, may properly use such information but the appellate body must follow the procedure laid down in many decisions and give the applicant the opportunity of considering and if necessary answering the contents of such documents. On this ground an order of *certiorari* to quash the judgment of the tribunal is granted.

A further matter of complaint by the applicant was that the Registrar of the Council and clerk to the Admission Committee also acted as clerk to the Appeal Tribunal, but as he took no part whatever in the deliberations of the Tribunal it is held, as in the Pharmaceutical Society case (*Re Lawson* (4)), that nothing unjust appeared to have been done.

AS TO REGISTRATION OF ARCHITECTS, see HALSBURY, Hailsham Edn., Vol. 3, pp. 352, 353, paras. 659-663.

FOR THE ARCHITECTS' REGISTRATION ACT, 1938, see HALSBURY'S STATUTES, Vol. 31, p. 71.]

Cases referred to :

- (1) *R. v. Board of Education*, [1910] 2 K.B. 165 ; 42 Digest 614, 141 ; 79 L.J.K.B. 595 ; *sub nom. R. v. Board of Education, Ex p. Swansea, Oxford Street (Church of England) School Managers*, 102 L.T. 578 ; *affd. sub nom. Board of Education v. Rice*, [1911] A.C. 179.
- * (2) *R. v. Essex J.J., Ex p. Perkins*, [1927] 2 K.B. 475 ; Digest Supp. ; 96 L.J.K.B. 530 ; 137 L.T. 455.
- (3) *R. v. Sussex J.J., Ex p. McCarthy*, [1924] 1 K.B. 256 ; 33 Digest 294, 97 ; 93 L.J.K.B. 129 ; *sub nom. R. v. Hurst, Ex p. McCarthy*, 130 L.T. 510.
- * (4) *Re Lawson*, (1941) 57 T.L.R. 315.
- (5) *R. v. Local Government Board, Ex p. Arlidge*, [1914] 1 K.B. 160 ; 42 Digest 602, 15 ; 83 L.J.K.B. 86 ; 109 L.T. 651 ; *on appeal, sub nom. Local Government Board v. Arlidge*, [1915] A.C. 120.
- * (6) *R. v. Westminster Assessment Committee, Ex p. Grosvenor House*, [1941] 1 K.B. 53 ; [1940] 4 All E.R. 132 ; Digest Supp. ; 165 L.T. 43.
- * (7) *R. v. Canterbury (Archbp.)*, [1944] 1 K.B. 282 ; [1944] 1 All E.R. 179 ; 113 L.J.K.B. 179 ; 170 L.T. 115.

MOTION on behalf of the applicant for an order of *certiorari* to quash a decision of the Tribunal of Appeal, constituted under the Architects' Registration Act, 1938, dismissing the applicant's appeal from a decision of the Architects' Registration Council, and also for an order of *mandamus* to the said Tribunal of Appeal to hear and determine the appeal of the applicant.

Roland Burrows, K.C., and *A. W. Nicholls* for the applicant.

Richard O'Sullivan, K.C., and *Holroyd Pearce* for the respondents.

LEWIS, J. : The grounds of the motion before us are set out in a statement made by Mr. Jaggar and are three-fold. First, it is said that the tribunal :

Adopted as the basis of their decision definitions of the terms "architect" and "practising" contrary to the Architects' Registration Act, 1938, and thereby took into consideration matters which they ought not to have considered, and failed to take into consideration matters which they ought to have considered and so failed to determine the question which they were required by the Act to determine.

The second ground is :

That the tribunal received evidence relating to the applicant's case, and improperly declined to communicate the substance thereof to the applicant, or to give him an opportunity of rebutting any adverse statements contained therein.

The third ground is :

That the person who acted as clerk of the admission committee and of the registration

council, and who so acted when the applicant's original application was considered and determined by those bodies respectively, improperly acted as clerk of the appeal tribunal at the hearing and determination of the applicant's appeal.

This matter arises under two Acts of Parliament which concern the registration of architects. By the Act of 1931, for the first time, as far as we are aware, it was enacted that a council of architects should be set up who should establish and maintain a register of what were to be known as "registered architects."

A That Act of Parliament also set up a body to be known as the admission committee, who should report to that council their opinion as to the qualifications for registration as an architect of any applicant. If, on consideration of the report from that committee, the council were satisfied that the applicant was a person who should be registered as an architect, the council forthwith should register him as such architect.

By sect. 6 of that Act, it is provided :

B Subject to the provisions of this Act, a person shall, on application made to the council in the prescribed manner and on payment of the prescribed fee, be entitled to be registered under this Act, if the council are satisfied on a report of the admission committee (a) that he is an architect member of the Royal Academy or of the Royal Scottish Academy ; or (b) that his application for registration was made within two years from the commencement of this Act and that at the commencement of this Act he was, or had been, practising as an architect in the United Kingdom ; or (c) that he has passed any examination in architecture which is for the time being recognised by the council ; or (d) that he possesses the prescribed qualifications.

The fact that the Act of Parliament lays down certain matters on which the council, on reading the report of the admission committee, must be satisfied would seem to me to suggest that there are certain qualifications which it is necessary for a person to have under the 1931 Act before the council is bound to register him as an architect under that Act.

D That matter is one, in my view, which becomes of importance when one considers the first of the grounds for the application before the court.

The 1931 Act was followed by the Architects' Registration Act, 1938. The 1938 Act among other things did away with the title of "registered" architect, which was a title which might be used under the 1931 Act, s. 10, by anybody whom the council thought fit to register. But, which is much more important, it set up a tribunal to which anybody, whose application had been refused by the council, could go on appeal from the decision of the council, a decision which, as I have said, was made upon the report of the admission committee. A statutory tribunal was set up of persons who were not members of the council, and were appointed by various departments and persons, which was empowered to hear the complaint of an applicant who had been refused to be made a registered architect by the council. The material section for this purpose is sect. 2 of the 1938 Act :

F Notwithstanding anything in the principal Act, a person shall, on application made to the council in the prescribed manner after the passing of this Act and before the first day of August, 1940, and on payment of the prescribed fee, be entitled to be registered under the principal Act, if he proves, to the satisfaction of the council, or, on an appeal under this section, to the satisfaction of the tribunal hearing the appeal, that at the date of the passing of this Act he was, or had been, practising as an architect in the United Kingdom or in some other part of His Majesty's Dominions.

G Subsect. (3) of sect. 2 is the section giving the constitution of the tribunal, and the tribunal is given power to make rules. The 1938 Act, s. 4 (2) enacts :

A person shall not, for the purposes of the principal Act and this Act, be treated as not practising by reason only that he is in the employment of another person.

H Those, I think, are the only relevant sections of the Acts of Parliament which we have to consider for the purposes of this motion. I should mention they were entitled to make their own regulations under the 1931 Act. The 1938 Act, s. 2 (5) lays down :

Three shall be a quorum at any meeting of the tribunal, and the tribunal shall have power to act notwithstanding any vacancy among the members thereof ; and the procedure of the tribunal shall be such as it may determine.

So, not only were they entitled under the 1931 Act to make their own regulations, but under the 1938 Act they were entitled to lay down their own procedure.

Mr. Jagger applied to be registered as an architect, and he filed the necessary papers in accordance with what was demanded of him under the Act of Parlia-

ment and the rules made thereunder. He set out what he was and what his qualifications were and his professional address, and then he gave, as he had to do in accordance with the Act of Parliament, certain details, namely, that he was employed and served his articles as borough engineer and surveyor, and that he was then borough engineer and surveyor at Huddersfield. Among other things, in accordance with a request which it was laid down that the council could make, he was asked to give the names of two registered architects or other responsible persons to whom reference could be made. Then in this application there follow certain works or schemes for which he had been, as he alleged, responsible as architect. A

The matter came before the admission committee, which is a committee which does not hear the party at all; but his credentials, if I may use that expression, are looked at. The admission committee, having no doubt got other information, then make up their minds and report to the council, and then, in accordance with the Act, if the council are not satisfied on the matters on which they have to be satisfied, on the report of the admission committee, they refused to register. In this case they refused to register Mr. Jagger as an architect under the 1938 Act, whereupon, in accordance with the rules and what was laid down in the regulations, Mr. Jagger proceeded to appeal to the tribunal set up under the 1938 Act. He appeared before that tribunal, being represented by counsel, and a solicitor appeared for the council, but apparently took little or no part in the proceedings. In due course, on Apr. 28, 1944, a document signed by the chairman of that tribunal was sent to Mr. Jagger, which is to this effect: B C

That the tribunal, having considered this case, have dismissed the appeal. The tribunal, by so doing, upheld the decision of the council not to admit Mr. Jagger as an architect.

The first ground of the appeal, which I have already read, raises this question. This is the way in which counsel for the applicant puts it. The tribunal laid down for themselves certain tests as to what the words "practising as an architect" (which occur in the 1938 Act, s. 2, and which is a question they have to decide) mean. At all material times, Mr. Thorpe, K.C., was the chairman, appointed by the Lord Chancellor, of this tribunal. In order to get conformity in the decisions, Mr. Thorpe, K.C., laid down, in consultation with the other members of the tribunal and the council, a definition of the words "practising architect." This test, as we understand it, was laid down on Nov. 26, 1941, and has been applied ever since 1939 or 1940, when Mr. Thorpe, K.C., was appointed, till his death. This is the test on which the tribunal have acted when they have sat: D E

An "architect" is one who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such buildings or other works calling for skill in design and planning as he might, in the course of his business, reasonably be asked to carry out or in respect of which he offers his services as a specialist. "Practising" in this context means: Holding out for reward to act in a professional capacity in activities which form at least a material part of his business. A man is not practising who operates incidentally, occasionally, in an administrative capacity only, or in pursuit of a hobby. F

In and around that definition or guide which the tribunal gave themselves, arises the first point taken by counsel for the applicant in this case. He says: G

We ask the court to quash this decision by writ of *certiorari*, because *certiorari* will lie in a case where a quasi-judicial tribunal, such as this, which has a statutory question to answer, namely, is this man practising as an architect, instead of answering that question, answers another wholly different question.

That, counsel for the applicant says, is the whole vice of this decision. He says that what the tribunal decided in this case was, not whether Mr. Jagger was practising as an architect, but whether he was practising as a competent architect. Counsel for the applicant says that the Act does not say they have to find out if he is practising as a competent architect. It only says they have to decide whether he is practising as an architect. There may be a great many people who are extremely incompetent architects, but, he says, the only question the tribunal has to decide is, is he practising as an architect? Counsel for the applicant lays stress on the words in the definition, where something is said H

about aesthetic considerations and the fact that anybody to be an architect, according to this definition, must be a person of "adequate skill and knowledge." That argument sounds, at first sight, to be extremely attractive. If the tribunal had decided, as counsel for the applicant asks us to say, that wrong question, not the question which was submitted to them, speaking for myself I have no doubt whatever, on the authorities and certainly one case—namely, *Board of Education v. Rice* (1), this court could, if they were satisfied the tribunal had not

- A answered the question which they were asked to answer but had answered something else, properly issue a writ of *certiorari* to quash their decision. But I venture to think the fallacy, if I may be permitted to say so, of the argument of counsel for the applicant is this. There is no definition of the word "architect" in these Acts of Parliament, or in any other Act of Parliament as far as I know—certainly in no Act of Parliament to which we have been referred. There are indications in the 1931 Act that before a person can be registered as an architect,
- B he must have certain qualifications, but I do not lay too much stress upon that. There being no legal definition in the Act of Parliament of the word "architect," one has recourse to the ordinary meaning of the word "architect." Using one's knowledge, and looking at the dictionary definitions of the word "architect," it is perfectly clear to my mind that the word "architect" connotes a certain amount of skill. In MURRAY'S NEW ENGLISH DICTIONARY, which counsel for the respondents cited to us yesterday, the first meaning of "architect" is :
- C A skilled professor of the work of building, whose business it is to prepare the plans of edifices, and exercise a general superintendence over the course of their erection. Therefore, one has the fact, if that definition of the word "architect" in MURRAY'S NEW ENGLISH DICTIONARY is right, the word connotes "A skilled professor." If one looks at WEBSTER'S INTERNATIONAL DICTIONARY, the meaning of "architect" is given as "A person skilled in the art of building."
- D In my opinion, the word "architect" must convey to anybody some degree of skill. There being nothing in the Act of Parliament to guide the council as to the meaning of the word "architect," it seems to me that the legislature purposely—one can very well see the reason of it—left to the council of architects the task of deciding what the proper degree of skill, or what the proper qualification or qualifications were for a man who was entitled to be called a registered architect. There is no question that under this Act of Parliament the powers
- E given to the council are powers which might, and do, affect very much a man's livelihood, but one can well see that qualification in the profession of architect is an important matter, and one which is highly valued by architects themselves. In my view, Parliament were saying that you have got to impose such qualifications as you think right. I am not for one moment suggesting that, if the council put some outrageous test which a person applying to be registered as an architect had to pass before he could be registered as an architect, it
- F might not be said in this court that the tribunal, by setting up this ridiculous test, had not really considered the question they ought to have considered, namely, whether this particular person was practising as an architect. But, in my view, in view of the terms of the interpretation laid down by the profession themselves, it is impossible to say, as counsel for the applicant wants us to say, that the question that they were in fact deciding was whether this man was a
- G competent architect. In my view, that was not the question. They were deciding the question : Was he practising as an architect within the meaning of the Act ? As the Act says nothing as to what the test should be, as I have already said, the council are entitled to lay down as a tribunal their own procedure.

I am reminded by my brother OLIVER, J., that the words used in the definition—I think I did read it—are "adequate skill," which to my mind is by no means putting a very high test of skill, but such skill as is adequate to qualify as an

- H architect. In my view, therefore, this motion fails on the first ground.
- I would like to deal next with the third ground. The third ground concerns the clerk of this body, Mr. Pembroke Wicks. In his affidavit he says he is a barrister-at-law, and is clerk to the appeal tribunal, and is also registrar of the architects' registration council, and also clerk to the statutory admission committee. He sets out in his affidavit his duties. His duty in the admission committee is :

... to carry out the instructions of the committee in correspondence with applicants for registration, and to give such legal advice to the committee as they may require,

while in the appeal tribunal my duty is to provide the machinery necessary for the hearing of the appeals, and to communicate the decisions of the tribunal to the appellants. He also states in terms :

I do not take part either in the deliberations of the admission committee on the merits of an application, or in the deliberations of the appeal tribunal.

Those facts are not challenged. Nobody suggests that Mr. Wicks has not stated in his affidavit perfectly candidly what he does and what his duties are. But it is said by counsel for the applicant that Mr. Wicks is a three-fold official, if I may use that expression, in the architects' council. He is registrar of the council : he is the clerk to the admission committee, which is the body which first of all has to look into these applications and report to the council : and then, if there is an appeal, he says he is the clerk to the appeal tribunal.

There are a great many cases, some of which we have been referred to, which go to the point of impropriety—I use no other word for the moment—of a person forming part of the tribunal which is trying a case in which he may have an interest, however slight. There is the case which was cited to us of the justices' clerk, whose firm had advised some lady or gentleman in some separation proceedings which came before his bench of magistrates without his knowledge. But it was held, though he did not know of the connection which his firm had with one of the suitors before his bench of magistrates, that it was improper for him to have taken any part, even the part of a magistrates' clerk, who was there after all only to advise the magistrates, and does advise the magistrates, but takes no part in the decision in the sense of ascertaining the facts. The court, invoking the principle which runs through all these cases on this subject, said that it is not a question as to whether justice has not been done, but the question is in all proceedings in the courts of this country or tribunals wielding quasi-judicial power, that it must be perfectly clear that justice "is seen to be done." It is said where you get circumstances such as I have, I hope more or less accurately, described in the case which I was referring to of *R. v. The Justices of Essex, Ex p. Perkins* (2), that the principle is infringed. There is also a similar case of *R. v. The Sussex Justices, Ex p. McCarthy* (3). Those are cases which, as I say, illustrate the principle that the court will quash by *certiorari* a case in which it is found, although quite uncommonly found, that the clerk to the tribunal is a person who has either given some advice, or his firm without his knowledge has given some advice, to one of the parties in the matter before the magistrates.

In my view, this case is very different to any of the cases which have been cited to us, with the exception of the latest case, as far as I am aware, on this topic of *Re Lawson* (4). That is a case in which there was a tribunal called the statutory committee of the Pharmaceutical Society of Great Britain. The point there was taken that the clerk of that tribunal ought not to have been present at the hearing, though taking no part, because he was an interested person in a sense. The headnote says, at p. 315 :

The appellant, a registered pharmacist, was found by the statutory committee of the Pharmaceutical Society of Great Britain to have been guilty of such misconduct as in the opinion of the statutory committee rendered him unfit to remain on the register of the society, and his name was accordingly directed to be removed therefrom. In pursuance of the provisions of sect. 14 (3) of the Pharmacy and Poisons Act, 1933, he appealed on the merits of the case, and, *inter alia*, on the ground that on the conclusion of the hearing of the case one L. who was the secretary of the Pharmaceutical Society and its council and also of the statutory committee, was present during the deliberations of the committee, contrary to a regulation which provided that the deliberations of the committee should be held in private, and that the decision of the committee was vitiated thereby. Before the hearing by the committee L., as its secretary, had written certain formal letters dealing with the procedure adopted by the committee on the hearing of a complaint, but he took no part in the deliberations of the committee after retiring with them.

VISCOUNT CALDECOTE, L.C.J., and HUMPHREYS, J., refused to accede to that argument, and said there was nothing improper in what had happened. What both VISCOUNT CALDECOTE, L.C.J., and HUMPHREYS, J., emphasised was that the question whether justice was not "seen to be done" must be a substantial question or must be a question of substance and of fact. The test is that of a reasonable person. Therefore, it is necessary to look at all the circumstances

in which this accusation is made, namely, that there was sitting, as clerk to the tribunal, a person who, by his position or his conduct, must have had a bias. The facts of this case are these. The tribunal did not retire to give their decision. They made up their minds in the room or court where they were sitting. Mr. Wicks, although present, took no part whatever in the deliberations. All that is conceded. For my part, I cannot see how either by reason of his position or his conduct, Mr. Wicks can be said to have exhibited anything which can be said to have given colour to a reasonable man to think that justice was not "seen to be done." Speaking for myself, I place great reliance on that case which I have just cited, and, in my view, it cannot be distinguished from the present case, bearing in mind that the test always is, not whether injustice has been proved to have been done—of course, no doubt it could be shown in some cases injustice was done by interference by the clerk, but that is not the real test—but whether justice is "seen to be done." In other words, was injustice manifestly done? In this case, in my view, the evidence on the affidavits before us is quite clear, that no reasonable man could suggest that there was anything in the conduct of Mr. Wicks, or the tribunal, on this branch of the case which showed that anything unjust appeared to be done. Therefore, I think on the third ground, in their order in the notice of motion, this application fails.

But with regard to the second ground, I think the matter is considerably more serious. It is the practice of the admission committee, as I have already said, to decide upon the report that they would make to the council upon the application sent in by the applicant with any documents he likes to send up with it, and any information which the admission committee may gather from outside, or anywhere else, with regard to the particular applicant. They do not have a hearing. They merely sit and decide the matter and report to the council. The council, acting on that report, either registers, or does not register the applicant. If the applicant's application is refused and he appeals, the matter comes before the tribunal of appeal. There the applicant can, and in this case did, go with his counsel to prove to the tribunal that he was practising as an architect, in the words of the section, at the material time, and, therefore, was entitled to be registered. At that hearing it transpired (and this only came to light after the affidavits in this case were filed)—that the tribunal had the file which the admission committee had had before them, and in it there were four letters of which complaint is made. Of those letters the applicant had no knowledge whatever. Mr. Crocker, who has sworn an affidavit in this case, has stated that Mr. Jagger, when he lodged his form of application for admission to the register of architects, had given as referees the names of Mr. Frank Abbey and Mr. J. E. Lunn. Letters from these two gentlemen were before the appeal tribunal on the file of the admission committee at the hearing of Mr. Jagger's appeal. It is quite true, as Mr. Crocker says, that Mr. Jagger did, when he lodged his form of application, give as referees the names of those two gentlemen. That appears on his form. He also gave apparently a letter from Mr. Lunn, and a letter from another gentleman named Procter, the town clerk of Huddersfield. Apparently Mr. Lunn and Mr. Abbey—Mr. Lunn certainly—sent another letter. Mr. Jagger did know of the existence of those letters at the hearing, and applied to see them, but that was refused. But there were two other letters written by a gentleman, who is nameless, and whose name has not been divulged, who had written to the admission committee, because on the file of the admission committee were two letters from a third architect, to whom Mr. Jagger had not referred, offering certain observations upon Mr. Jagger's qualifications. Those two letters were before the tribunal, and Mr. Jagger not only never saw them, but was entirely ignorant of their existence. Mr. Jagger complains in this case, first of all, that there were the two letters from his referees, of the existence of which he knew, which he was not permitted to see, and also there are the two other letters from the unknown architect which were before the tribunal, he says, improperly. Those are documents which he says he was entitled to see, and the contents of which he was entitled to know. In my view, it is not necessary or material to know whether or not those letters were unfavourable to Mr. Jagger or not. But it would appear that the two letters which were received from the unknown architect and the referees were used as material on which to base "pertinent questions." It would appear from para. 5 of Mr. Crocker's affidavit that those

references and those two letters contained unfavourable observations, because Mr. Crocker has sworn :

The practice of the tribunal has always been to give full weight to favourable references and to use unfavourable observations in references only as material upon which to base pertinent questions directed to elucidating from the appellant the truth in relation to those observations.

For the purposes of my judgment, it matters not whether those observations were hostile or contained severe criticism or not, because whatever those letters A contained was not divulged to the applicant or his advisers.

There are a great many authorities upon this question of tribunals of this character other than courts of justice where documents have not been shown to one party or the other. There is the case, to which I have already referred on another point, of *The Board of Education v. Rice* (1). Then there is *Arlidge v. The Local Government Board* (5), and *R. v. The Westminster Assessment Committee* (6) in which the same sort of point was taken, it being said that documents were not produced or the tribunal had before them information which was not divulged to the applicant or the person appearing for him. I am not going through all the authorities because it appears to me there is one underlying principle in cases of this sort. I cite this passage from the judgment of SCOTT, L.J., in *R. v. Westminster Assessment Committee* (6), where he comments on the fairness or unfairness of an assessment committee using matter which has been collected for the purpose of the inquiry and not divulging to the party appearing before it the contents of the report. SCOTT, L.J., said, at p. 65 ([1940] 4 All E.R., at p. 140) :

On the other hand, if after the hearing it obtains such a report, it does seem to me inconsistent with what I can only call a sense of natural fairness, that although it may be really relevant, either because it supports or because it controverts the ratepayer's objection, the assessment committee should not disclose it to the ratepayer's adviser, and give him a chance of dealing with it. On the whole I think it should, in such a case, resume the hearing after due notice. D

Then DU PARCQ, L.J., delivering judgment on grounds with which CLAUSON, L.J., agreed, says, at p. 69 ([1940] 4 All E.R., at p. 143) :

One answer to this contention, and we think a sufficient answer, is that the experience of an expert tribunal, such as this, is part of its equipment for determining the case. Litigants must take that experience as they find it : and because the tribunal is assumed to be impartial they have no grievance if they cannot test it by cross-examination. E

That referred to the reports which an assessment committee or a committee of that sort had had made some time ago, which he says is all part of their general equipment and knowledge. Then he deals, at p. 69, ([1940] 4 All E.R., at p. 143), with a report obtained, so to speak, *ad hoc* from an expert witness or adviser : F

An expert witness or adviser, however eminent, is in a very different position. He must not be substituted for the tribunal. Those whose claim is being considered have a right to question and to test every statement he makes, and any opinion he expresses. If that opportunity is denied them, justice is not done. On the ground, therefore, that the committee improperly (though no doubt with the best intentions) considered and gave weight to evidence and, it may be, argument, which was never communicated to the parties most interested, we are of opinion that the respondents are entitled to have the determination of the committee quashed. It follows that *mandamus* "to hear and determine" must also go. G

The principle is that a person before a tribunal of this character should, to use the words of LORD GREENE, M.R., at p. 290, ([1944] 1 All E.R., at p. 181), in *R. v. The Archbishop of Canterbury* (7), have :

... a real and effective opportunity of meeting any relevant allegations made against him. H

If that is not done in a case where the committee or tribunal concerned is a quasi-judicial tribunal, then it is contrary to natural justice and the infringement of the rule that justice must always "be seen to be done."

Reliance was placed on *R. v. The Archbishop of Canterbury* (7), on which case I need only make this comment. The court in that case said the Archbishop was not exercising a function analogous to that of a person hearing a *lis inter partes*, and he was under no obligation to act in a quasi-judicial manner. Therefore

the court held that certain information which he had he was not bound to divulge to the person whose case he was hearing. There was no *lis inter partes*, and he was not acting in a quasi-judicial manner.

The tribunal had before them, and used, documents which should have been disclosed, or documents which the applicant was entitled to see if they were going to be used by the tribunal. I wish to make it perfectly clear that I am not for one moment suggesting that any of the three members of this tribunal acted in any improper manner in the sense that they did not act *bona fide*. But they did not, in my view, do what the authorities say they should have done, which was to give a real and effective opportunity to the litigant to deal with, or meet, any relevant allegations made in these documents. Sir Richard Allison and Mr. Crocker have each sworn an affidavit, which I need hardly say I entirely accept. But when one looks at those affidavits, especially at the affidavit of Mr. Crocker, one finds that he does not say that a fair opportunity was given to the applicant, Mr. Jagger, to meet the allegations. The letters referred to were used as material upon which to base "pertinent questions." Mr. Jagger was in entire ignorance—indeed, the contrary is not suggested—of the fact that the tribunal had before them two letters at least which had been sent by some third party to the admission committee. Whether stating to an applicant: "We have certain information, A, B, C and D, will you deal with it?" is giving a litigant a real and effective opportunity of dealing with the matter when the litigant is not told who the informant is, I do not decide. I am extremely doubtful whether anything short of telling the litigant what the information is and what source it came from would be giving him a real and effective opportunity of dealing with it. When that is not done, as it was not done in this case, and the tribunal have before it correspondence of this nature which is not disclosed, and the tribunal look at that correspondence and base what they call relevant questions upon that correspondence, it seems to me, as I view it, that that is not doing what this tribunal in its position should have done, namely, if they looked at the letters at all, to inform the litigant what they contained and the source from which they came. I wish to repeat again that no suggestion is made as to the integrity or *bona fides* of any members of the tribunal, or of Mr. Wicks, or anybody else.

In my view, this is a case in which the tribunal were wrong in not letting Mr. Jagger or his counsel have knowledge of these documents if the tribunal were going to look at them and use them. I appreciate what is said in the affidavit with regard to the references that there is a necessity to keep the names of the referees or any of the information which is obtained secret because otherwise the value of the references might well be diminished. It may be that it is perfectly right for the very informal body, the admission committee, to have this information before them, but if there is an appeal—I am not expressing this view as a judge—I suggest it would be wiser that the tribunal should not have before them material such as has been sent to the admission committee unless the applicant is fully informed of it. That is only a suggestion which I throw out.

As the matter stands at present, I feel that this motion should succeed on this second ground which is set out in the notice; that the tribunal received evidence regarding the applicant's case and improperly declined to communicate the substance thereof to the applicant or to give him an opportunity of rebutting any adverse statement contained therein. As I have said, I think that ground for the motion succeeds.

OLIVER, J.: I agree with my Lord's judgment, and I have nothing to add.

BIRKETT, J.: I also agree with my Lord's judgment, and I, too, have nothing to add.

Order of certiorari to quash the tribunal's decision granted with costs. No order for mandamus. Tribunal undertaking to re-hear appeal.

Solicitors: Hargrove & Co. (for the applicant); Janson, Cobb, Pearson & Co. (for the respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

FENDOCH INVESTMENT TRUST CO. v. INLAND REVENUE COMMISSIONERS. ALPORTENO INVESTMENT TRUST CO. v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Russell of Killowen, Lord Macmillan, Lord Porter, Lord Simonds and Lord Goddard), **February 21, 22, May 17, 1945.**]

Income Tax—Sur-tax—Investment company—Apportionment of income—All income apportioned by Special Commissioners to one member—Whether facts to be considered in apportioning income are those existing at the end of the year—Jurisdiction of Commissioners to direct that income of company is deemed to be income of member—Finance Act, 1922 (c. 17), s. 21, First Schedule, paras. 4, 9—Finance Act, 1936 (c. 34), s. 20 (1)—Finance Act, 1939 (c. 41), ss. 14 (1), 15 (2), (3).

The Fendoch company was an investment company which, throughout the financial year 1938-39, was under the control of Mrs. Elizabeth Murray, who was assessed to sur-tax for that year in respect of the company's income pursuant to the Finance Act, 1922, s. 31 and the Finance Act, 1939, s. 15 (7). The original capital of the company was £100,000 divided into 10,000 "A" ordinary shares, 45,000 "B" ordinary shares and 45,000 "C" ordinary shares of £1 each. All the "A" and "B" shares were held, since Sept., 1937, by Mrs. Murray. On Apr. 4, 1938, special resolutions were passed whereby "A" shares were to carry rights of 10 votes each on a poll, whereas the holders of "B" and "C" shares were given one vote for every five shares. Mrs. Murray thereby obtained the complete control of the company. On Dec. 8, 1939, further resolutions were passed reorganising the capital of the company. The capital was reduced to £70,000 divided into 15,000 "B" shares and 55,000 "C" shares, the whole of the 10,000 "A" shares and 30,000 of the 45,000 "B" shares being redeemed and the remaining "B" and "C" shares being converted into ordinary shares ranking equally. Thus for the period from Dec. 8, 1939 to Apr. 5, 1940, the end of the financial year, Mrs. Murray, holding 15,000 shares only, was no longer in control of the company. The Special Commissioners, acting under the powers given to them by the Finance Act, 1939, s. 15 apportioned the whole of the actual income of the company for the years of assessment 1938-39 and 1939-40 to Mrs. Murray. The appellants, while not disputing that the apportionment for 1938-39 must stand, contended that the facts which enable the commissioners to make an apportionment must exist on the last day of the year of assessment and that in the present case they did not exist on Apr. 5, 1940; alternatively, that no apportionment could be validly made which did not recognise and give effect to the fact that from Dec. 8, 1939, to Apr. 5, 1940, the position was changed, so that in any case not the whole of the actual income of the company for the year of assessment could be properly apportioned to Mrs. Murray:—

HELD: (i) the commissioners were entitled to make an apportionment under the Finance Act, 1939, s. 15, against a person of whom it could be predicated at any time in the fiscal year that he was "able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interests in the company, considered in relation to the value for those purposes of the relevant interests of other persons therein."

(ii) as to quantum, the power of the commissioners was to apportion to the member, or a person who was treated as a member, such part of the income "of the company as appeared to them to be appropriate." Since there was no ground to say that the commissioners exercised improperly their statutory discretion, the direction of the commissioners should not be interfered with.

Decision of the Court of Appeal ([1943] 2 All E.R. 413) *affirmed.*

[EDITORIAL NOTE. In the case of an investment company the Finance Act, 1939, s. 15, gives power to the Special Commissioners to apportion the company's

income to any person, a member of the company and in their opinion able to secure that income or assets of the company will be applied for his benefit. No time is indicated in relation to such person, and it is argued that the power to apportion depends upon the circumstances existing on the last day of the year of assessment. The House holds, however, that apportionment may be made if there is ability to secure income or assets at any time during the fiscal year.

- A As to the quantum of the apportionment, the commissioners have an absolute discretion, and an apportionment of the whole income of the company upon a person having control of the company during some part of the year is held valid, although control was surrendered during the year.

The decision in this case is of importance not only upon the immediate subject of consideration, but also upon the power of the Special Commissioners to make apportionment of the income of companies within the Finance Acts of 1922 and 1936. The leading speech suggests that this power is a wider one than has previously been supposed.

- B As to UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289, 290, paras. 574, 575; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674g-674cc.

FOR THE FINANCE ACT, 1939, s. 15, see HALSBURY'S STATUTES, Vol. 32, pp. 185-187.]

- C CONSOLIDATED APPEALS by the companies from decisions of the Court of Appeal (SCOTT, MACKINNON and LUXMOORE, L.J.J.), dated June 9, 1943, and reported [1943] 2 All E.R. 413, affirming a decision of MACNAGHTEN, J., dated Jan. 14, 1943. It was agreed that, as the questions in the two appeals were identical, the decision in the Fendoch company case should govern that in the Alporteno company case. The facts and arguments are fully stated in the opinion of LORD SIMONDS.

Cyril King, K.C., and J. S. Scrimgeour for the appellants.

- D *The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp* and *Reginald P. Hills* for the respondents.

LORD RUSSELL OF KILLOWEN: My Lords, I have had an opportunity of reading and considering beforehand the opinion about to be delivered by LORD SIMONDS. I concur in it and I desire to add nothing to it. LORD MACMILLAN who is unable to be present here today, desires me to say that he also concurs in that opinion.

- E LORD PORTER: My Lords, I also have had a like opportunity and find it unnecessary to add anything to the opinion prepared by LORD SIMONDS, with which I agree.

LORD SIMONDS: My Lords, these consolidated appeals are from orders of the Court of Appeal (SCOTT, MACKINNON and LUXMOORE, L.J.J.), affirming orders of the King's Bench Division (MACNAGHTEN, J.), which had affirmed decisions of the Commissioners for the Special Purposes of the Income Tax Acts. F In each case the issue turns on the meaning and effect of the Finance Act, 1939, s. 15, and it is conceded on both sides that the decision in one case must govern that in the other. It will be sufficient therefore to state the facts in one case only and following the course taken at your Lordships' bar I shall confine myself to the facts of the case of the Fendoch Investment Trust Company, which I will call "the Fendoch company."

- G On Sept. 20, 1935, the late P. A. Molteno (whom I will call "the settlor") executed a trust deed between himself as settlor and three other persons as trustees, namely his daughter, Mrs. Elizabeth M. Murray, her husband Lenox Biggar Murray, and Vincent B. Molteno. The trust fund was to consist of such funds or properties as the trustees might from time to time receive. During his lifetime the settlor had power to direct in what manner the trust funds should be invested and to appoint new trustees. The trusts, as declared and subject H to a power of variation that was not exercised, were for the accumulation of income during the settlor's lifetime and thereafter for the benefit of Mrs. Murray's children or their issue. Three days later, on Sept. 23, the settlor formed the Fendoch company, an unlimited company, and to it in due course transferred investments of the value (at cost) of £87,070. The original capital of the company was £100,000 divided into 10,000 "A" ordinary shares of £1 each, 45,000 "B" ordinary shares of £1 each and 45,000 "C" ordinary shares of £1 each.

On Sept. 26, 1935, a special resolution of the company was passed whereby (a) the voting rights were so arranged as to give the holders of "A" shares

control of the company, ten votes being given for each "A" share and one vote only for every five "B" or "C" shares, and (b) during the settlor's lifetime, so long as he held all the "A" shares of the company, each class of shares was to be entitled to such dividends as the company in general meeting should determine and (c) on the settlor's death all shares were to be merged into one class ranking equally and (d) the settlor was to be chairman and governing director of the company for his life. I have stated compendiously and with sufficient accuracy for the present purpose the elaborate provisions of the special resolution.

On Dec. 31, 1935, the settlor held 10,000, that is, all the "A" shares, Mrs. Murray held 45,000 "B" shares, and the trustees of the settlement of Sept. 20, 1935, held 40,000 "C" shares, which had been transferred to them by the settlor on Sept. 26, 1935. A further 2,920 "C" shares were at a later date acquired by the trustees. On Sept. 19, 1937, the settlor died. He had been in control of the company since Sept. 26, 1935, under the terms of the special resolution which I have stated, but upon his death the three classes of shares merged and became one class with equal rights. The trustees of the settlement as the holders of 42,920 out of 97,920 issued shares of the company were thus in a position to prevent the passing of any special resolution which might prejudice their rights. By his will which was duly proved by the executors therein named, his brother Vincent B. Molteno, his son, Donald James Molteno, and Mrs. Murray, the settlor bequeathed his 10,000 "A" shares of the company to Mrs. Murray.

Thus matters rested until Apr. 4, 1938, when by further special resolutions of the company duly passed on that day the former capital structure of the company was restored to what it had been before the death of the settlor and Mrs. Murray was appointed governing director with all the powers previously possessed by the settlor. Thus as beneficial owner of all the "A" shares with their former voting rights restored to them and as governing director, Mrs. Murray had complete control of the company and was able to secure to herself as holder of "A" or "B" shares and to deny to the settlement trustees as holders of "C" shares as much or as little of the income of the company as she thought fit. In this resolution the trustees had strangely acquiesced. On Dec. 8, 1939, the final event in the story took place. On that day further special resolutions of the company were passed whereby its capital was again re-organised. The effect of these resolutions was that the capital of the company was reduced to £70,000 divided into 15,000 "B" shares and 55,000 "C" shares, the whole of the 10,000 "A" shares and 30,000 of the 45,000 "B" shares being redeemed, and that the remaining "B" shares and the "C" shares were then converted into ordinary shares ranking equally. Thus for the period from Dec. 8, 1939, to Apr. 5, 1940, the end of the financial year, Mrs. Murray held 15,000 shares and the settlement trustees held 42,920 shares all ranking equally. Mrs. Murray no longer controlled the company.

My Lords, the question for your Lordships' decision arises upon certain apportionments of the income of the Fendoch company that were made by the commissioners under the Finance Act, 1939, s. 15, during the relevant periods, but, before I refer to them, I must remind your Lordships of certain provisions of the Finance Acts affecting this company.

The Fendoch company is an "investment company" as defined by the Finance Act, 1936, s. 20 (1). As it was at all material times under the control of not more than five persons, it was a company to which the Finance Act, 1922, s. 21, applied. None of its income consisted of estate or trading income. Therefore by the Finance Act, 1939, s. 14 (1), the whole of its actual income from all sources must be deemed for the purposes of assessment to surtax to be the income of its members, and the Special Commissioners were bound to give a direction that the whole income of the company for the fiscal year 1938-39 and for each subsequent fiscal year of assessment should be deemed to be the income of the members. It is not in respect of these matters that any controversy has arisen. It is conceded that the directions were correctly given and that having given them the commissioners were bound to make an apportionment. The question for your Lordships' consideration arises out of the fact that the Special Commissioners acting under the powers given to them by the Finance Act, 1939, s. 15, apportioned the whole of the actual income of the company for the years

of assessment 1938-39 and 1939-40 to Mrs. Murray and it is to this section that I must now turn, though it will be necessary at a later stage to refer also to the earlier Finance Acts.

Sect. 15 of the Finance Act, 1939 (which falls within Part II of the Act and therefore under sect. 38 (3) is to be "construed as one with the Income Tax Acts") provides as follows :

A (1) If in the case of any investment company the Special Commissioners are of opinion that any person who is not a member of the company for the purposes of sect. 21 of the Finance Act, 1922, and the enactments relating thereto is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit, they may, if they think fit, treat him as a member of the company for the said purposes.

(2) In apportioning for the purposes of the said sect. 21 the income of an investment company :

B . . . (c) to any person who is a member of the company and in their opinion is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interests in the company, considered in relation to the value for those purposes of the relevant interests of other persons therein ;

C the Special Commissioners may apportion to him such part of the income of the company as appears to them to be appropriate and may adjust the apportionment of the remainder of the company's income as they may consider necessary.

It will be observed that subsects. (1) and (2) (c) deal with two classes of persons (a) a person who "is able to secure . . ." and (b) a person who "is likely to be able to secure . . ." Subsect. (3) defines these two classes and it is common ground that Mrs. Murray does not fall within class (b). She is covered, if at all, by the first branch of subsect. (3) which provides that for the purposes of the section a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is in fact able to do so by any means whatsoever whether he has any rights at law or in equity in that behalf or not. By subsect. (6) (c) the expression "relevant interests" is defined to mean in relation to a person connected in any way with a company interests by reference to which income could be apportioned to him for the purposes of the Finance Act, 1922, s. 21, apart from the provisions of that section, and the expression "value for apportionment purposes" to mean in relation to any relevant interests in any company the value falling to be put thereon in apportioning income of the company for the purposes of the said sect. 21.

It is not, I think, necessary to refer to any other provision of the Finance Act, 1939. Acting under the wide discretionary power given to them by sect. 15 the Special Commissioners treated Mrs. Murray as a person who in the years of assessment 1938-39 and 1939-40 was able to secure that income or assets whether present or future of the company should be applied for her benefit to a greater extent than was represented in the value for apportionment purposes of her relevant interests in the company and accordingly as already stated thought it appropriate to apportion to her the whole of the company's income for the same two years of assessment. It is not disputed before your Lordships that the apportionment for the earlier year of assessment, 1938-39, must stand.

G From Apr. 6, 1938 to Apr. 5, 1939, Mrs. Murray was in absolute control of the company. What was in fact done with the income of the company is immaterial : it was the indisputable fact that she was in a position to do what she liked with it.

It is in regard to the second year of assessment that the validity of the apportionment is still challenged. Your Lordships will remember that it was in the course of this year that the last recorded change in the financial constitution of the company took place. On Dec. 8, 1939, Mrs. Murray surrendered her control of the company in the manner that I have already stated and thereafter and particularly on the last day of the fiscal year, the 5th April, 1940, she was a minority shareholder in a company, all of whose shares carried equal voting and other rights. It is on this fact and this fact alone that the Fendoch company relies, contending that the facts which enable the commissioners to make an apportionment must exist on the last day of the year of assessment and that in the present case they did not exist on Apr. 5, 1940. In the alternative it is claimed that no apportionment can be validly made which does not recognise

and give effect to the fact that from Dec. 8, 1939, to Apr. 5, 1940, the position was changed, so that in any case not the whole of the actual income of the company for the year of assessment can be properly apportioned to Mrs. Murray.

These contentions, which have been rejected in turn by the Special Commissioners, by MACNAGHTEN, J., and by the unanimous judgments of the Court of Appeal, must now be examined.

Upon the language of the Finance Act, 1939, s. 15, taken by itself counsel for the Fendoch company did not appear to rely. There is nothing in that section to confine a member or a person who "is able to secure, . . ." to one who fills that role on the last day of the fiscal year. Strictly read the present tense in the expression that I have cited might refer to the date of apportionment. This is a construction which has nothing to commend it. Some words then have to be written in; the Fendoch company would write in "on the last day of the year of assessment," the respondents "at any time during the year of assessment." Between these alternatives I have no hesitation in adopting the second. Here is a section, which is intended to bring within the ambit of taxation to surtax for a particular year of assessment a class of persons who under pre-existing law would be outside it. I should require a clear expression or compelling context before I concluded that inclusion within or exclusion from that class depended on the circumstance that on the last or any other day of the year of assessment a person did or did not fill the prescribed role. In the section read by itself neither grammar nor context demand the construction for which the appellants contend.

It is however on the scheme of taxation of which the Finance Act, 1939, s. 15, forms part that reliance is placed. It is urged that a consideration of the Finance Act, 1922, s. 21, which may be regarded as the principal Act, and of the amending Acts shows that it is as on the last day of the year of assessment that the position has to be reviewed, and to support this contention your Lordships have been invited to consider in detail the elaborate provisions of the principal and other Acts which have been framed to meet the no less elaborate devices of those who would escape from a position in which surtax is exigible. My Lords, I do not doubt that in construing the latest of a series of Acts dealing with a specific subject matter, particularly where all such Acts are to be read as one, great weight should be attached to any scheme which can be seen in clear outline and amendments in later Acts should if possible be construed consistently with that scheme. But this is a principle which can easily be pressed too far in the consideration of a body of legislation such as that now under review, in which, if any prevailing motive can be found, it is in the attempt, as each loophole for escape from taxation is discovered, to close it as firmly as possible. I can by no means find in it any such scheme or context as would justify me in giving to the language of the Finance Act, 1939, s. 15, any meaning which it does not naturally bear.

I turn however to the matters principally relied on by the company. It was contended—and this is, of course, fundamental to the argument—that under the principal Act an apportionment could only be made against a person who was a member (as defined by sect. 21 (7)) on the last day of the accounting period. Sect. 21 (1) of the principal Act provides that the commissioners may direct that:

... for purposes of assessment to super tax the said income of the company shall for the year or other period specified in the notice be deemed to be the income of the members and the amount thereof shall be apportioned among the members . . . and para. 8 of the First Schedule to the Act provides that:

... the apportionment shall be made . . . in accordance with the respective interests of the members . . .

I find nothing in these words which supports the appellants' contention or would restrict the meaning of members to persons who were members during the whole period or the last or any other day, of it. The language of the section is clearly apt to include any person who was a member at any time during the period in question. But here again the appellants rely on some limiting context. It is said that it is as at the end of the period that it must be ascertained whether there has been a reasonable distribution. It is said that under para. 9 of the First Schedule to the Act the income apportioned to a member under sect. 21

is for the purposes of tax to be deemed to have been received on the date to which the accounts of the company are made up. This last provision is repeated in para. 1 (b) of the Schedule to the Finance Act, 1937, with the substitution of the last day of the year of assessment for the date to which the accounts of the company are made up. Under the Finance Act, 1927, s. 31 (6), income apportioned to a member of a company for the period from the end of the last year or other period for which accounts have been made up to the date of the order or resolution for winding up shall for the purposes of sur-tax be deemed to have been received by him on the date of that order or resolution. An analogous provision is to be found in the Finance Act, 1937, s. 14 (3). Pointing to these and, it may be, to other provisions counsel for the Fendock company have urged that it is only members as on the last day of the accounting period or year of assessment as the case may be, against whom an apportionment can consistently be made. And counsel says, what was true of members before the Finance Act, 1939, was passed must be true also of members and other persons against whom an apportionment can be made under sect. 15 of that Act. I have already indicated that to me this final conclusion does not commend itself.

But it appears to me that the argument breaks down at an earlier stage. I do not find in the provisions to which reference has been made any sufficient justification for thus limiting the meaning of members. On the other hand I think that there are numerous indications which suggest that no such limitation can have been intended. Under para. 4 of the First Schedule to the principal Act the commissioners may require any company to which sect. 21 applies to furnish a statement of the names and addresses and particulars of the respective interests of all members of the company for the period for which the company's accounts are made up. This must mean all persons who have at any time during the period been members. It is not obvious for what purpose the commissioners require such particulars unless the persons concerned are possible objects of apportionment. Again, under the Finance Act, 1936, s. 20 (4), the definition of member is extended so as to include a "loan creditor." The object of this extension might be largely defeated if only those loan creditors could be regarded as members whose loans have not been repaid at the end of the fiscal year. Again, a striking contrast is provided by the Finance Act, 1927, s. 32, which deals with so-called interconnected companies. That section specifically requires the companies concerned to furnish to the commissioners . . . a statement showing the names and addresses . . . of all its members as on the last day of the year or other period . . .

The difference between this provision and that of para. 4 of the First Schedule to the principal Act, which I have already cited, cannot be ignored. Numerous other provisions and illustrations were in the course of the argument brought to your Lordships' notice in support of the respondents' submission that the members against whom an apportionment can be made include all persons who have been members at any time during the period under review. I do not think it necessary further to examine them. I have already expressed my view that this submission accords with the natural meaning of the language of the principal operative section. It is sufficient to add that the context does not oppose but rather supports this construction. I, therefore, conclude this part of the case by saying that it has in my opinion been rightly held that the commissioners can make an apportionment under the Finance Act, 1939, s. 15, against a person of whom it could be predicated at any time in the fiscal year that he was "able to secure . . ."

There remains the question of quantum. This can be disposed of very shortly. The power of the commissioners is to apportion to the member (or person who is treated as a member) such part of the income "of the company as appears to them to be appropriate." It has in this case appeared to the commissioners to be appropriate to apportion the whole of the income to Mrs Murray. I see no ground upon which it can be said that they have improperly exercised their statutory discretion. It has been contended that an arbitrary division of the income of the company should be made as at Dec. 8, 1939, the date when Mrs. Murray surrendered her control of the company, and that the commissioners could not validly apportion to her more than a rateable part of the whole income. If your Lordships upheld such a contention, you would,

I think, be setting a dangerous precedent by imposing a fetter upon the exercise by the commissioners of their discretion in a field where experience has shown, and the language of the statute confirms, that it should be unfettered and absolute.

I would, therefore, dismiss this appeal, and the same result will follow in the appeal of the Alporteno Investment Trust Company.

My Lords, LORD GODDARD who is unable to be present today has asked me to say that he has read and concurs in the opinion which I have just pronounced. A

Appeal dismissed.

Solicitors: *Markby, Stewart & Wadesons* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

Lied. BANKS v. COPE-BROWN. [1948] 2 All E.R. 76. *Applied.* LLEWELLYN v. HINSON. [1948] 2 All E.R. 95. *Distinguished.* LINDOP v. QUAIFFE. [1949] 1 All E.R. 456.

ingushed. BAKER v. TURNER. [1949] 1 All E.R. 834.

COLE v. HARRIS.

[COURT OF APPEAL (MacKinnon, Lawrence and Morton, L.JJ.), April 27, May 17, 1945.]

Landlord and Tenant—Rent restriction—Standard rent—Apportionment—Exclusive use of three rooms with use in common of combined bathroom and lavatory—Three rooms “part of a house let as a separate dwelling”—Whole house itself not controlled—No apportionment of standard rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), ss. 12 (1), (2), (3), 14 (1)—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16 (1)—Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (c. 26), ss. 5, 7 (6)—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), ss. 3, 7 (1). C

The respondent was the owner of a house in Gloucester. Under an agreement made in June, 1943, the appellant was to have the exclusive use of three rooms on the first floor at a weekly rent of 32s. together with the right to use, in common with the respondent and the occupant of rooms on the upper floor, the bathroom, which also contained the lavatory. The three rooms were a sitting room, a bedroom and a combined kitchen and scullery. In May, 1939, these rooms had been let on the same terms to another tenant at a rent of 22s. per week. Prior to Sept. 1, 1939, the house as a whole was not controlled by the Rent Restrictions Acts, 1920-1938, its rateable value being then and at all material times £40 a year. In Jan., 1945, the appellant brought an action claiming (i) that the three rooms were let to him as a separate dwelling within the meaning of the Rent and Mortgage Interest Restrictions Act, 1920, s. 12 (2); (ii) that the standard rent of the rooms let was to be determined by apportionment of the standard rent of the whole house, under sect. 12 (3) of the 1920 Act as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 5; (iii) that he was entitled to repayment of rents paid in excess of the standard rent for the three rooms:— D

HELD: (i) (LAWRENCE, J., dissenting): where a tenant had the exclusive use of some rooms and shared certain accommodation with other tenants, there was a letting of “part of a house as a separate dwelling” within the meaning of sect. 16 of the 1933 Act, incorporated by sect. 7 in the 1939 Act, if and only if, the accommodation shared with others did not comprise any of the rooms which may fairly be described as “living rooms” or “dwelling rooms.” Therefore the appellant became the tenant of “part of a house let as a separate dwelling” in June, 1943. E

Neale v. del Soto (1) distinguished. F

(ii) since the house of which the appellant’s rooms formed part was, before and after Sept. 1, 1939, not “let” as a separate dwelling, the standard rent of the three rooms could not be determined by apportionment under sect. 12 (3) of the 1920 Act as amended by sect. 5 of the 1938 Act. G

(iii) as the standard rent for the rooms on Sept. 1, 1939, was 22s. a week, the appellant was entitled to recover the overpayments. H

[EDITORIAL NOTE. This case again considers the question of what constitutes “part of a house let as a separate dwelling” within the Rent Restrictions Acts, when

there is exclusive use of some rooms and a sharing in common of others. It is argued that the decision in *Neale v. del Soto* (1) laid down the principle that the sharing of essential parts of the accommodation takes the case out of the Acts, but the majority of the court hold that this is not the true *ratio decidendi* of *Neale v. del Soto* (1). The true test is whether "living rooms" are shared; if they are, then there is no separate letting within the Acts. For this purpose a kitchen is a "living room," but a bathroom, w.c., and box-room are not.

A It is further held that, although the flat in question is, on the application of the above rule, a "dwelling-house" within the Acts, no case for apportionment of rent is made out, since the whole house of which it formed a part was not controlled.

AS TO APPORTIONMENT OF STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 570-572, Nos. 7182-7198.]

Cases referred to :

- B * (1) *Neale v. del Soto*, [1945] K.R. 144; [1945] 1 All E.R. 191; 114 L.J.K.B. 138; 172 L.T. 65.
 * (2) *Sharpe v. Nicholls*, [1945] 2 All E.R. 55.
 * (3) *Smith v. Prime* (1923), 129 L.T. 441; 31 Digest 563, 7108;
 * (4) *Sutton v. Begley*, [1923] 2 K.B. 694; 31 Digest 571, 7195; 92 L.J.K.B. 1086; 129 L.T. 773.
 * (5) *Field v. Gover*, [1944] 1 K.B. 200; 60 T.L.R. 164; *sub nom. Gover v. Field*, [1944] 1 All E.R. 151; 113 L.J.K.B. 129; 170 L.T. 73.

C APPEAL by the plaintiff from a decision of His Honour JUDGE WETHERED made at Gloucester County Court and dated Mar. 12, 1945. The facts are fully set out in the judgment of MORTON, L.J.

D. N. Pritt, K.C., and *H. G. Garland* for the appellant.

Richard O'Sullivan, K.C., and *W. J. K. Diplock* for the respondent.

D MACKINNON, L.J. : In this case the defendant was the owner of a house, No. 11, Belgrave Road, Gloucester. In June, 1943, she made an agreement with the plaintiff under which in consideration of 32s. a week the plaintiff was to have the exclusive use of three rooms on the first floor of this house, together with the right to use, in common with the defendant, and the occupant of the three rooms on the top floor, a bathroom containing a w.c. apparatus. The three rooms of which the plaintiff had the exclusive use were a sitting-room, a bedroom, and a combined kitchen and scullery. In his rooms were
 E separate meters for gas and electric light.

In Jan., 1945, the plaintiff began this action in the Gloucester County Court. In effect he alleged (a) that the three rooms were let to him as a separate dwelling within the Rent and Mortgage Interest Restrictions Act, 1920 s. 12 (2); (b) that under the Rent Acts the standard rent of the said separate dwelling was 12s. a week; and (c) that by virtue of sect. 14 (1) of the 1920 Act, as amended
 F by sect. 7 (6) of the 1938 Act and by the schedule of the 1939 Act he was entitled to recover 20s. a week out of the 32s. a week paid to the defendant since June, 1943.

Many questions arising on this chaotic series of Acts were elaborately discussed by the county court judge in a careful judgment. I only propose to deal with one of them. The judge held that the plaintiff's claim failed because the three rooms were not let to him as a separate dwelling within sect. 12 (2) of the 1920 Act; and he came to that conclusion upon what he took to be the principle
 G laid down by this court in *Neale v. del Soto* (1). In my view, the decision in that case was rather upon the admitted facts than upon any principle of law. In so far as any such principle can be derived from it, I do not think it was correctly enunciated by the judge in this case. In effect, it was held that there was no letting of part of the house as a separate dwelling, but an agreement by the plaintiff and defendant to share the house. As MORTON, L.J., said at
 H p. 147, the substance of the matter was that :

... there was a sharing of the house. Each party had the exclusive use of some rooms and the two parties together had the use in common of other rooms.

These two contrasted sorts of agreement—(a) a demise of part of a house as a separate dwelling, and (b) an agreement to share the use of a house—are perfectly intelligible. Whether any particular agreement falls under (a) or under (b) is much more a question of the facts than of any rule of law. In *Neale v. del Soto* (1) the judge found it was (b), and the Court of Appeal agreed with him. In this case I think on the admitted facts the arrangement fell under (a) and not

under (b). The three rooms of which the plaintiff had exclusive use contained all the requirements of a separate dwelling with the sole exception of a w.c. Outside his three rooms he had the use of a w.c., and of a bath in the same room, and necessarily it was the exclusive use of that room at any time when the defendant or the other tenant were not exercising their right to its exclusive use. By contrast in *Neale v. del Soto* (1) the alleged tenant shared the use, contemporaneously with others, of various rooms, including a common kitchen. The judge says, of *Neale v. del Soto* (1) :

The principle of the decision appears to me to be that the sharing of any part of the accommodation included in the tenancy contract which is essential to the conception of a dwelling-house, according to ideas held at the present day, prevents the letting from being a letting of part of a house as a separate dwelling.

I am clear that that was not the principle of the decision. The conclusion was that on the facts there was no demise at all, but an agreement by the owner of a house to take in a lodger, giving him the exclusive use of some of the rooms in the house. Whereas on the facts of this case I think the status of the plaintiff under his contract with the defendant was that of tenant under a demise, and not that of a lodger with the exclusive use of some rooms.

The only other point that is material in this appeal is the question of what is the standard rent of the part of the house let to the plaintiff as a separate dwelling. As to that I think counsel for the defendant was right in saying that it is 22s. a week, the rate at which the defendant let it to another tenant in May, 1939. The defendant alleged this, alternatively, in para. 3 of her defence, and by a subsequent notice (the date of which is omitted in the copy supplied to me) paid into court with a denial of liability £33 2s. 3d., which I presume is the difference between 32s. a week and 22s. a week. The plaintiff is entitled to recover upon that basis.

Since writing the above I have had the advantage of reading the careful and elaborate judgment of MORTON, L.J., who arrives at the conclusion I have expressed. It is one of the difficulties under these Acts that proceedings under them must always begin in the county court, and by other legislation a finding of fact by a county court judge is final. In one sense, the conclusion of the judge in this case that there was no letting of part of the house to the plaintiff as a separate dwelling may be regarded as a conclusion of fact. But he arrived at it by applying what he conceived (as I think erroneously) to be the principle of law laid down in *Neale v. del Soto* (1). It is, I think, difficult to formulate any principle of law which separates what I have called the contrasted conceptions of (a) a demise of part of a house as a separate dwelling, and (b) an agreement to share the use and occupation of a house. But I think MORTON, L.J., provides the best formula by saying that to create (1) there must be an agreement by which the occupier has the exclusive use of the essential living rooms of a separate dwelling-house. After all, a dwelling-house is that in which a person dwells or lives, and it seems reasonable that a separate dwelling should be one containing essential living rooms. A w.c. may be essential in modern days, but I do not think it is a living room, whereas a kitchen, I think, is.

LAWRENCE, L.J. : I do not repeat the facts which are stated by my brethren. The principal question we have to decide is whether the county court judge has adopted the true test in applying the decision of the Court of Appeal in *Neale v. del Soto* (1). The test which the county court judge did apply was that part of a house is not let as a separate dwelling within the meaning of sect. 12 (2) of the 1920 Act where a part of the house so let essential to it as a dwelling was by the agreement to be shared with other tenants. It was not disputed that the effect of sect. 7 of the 1939 Act, sect. 16 of the 1933 Act, and sect. 12 of the 1920 Act is that the Acts only apply to parts of houses let as separate dwellings, but it was argued that the essential nature of the rooms shared is not the true test of whether such sharing prevents the letting being of a separate dwelling and that the true test is either one of degree or whether the part shared is substantial.

In my opinion, the county court judge adopted the right test. If an essential part of the house let is by the tenancy agreement to be shared, it is not, in my view, let as a separate dwelling. It does not appear to me to be an answer to say that people can dwell in a building without baths or lavatory accommodation. They can, of course, live without baths and they can make use of lavatories

outside their dwelling, but if they choose to include in the tenancy agreement of what they contend is a separate dwelling the right to share a bathroom and lavatory, it appears to me that the premises let are not let as a separate dwelling. A single room can, of course, be let as a separate dwelling, but if the tenancy agreement includes for one rent a right to share other rooms it appears to me impossible to say that the letting is of a separate dwelling. The decision in *Neale v. del Soto* (1) is binding upon us and it must be accepted therefore for the purposes of this court that the sharing of certain parts of a dwelling-house by the tenant with the landlord or other tenants prevents the dwelling being let as a separate dwelling.

What better test can there be then as to what part of the dwelling must be shared to render it not a separate dwelling than the essential parts? And if this is the true test it must be a question of fact for the county court judge what parts are essential. Even if it were held to be a question of degree to be decided by the judge as a question of fact in each case, that would be no ground for reversing the judgment of the judge in this case, who has laid down a more stringent test. It has been suggested that this test if applied to a staircase of which the tenants have the joint use would exclude many parts of houses from the protection of the Acts, but in my opinion the true view is that the mere right to use a staircase along with other tenants or the landlord does not prevent the letting being of a separate dwelling. The exclusive use of the staircase is at no time essential to the use of the dwelling. Moreover, sect. 12 (9) of the 1920 Act, referring to self-contained flats, assumes that staircases may be common to dwellings controlled by the Acts.

Since writing this judgment I have seen the judgment of MACKINNON, L.J., and MORTON, L.J., in which MORTON, L.J., adopts a test not suggested during the argument, namely, whether the room or rooms shared are what are sometimes called living rooms and he finds that the bathroom and lavatory in question were not living rooms and, therefore, holds that sharing those rooms did not prevent the letting from being the letting of a separate dwelling. I regret that I am unable to agree with this view. It appears to me that the actual agreement between the landlord and tenant must be considered and if it provides for the letting of part of a house as a dwelling it must be as a separate dwelling to come within sect. 12 (2) of the 1920 Act, and that if any part of what is let is essential to the use of the premises as a dwelling that part must be let to the tenant separately and not jointly with other persons.

For these reasons I am of opinion that the appeal should be dismissed. I concur in the views expressed by my brethren as to the standard rent of the premises if the Acts are applicable.

MORTON, L.J. : This is an appeal from a decision of His Honour JUDGE WETHERED, sitting in the Gloucester County Court, that certain rooms let to the plaintiff by the defendant were not a "dwelling-house" within the Rent and Mortgage Interest Restrictions Act, 1939, and accordingly that certain claims by the plaintiff for apportionment of rent and repayment of rent overpaid must fail.

The facts of the case and the contentions of the parties were very fully and clearly set out by the county court judge as follows :

The plaintiff is the tenant of a flat on the first floor of No. 11, Belgrave Road, Gloucester, at the weekly rent of 32s. The upper floor is occupied by another tenant at 20s. per week and the ground floor is occupied by the defendant, who is the owner of the house. The plaintiff alleges that his flat was brought under control of the Rent Restrictions Acts by the Rent and Mortgage Interest Restrictions Act, 1939, and claims an apportionment of the standard rent of the house, in order to ascertain the standard rent of his flat, by virtue of sect. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or that subsection as amended by sect. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, and repayment of all rent paid by him, since the appropriate day, in excess of the recoverable rent. The material facts in relation to the claim are as follows : On June 28, 1936, No. 11, Belgrave Road, was owner-occupied and at that date, and at all material times was rated at £50 gross and £40 rateable value. There was no evidence that prior to that date the premises had ever been leased or let but if they were leased or let prior to that date they were freed from control under the Rent Restrictions Acts, by sect. 1 (2) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which, as from Sept. 29, 1933, freed from control all houses in England (outside London) the recoverable rent

and rateable value of which exceed £35. On June 29, 1936, the house as a whole was leased for three years at the annual rent of £75. This lease did not bring the house within the operation of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933 since the house was then free from control. At some date prior to Apr., 1939, this lease was surrendered and in that month the defendant purchased the fee simple estate therein with vacant possession. The house had three floors and a small garden.

The defendant occupied the ground floor herself and fitted up the two upper floors in order to let them as two "flats." No structural alterations were made. She redecorated the rooms on the two upper floors and fitted one room on each floor as a kitchen by installing therein a sink with a gas heater over it. Separate meters were installed in each flat for the gas and electricity supplies. The house already was wired for electric light. One further alteration she made. On the first floor there was a room which contained a w.c. and which at one time had also contained a bath. This bath had been removed to one of the other rooms on this floor. The defendant moved the bath back to its former position in the room containing the w.c. and reconnected the hot and cold water supplies. The room from which the bath was removed was fitted up as the kitchen. Each "flat" therefore consisted of one sitting room, one bedroom and a kitchen and on the first floor was the room fitted as a combined bathroom and w.c.

On May 19, 1939, the defendant let the first floor to a Mrs. Ormerod on a weekly tenancy at 22s. per week together with the user, in common with herself and the tenant of the upper flat (which was not then let), of the combined bathroom and w.c., and the garden, for the purpose of drying clothes and storing coal. In July, 1939, the defendant let the upper flat on a weekly tenancy at 20s. per week and granted to the tenant, in common with herself and the tenant of the first floor flat, the right to use the combined bathroom and w.c., and the garden for the purposes mentioned. On the ground floor the defendant had a Premier gas heater which supplied hot water to the bath and this was furnished, when required, at a charge of 3d. each time hot water was supplied. The flats were not and never have been separately rated. In June, 1943, Mrs. Ormerod left and the defendant redecorated the rooms on the first floor and installed in the bedroom a washing basin with water laid on, a gas ring and a gas fire and in the sitting room a gas fire. On June 16 she let the first floor flat to the plaintiff, on the same terms as it was previously let to Mrs. Ormerod, at 32s. per week on a weekly tenancy.

The plaintiff claimed, by virtue of sect. 5 of the 1938 Act, and/or sect. 12 (3) of the 1920 Act to have the standard rent of the first floor flat determined by apportionment of the standard rent of the house as a whole, which was agreed at £75 per annum, on the ground that as from Sept. 2, 1939, the house and the flat came under control of the principal Acts (i.e., the Rent Restrictions Acts, 1920 to 1925 as modified by the 1939 Act) by virtue of sect. 3 of the 1939 Act, since the rateable value of the house on the appropriate day, as defined in sect. 7 (1) of the 1939 Act, did not exceed £75. The defendant submitted that this claim was ill-founded because, first, the division of the house into three flats or tenements in the spring of 1939 amounted to a *bona fide* reconstruction of the premises by way of conversion into two or more separate and self-contained flats or tenements within the meaning of sect. 12 (9) of the 1920 Act and the flats accordingly were free from control under the principal Acts when they were first constructed and the defendant was free to charge any rent which she could obtain. Secondly, if, which she denied, the plaintiff's flat was brought under control by the 1939 Act, the rent at which it was let on Sept. 1, 1939, became its standard rent and no question of apportionment arose. She sought to justify the increase of the rent of the plaintiff's flat from 22s. to 32s. per week on the ground that she had incurred considerable additional expense in fitting up the flat before she re-let it to the plaintiff. This claim was abandoned at the hearing. Thirdly, she submitted that owing to the user in common of the combined bathroom and w.c., and the garden the plaintiff's flat was not "part of the house let as a separate dwelling," within the meaning of sect. 12 (2) of the 1920 Act, as interpreted by the Court of Appeal in *Neale v. del Soto* (1), and was not, therefore, a dwelling-house to which the 1939 Act applied. Fourthly, she submitted that sect. 5 of the 1938 Act had no application because the house, as a whole, was not let and was not, therefore, a dwelling-house to which the principal Acts applied, in view of the definition of the expression "dwelling-house" in sect. 16 of the 1933 Act, incorporated in the 1939 Act by sect. 7 (1).

The judge decided that No. 11, Belgrave Road, was at no time "*bona fide* reconstructed by way of conversion into two or more separate and self-contained flats or tenements within sect. 12 (9) of the 1920 Act." There is no appeal from this decision, which was in my view clearly correct. Thus the questions for decision in this court are (1) Did the plaintiff, on June 16, 1943, become tenant of property which was "part of a house let as a separate dwelling" and was thus "a dwelling-house" within the definition in sect. 16 of the 1933 Act, incorporated in the 1939 Act by sect. 7 (1) of that Act? (2) If so, is the plaintiff entitled (a) To have the standard rent of that property determined

by apportionment, (b) To be repaid any part of the sums already paid by him as rent? The county court judge answered question (1) in the negative and gave judgment for the defendant with costs. He intimated, however, that if he had answered the first question in the affirmative he would also have answered question (2) (a) and (b) in the affirmative.

A I now turn to question (1). A similar question was recently considered by this court, in *Neale v. del Soto* (1). That case turned upon the construction of the identical words which appear in sect. 12 (2) of the 1920 Act. In that case the landlord of a house, Mrs. del Soto, had sub-let to the tenant two unfurnished rooms in a house containing seven rooms of which she was the lessee. The tenancy agreement provided for the use by the tenant, jointly with the landlord, of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory. In the course of my judgment, with which my brethren agreed, I said, at p. 147:

B Were the two rooms in question in the present case a part of a house let as a separate dwelling? In my view, they were not . . . The real substance of the matter was that there was a sharing of the house. Each party had the exclusive use of some rooms and the two parties together had the use in common of other rooms . . . It was suggested in the course of the argument for the tenant that, if the county court judge's decision is upheld, the result might follow that a letting of two rooms, together with the use, in common with the landlord, of, for instance, a w.c., would be outside the Act. I am content to leave that matter to be dealt with if, and when, it arises, but it may be

C —I express no view on the matter—that this question is one of degree and, as the judge below observed in his judgment, in the present case a very substantial part of the dwelling was shared, including such a very important room as the kitchen.

In the case now before us there is no sharing of a kitchen and it seems to me that the true construction of the words "a part of a house let as a separate dwelling" must fall somewhere between two extremes. It cannot be that any sharing of any room, however unimportant, takes the property outside the operation of the Act. The words may be susceptible of that construction, but so to construe them would be to defeat, to a large extent, the purpose of the Act. For instance, take a case in which an entire floor of a house is let to a tenant, and there is no sharing of any room, except that the tenant is allowed, in common with the landlord, to store his boxes in an attic. It seems to me quite contrary to the intention of the Act to exclude from its operation a letting of this nature,

E where the tenant is, I think, "dwelling" in a "separate" part of the house.

Turning now to the other extreme, I think it is clear that a part of a house which is let to a tenant does not necessarily come within the Acts merely because the tenant has the exclusive use and occupation of one or more rooms. This was decided by this court in *Neale v. del Soto* (1). It is, however, a matter of great difficulty to determine where the line should be drawn, so as to distinguish between a "sharing" of a house and a letting of part of a house as a separate dwelling. I do not doubt that the case of *Neale v. del Soto* (1) fell clearly on one side of the line. There was a sharing of extensive accommodation, including the kitchen, and in fact the parties shared their meals in the kitchen and divided between them the work of preparing these meals. That fact does not appear in the report of the case, but we have been referred in the course of the argument to the notes of the county court judge, and this fact appeared quite plainly from the notes. However, even if the parties had not shared their meals, the court would have arrived at the same conclusion, and in fact the court did not rely upon this feature of the case.

F

G

Since the case of *Neale v. del Soto* (1) was decided, this court has had to consider the same point, in relation to other premises, in the case of *Sharpe v. Nicholls* (2). In that case the defendant was the tenant of a house, and the county court judge ordered:

H . . . that the defendant do give the plaintiff possession of the said house on Apr. 6, 1945, subject to the plaintiff allowing the defendant a Rent Act protected tenancy of the front two rooms, together with the joint use of the kitchen and out offices. Rent to be apportioned by registrar failing agreement by the parties.

There were other points in the case, but all the members of this court took the view that it was not possible for the defendant to have a Rent Act protected tenancy of the front rooms together with joint use of the kitchen and "out offices" having regard to the decision of this court in *Neale v. del Soto* (1). The house in the case of *Sharpe v. Nicholls* (2) was a small cottage with two

front rooms, two back rooms, and a kitchen and, what the county court judge described as "out offices." In my judgment I said :

It is true that the case of *Neale v. del Soto* (1) was a decision upon the facts then before this court, but I think that the result of such an order as was made by the county court judge here would be (to quote *Neale v. del Soto* (1), at p. 147) in substance a sharing of the house.

Sharpe v. Nicholls (2) was also a case which turned upon its own facts, but the court recognised that the sharing of a kitchen and lavatory was sufficient to take the case out of the Rent Restriction Acts. A

In the present case the tenant, who has the exclusive occupation of three rooms, also has the right, in common with the landlord and the tenant of the upper flat, to use the combined bathroom and w.c., and also to use the garden for the purpose of drying clothes and storing coal. Does this fact prevent him from being the tenant of a part of a house let as a separate dwelling, and what is the test which should be applied in determining the question ? The matter is one of great importance, for no doubt the test adopted in this court will be used by county court judges in future in determining whether or not a particular letting does or does not fall within the Acts. B

The county court judge thought that :

... the sharing of any part of the accommodation included in the tenancy contract which is essential to the conception of a dwelling-house, according to ideas held at the present day, prevents the letting from being a letting of part of a house as a separate dwelling. C

He thought that this was the principle, the *ratio decidendi*, of the decision in *Neale v. del Soto* (1). He added that "sharing of non-essential parts of the accommodation may be a question of degree," but in his view the combined bathroom and w.c. was an essential part, and the sharing of that essential part took the present case outside the Acts. I do not think that *Neale v. del Soto* (1) laid down any principle, and I am not prepared to accept the test suggested by the judge. I recognise that this test is one which might well be adopted and it is approved by one of my brethren. The objection to it is, to my mind, that it unduly restricts the operation of the Rent Restriction Acts, having regard to the scheme of the Acts as a whole. There can be no doubt that if a dwelling-house includes a w.c., the w.c. is a part of the accommodation which is essential, according to ideas held at the present day. Nevertheless I do not think that the legislature intended that the sharing of a w.c. with the landlord or with others should be sufficient to prevent a letting of rooms from being a letting of part of a house as a separate dwelling within the meaning of the Acts. I suspect that there are very numerous cases all over the country where two or more families each occupy a separate set of rooms, and the lavatory accommodation is shared in common, and I cannot believe that the legislature intended to exclude all such cases from the operation of the Acts. If the legislature had used words which would only bear this construction, if fairly construed, we should have had to give the words this construction, and leave it to the legislature to pass fresh legislation if it thought fit. In my view, however, the words are fairly open to another construction. I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows : there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as "living rooms" or "dwelling rooms." To my mind a kitchen is fairly described as a "living room," and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling. In many households the kitchen is the principal living room, where the occupants spend the greater part of the day. Very often it is the warmest part of the house and the family tend to congregate there for that reason. On the other hand, both the bathroom and the w.c. are rooms which are only visited on occasions for a specific purpose, and I think they may fairly be classed with such a room as a box-room, though no doubt it is not visited so often. I think that this test gives a reasonable construction to the Acts, and one which is in accordance with their general scheme and intention. D E F G H

Applying this test to the letting to the plaintiff in the present case, I think it is clear that a part of the house has been let to him as a separate dwelling within the meaning of the Acts. He has the exclusive possession and use of a bedroom, a kitchen and a sitting room: He does not share any living room with other people, though there are certain valuable conveniences which he shares with other people, namely, the use of the combined bathroom and w.c., and the use of the garden for the purpose of drying clothes and storing coal.

- A The county court judge seems to have felt some doubt as to whether there was a demise to the plaintiff of the combined bathroom and w.c., subject to the rights reserved to the landlord and the tenant of the top floor to use it in common with the plaintiff, or whether there was an irrevocable licence to the plaintiff to use the combined bathroom and w.c., and also the garden (for the purposes already mentioned) in common with the other occupiers. In my judgment our decision should be the same, whatever may be the true view on these points.
- B In either case, the plaintiff does not share any living room with other people. The result is that, in my view, the county court judge arrived at the wrong conclusion on the first question arising on this appeal. The flat which was let to the plaintiff on June 16, 1943, was "part of a house let as a separate dwelling" and was thus a "dwelling-house" within the meaning of the 1939 Act.

I am fortified in the conclusion to which I have come by a further consideration of the case of *Smith v. Prime* (3), and by a consideration of the case of *Sutton v. Begley* (4). The former case, decided by ROCHE, J. (as he then was) on Apr. 17, 1923, was cited to this court in *Neale v. del Soto* (1); the latter case, decided by this court on May 2, 1923, was not so cited. *Smith v. Prime* (3) was a decision upon sect. 12 (9) of the 1920 Act, and is, therefore, not directly in point. In that case a house had been converted into two flats. Each flat had its own kitchen and its own gas and hot water system. There was no provision of any physical means of separation between the two flats, but the only common user was of the staircase and of a closet and bathroom, divided from one another by a partition, on the half-landing between the lower and upper flats. ROCHE, J., said, at p. 404:

That sanitary and bathroom accommodation was enjoyed equally and in common by the occupier of both the lower and the upper flat.

- E It was held that these two flats were "separate and self-contained flats," and the reasoning of ROCHE, J., is reported as follows, at p. 404:

On these facts, he had come to the conclusion that the absence of a partition was not fatal to the claim that these flats were separate. Separate, in his judgment, meant not separated physically, or partitioned off, but meant rather distinct, and just as, in his view, to put in a partition would not by itself constitute a *bona fide* reconstruction by way of conversion into separate flats, so as to bring a case within the subsection, so the absence of a partition where one found a *bona fide* reconstruction which did result in the flats being distinct from one another, so as to be capable of being held as separate and distinct dwelling-houses, did not prevent them from coming within the section, so far as the word "separate" was concerned.

This reasoning is directed to the construction of a subsection different from that which is now before us, but it is interesting to observe that ROCHE, J., thought that premises could be a "separate flat" even if the occupant shared a closet and bathroom with other persons.

- G In *Sutton v. Begley* (4) it was clear that the dwelling-house—a large house in Leamington—had not been "reconstructed" within sect. 12 (9) of the 1920 Act. Two spinster ladies had taken a lease of it in Mar., 1921, for a term of five years. The house contained 19 rooms, 2 lavatories, a bathroom and a large basement with a garden in front and at the back. By a written agreement of June 11, 1921, they let to one Sutton:

- H All those four rooms, thereafter called the said premises, on the ground floor of York House with the fixtures and fittings together with the use jointly and in common with the landlords and other tenants of other parts of York House of the entrance hall leading to the said premises, the use of the water closet on the ground floor, the right to use the basement, kitchen and scullery in common with all persons to whom the landlords might have granted or might thereafter grant the like right, the right in common as aforesaid to use the bathroom on the second floor at all reasonable times, and the use of the garden in front of the said premises, to hold the same for the term of three years from May 24, 1921, at the yearly rent of £80 per annum payable as therein mentioned.

Counsel for Sutton, the appellant, appears to have assumed, as a point requiring no argument, that the premises let to Sutton were a dwelling-house to which the 1920 Act applied, and he directed his argument to other points. His opponent was not called upon to argue, so one cannot tell whether or not he would have argued to the contrary. This court proceeded to give judgment on the footing that Sutton's premises were a dwelling-house to which the 1920 Act applied, and decided a point which does not arise in the present case. That case is not an authority on the question before us, and counsel's assumption was ill-founded, having regard to the decision in *Neale v. del Soto* (1), but it is interesting to note that it did not occur to any member of this court that the sharing of accommodation in that case took it outside the Act.

I suspect that, since these two cases were heard 22 years ago, thousands of premises have been treated as being "let as a separate dwelling" within the Acts, where there was a separate letting of certain rooms together with the use, in common with other persons, of a w.c., with or without a bathroom.

As a result of my view that the plaintiff's flat is a dwelling-house within the 1939 Act, it becomes necessary to consider question (2) (a), that is, whether the plaintiff is entitled to have the standard rent of his flat determined by apportionment under sect. 12 (3) of the 1920 Act as amended by sect. 5 of the 1938 Act. The county court judge held that the plaintiff was so entitled, if his flat was a dwelling-house within the Acts, but I have arrived at a different conclusion. In my view the standard rent of the plaintiff's flat is fixed at 22s. per week by the provisions of sect. 12 (1) of the 1920 Act, as applied to houses brought within the operation of the 1939 Act. So applied, the subsection reads as follows, so far as material :

The expression "standard rent" means the rent at which the dwelling-house was let on Sept. 1, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Sept. 1, 1939, the rent at which it was first let.

I have already arrived at the conclusion that the plaintiff's flat was a dwelling-house within the Acts. On Sept. 1, 1939, the position was that this dwelling-house was let to Mrs. Ormerod on a weekly tenancy of 22s. per week. Thus the standard rent is 22s., and the remainder of the subsection does not apply.

In my view neither sect. 12 (3) of the 1920 Act, nor sect. 5 of the 1938 Act applies to the present case. At the present moment, the flat let to the plaintiff is a dwelling-house to which the 1939 Act applies, but the whole house, No. 11, Belgrave Road, is not a dwelling-house to which this Act applies. It is true that the rateable value of No. 11, Belgrave Road is within the maximum stated in sect. 3 (1) of the 1939 Act, but at the present moment No. 11, Belgrave Road is not a "dwelling-house" within the definition contained in sect. 16 of the 1933 Act, which is incorporated in the 1939 Act. It is not, and was not when the 1939 Act came into force, a house let as a separate dwelling. For some time before the 1939 Act came into force, the defendant was the owner of the whole house, which was then free from control, and she had elected to let out parts of the house instead of letting the house as a whole. The whole house is at the moment outside the Rent Restriction Acts.

Bearing these facts in mind, I turn first to sect. 12 (3) of the 1920 Act. That subsection is as follows :

Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive. It is to be observed that this subsection only comes into operation where, for the purposes therein mentioned, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed. In the present case there is no necessity whatever for apportioning that rent. The plaintiff's flat was let at a rent of 22s. on Sept. 1, 1939, while the house of which it forms part was not then and is not now "let" as a separate dwelling. Thus, as I have already pointed out, the standard rent of the plaintiff's flat is fixed at 22s. I now turn to sect. 5 of the 1938 Act, which is as follows :

Where a dwelling-house to which the principal Acts apply is part of another dwelling-house to which those Acts apply, the standard rent of the first-mentioned dwelling-house

as from the twenty-ninth day of September nineteen hundred and thirty eight, shall be a standard rent ascertained by apportioning the standard rent of the second-mentioned dwelling-house, and subsect. (3) of sect. twelve of the Act of 1920 shall apply accordingly notwithstanding that the first-mentioned dwelling-house was let as a separate dwelling on or before the first day of August, nineteen hundred and fourteen, or on or before the date on which the second-mentioned dwelling-house was first let. The present case is excluded from this section (assuming that this section would otherwise apply) because the plaintiff's "dwelling-house" although it is a dwelling-house to which the 1939 Act applies, is not part of another dwelling-house "to which those Acts apply." For the reasons which I have already stated, No. 11, Belgrave Road is not, at the moment, a dwelling-house to which the Rent Restriction Acts apply, and, therefore, this section has no application to the present case. I think the county court judge, in arriving at the contrary conclusion, may have failed to notice that in *Gover v. Field* (5) the whole house was "let" on Sept. 1, 1939, and was thus a dwelling-house to which the Acts applied.

The result is that although in my view the plaintiff has succeeded in his arguments that his flat is a dwelling-house protected by the Acts, he has failed in his claim for apportionment of the rent.

I answer question 2 (b), stated above, by saying that the plaintiff is entitled to repayment of any rent paid in excess of 22s. a week.

Appeal allowed; judgment for the plaintiff for £33 2s. 3d. with costs up to the date of payment into court.

Leave to appeal to the House of Lords.

Solicitors: *Wrinch & Fisher*, agents for *Langley-Smith & Sons*, Gloucester (for the appellant); *Armitage, Chapple & Co.*, agents for *Madge, Lloyd & Gibson*, Gloucester.

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MOORE v. ELPHICK.

[KING'S BENCH DIVISION (Humphreys and Cassels, JJ.), June 7, 1945.]

Gaming and Wagering—Lottery—Football pools—Formation of club for supplying members with forecast of results—Forecast based partly on expert knowledge—Members of club making financial contributions only—Whether premises used for purposes connected with the conduct of a lottery—Element of skill—Betting and Lotteries Act, 1934 (c. 58), s. 22 (1) (f).

The appellant formed a club known as the "Faber's Pools Club" for the purpose of allowing members to participate in football pools conducted by various organisations. Members had to pay an entrance fee of 6d. For a further weekly charge of 2s. 6d., the appellant undertook to make on their behalf entries in a football pool conducted by a particular organisation and selected by him. These entries were made in the following manner; the appellant, who had carefully studied the results of football matches for a number of years, selected out of a total of twelve matches played in a particular week, usually on a Saturday, four teams which he considered to be likely winners. For the remaining eight teams he made varying entries, worked out on a mathematical basis of permutation and combination. For this purpose he divided the members into groups of twenty each, all the members in the same group showing the same forecast as worked out by him. Thus each member of a winning group would be entitled to one-twentieth of the prize. The members themselves did not take any part in the forecast, their only contribution being a weekly payment of 2s. 6d. On appeal, the main question for the determination of the court was whether the predominant element in the business carried on by the appellant was a lottery, *i.e.*, a game of chance, or whether there was a substantial element of skill:—

Held: the selection of football pools conducted by a particular organisation and the correct forecast of matches played on which the winning of prizes depended, not being entirely dependent on chance but on the skill exercised by the appellant, the business carried on by him was not, therefore, a lottery.

Scott v. Director of Public Prosecutions (1) and *Hall v. Cox* (2) applied.

[**EDITORIAL NOTE.** The question at issue here is whether the conduct of a football pools club constituted a lottery within the Betting and Lotteries Act, 1934. It must be noted that the appellant was not running a pool himself, but offered to assist others, on payment of a fee, to fill in their entries to pools run by others. "Lottery" for the purpose of the Act was defined by LUSH, J., in *Scott v. Director of Public Prosecutions* (1) as a distribution of money by chance and nothing but chance. The exercise of any skill, greater than a mere scintilla, which, looking at the scheme as a whole, has contributed to the successful result, will be sufficient to take the case out of the Act. Here the appellant used his knowledge and experience of the football world in choosing the pools to be entered and the method of completing them, and it is held that there is sufficient exercise of skill to prevent the scheme from being a lottery. A

As to LOTTERIES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 525-528, paras. 928-930; and FOR CASES, see DIGEST, Vol. 25, pp. 454-456, 463-465, Nos. 434-450, 496-506.]

Cases referred to:

- * (1) *Scott v. Director of Public Prosecutions*, [1914] 2 K.B. 868; 25 Digest 465, 506; 83 L.J.K.B. 1025; 111 L.T. 59. B
- * (2) *Hall v. Cox*, [1899] 1 Q.B. 198; 25 Digest 465, 505; 68 L.J.Q.B. 167; 79 L.T. 653.
- * (3) *Public Prosecutions Director v. Phillips*, [1935] 1 K.B. 391; Digest Supp.; 104 L.J.K.B. 73; 152 L.T. 190.
- * (4) *Coles v. Odhams Press, Ltd.*, [1936] 1 K.B. 416; Digest Supp.; 105 L.J.K.B. 208; 154 L.T. 218.
- * (5) *Strang v. Adair*, [1936] S.C. (J.) 56; Digest Supp.
- (6) *Taylor v. Smetten* (1883), 11 Q.B.D. 207; 25 Digest 455, 443. C
- (7) *Barnes v. Strathern*, [1929] S.C. (J.) 41; Digest Supp.

CASE STATED by the chairman of the London Quarter Sessions. The appellant J. W. Moore, was fined £75 with costs by a metropolitan police magistrate on Feb. 18, 1944, on an information under the Betting and Lotteries Act, 1934, s. 22 (1) (f) charging him with having "unlawfully used certain premises for purposes connected with the conduct of a lottery." On appeal, quarter sessions affirmed the decision of the magistrate. The facts and arguments are fully set out in the judgment of HUMPHREYS, J. D

Gilbert Beyfus, K.C., and *J. B. Herbert* for the appellant.

Geoffrey Howard for the respondent.

HUMPHREYS, J.: This is a case stated by the chairman of the London Quarter Sessions in these circumstances: the appellant, Moore, was convicted at Bow Street Police Court of an offence which is stated in these terms, that he "unlawfully used certain premises for purposes connected with the conduct of a lottery contrary to sect. 22 (1) (f) of the Betting and Lotteries Act, 1934." He appealed to quarter sessions. Quarter sessions dismissed his appeal against conviction but stated this case, the main question being whether the business admittedly carried on by the appellant was the business of a lottery. E

The accepted definition of a lottery is and has for many years been a distribution of prizes by lot or chance, and perhaps it is as well to have in mind the language of LUSH, J., in that part of the judgment in *Scott v. Director of Public Prosecutions* (1), which deals generally with the meaning of the word "lottery" and explains what has to be proved against the person who is charged with using the premises for the purpose of a lottery before he can be convicted of a criminal offence. The judge said this, at p. 874: F

The word "lottery" indicates clearly enough what is the offence aimed at by the statute, and the Act has been interpreted in accordance with the obvious meaning of the term as applying only to distributions of money by chance, and nothing but chance, that is, by doing that which is equivalent to drawing lots. If merit or skill plays any part in determining the distribution, there has been no lottery, and there is no offence. G

To that definition, I think, should be added that the merit or skill must be real skill which has some effect. It must be something more than a scintilla of skill, so that it can fairly be said that the distribution of the prize, the allocation of the prize, in the particular case, was due to two causes, not one cause with possibly a scintilla of some other cause added to it, but two separate causes, one being skill and the other being chance. H

Another thing that has been the subject of judicial decision is that it is not sufficient for a person charged to show that on the face of it his scheme is a legal scheme; the court will go deeper than that into the real scheme as it emerges

from a close examination. The court deals with realities and not with the mere appearance. Subject to that, the court will take notice of the fact, because certainly in one respect it is material, that in this case there is no question as to the *bona fides* of the appellant. The scheme which he advertised, it appears to be common ground, was carried out honestly and exactly as he represented it, and if he has erred, then he has erred because he did not understand the law. That may happen to any perfectly respectable person, and I think that that must have been the view of quarter sessions, because on the question of penalty, with which we are in no way concerned, they very substantially reduced the penalty which had been inflicted by the magistrate.

With those observations, let us see what this scheme was. The case states that the scheme was called "Faber's Pools Club," and we have to remember that Faber's Pools Club was formed to make use of what are called football pools, a form of combined betting, a modern institution which has eliminated the bookmaker, who used to be one of the two parties to the contract of betting as one used to understand it. By the introduction of what used to be called *pari mutuel*, which afterwards became known as a totalisator scheme, there is now, I suppose, in constant use in the football season at all events, a scheme whereby competitors bet with each other, and the part which would have been played by the bookmaker is now played by someone who merely collects the bets from a large number of people. By agreement, he does certain mathematical calculations. Of course, he deducts something for himself; he is not a philanthropist. He takes his profit, as he is perfectly entitled to do, and he distributes in accordance with the advertised rules the money, less his commission and expenses, and so forth, to the winner or winners of the particular race or the event on which the bets are made, to the persons who are entitled to it. That involves every person who enters one of those pools entering up once a week, because the football matches are played on Saturday—those which are the subject of these pools—in some form or other showing, if it is a horse race, what particular horse or horses, or, if it is a football match, which particular contestant he wants to back to win.

The matter is rendered more complicated by the fact that whereas in horse racing one race is taken at a time, in football betting in this way no less than 12 separate football matches are included in one entry by one person, and he has to forecast the results of 12 particular football matches played in 12 separate places on the same day. There are three possible results to a football match. One is that the home team may win; another is that the home team may lose and the other team—I think it is called the away team—may win, and the third possibility is that there may be a draw. That applies to each one of those 12 football matches.

It occurred to the appellant—this is the way I understand it, but I do not profess myself to understand the details of this scheme—that he might act as agent for a large number of people if they were so minded, of course for reward, in filling up their entries for them. He advertised himself as an expert who had devoted a great deal of time and trouble to forecasting the results of football matches over a number of years.

The result was that the people who entered his scheme themselves admittedly did nothing towards winning a prize; they paid 6d. to enter the scheme once for the whole season. After that, all they had to do was to pay 2s. 6d. They paid it for certain reasons, which do not matter to this case, not before but after the match, and all the person had to do was to pay 2s. 6d., and he exercised no skill of any sort or description. He relied upon the appellant to use his skill in selecting the teams that he should back and everything else that had to be done, seeing that everything was right, including seeing that if a competitor won he received a prize.

It may not be a desirable thing that the public should be encouraged to spend half-a-crown every week in doing something which is a pure lottery as far as the member of the public is concerned, an absolute lottery, to try and win a substantial prize for which he does absolutely nothing in the shape of using his mind, or his brains, if he has them. But this case has been conducted on the understanding that it is admitted that the member of the public, having an agent, if that agent has used his brains and his skill so as to prevent the scheme being a lottery, then it cannot be said that the prize that goes to

one of the competitors or a number of competitors through his skill, is a lottery at all so far as those people are concerned. That contention is based, I suppose, upon the principle of the Latin tag, *qui facit per alium facit per se*, what you do by your agent you do by yourself.

That was the scheme. Now we get some details of the scheme from the case itself. What the appellant did was this: A person was enrolled as a member of his pools club for the season on payment of 6d. As a member he was included in a group of 20 members all having an equal share in 288 *2d.* pool entries in football pools every week. 288 is a number which is made up in a way which purports to be explained in a pamphlet which is part of the documents in the case, but that is what the case states. The appellant made the forecasts and entries each week on behalf of each member; I suppose that means on behalf of each group, because as I understand it no member made a different forecast from any other member of the same group; the group made the forecast. I think I am right about that; at all events, it was the appellant who made the forecast, as the case states, and made the entries. The usage was that the appellant would send a document to each member of each particular group of 20 persons who, perhaps I ought to have said, would be one of 70 groups making a set, so that a set consisted of 1,400 separate entries. This document showed in a rather cryptic way, but no doubt so that the member would understand it, what bets he, the appellant, had made for that person in regard to the next Saturday's football matches. The one which I have called Group A1, and shows that there are 288 lines, as they are called, which I suppose means entries. It gives 12 matches, which are matches known to the member because he has had a previous document which gives him the names of the different football clubs contesting and it shows how the appellant has filled up the entries for this particular competitor.

I should have said that before all that, the appellant has done something else. He has considered—I must assume that he has really considered—the merits of the different football pools which are open on that particular week. There are a number of different people who run these football betting pools, and it may be that in his expert view one football betting pool run by somebody called Murphy, perhaps, on this occasion, is rather more favourable, it is easier to spot the winner than some other. That is an exercise of skill which I think he is entitled to call in aid. That is one thing he has done. Then he has, as I have said, selected what he is going to put this gentleman's money on; that really, I think, is the way it may be put, and it is quite obvious that a person who is an expert and has studied these questions may be in a position to use skill; whether he does or not is another matter, but he may have skill and probably does have skill which he can use if he chooses.

Whether he does or does not is a question of fact, and in this case we have the views of quarter sessions as to what in fact he did, and we find that in para. 6 of the case:

The appellant had six "sets" made up [that is, six times 1,400 entries] lettered respectively A-G. Each set contained four forecasts of matches constant throughout the set, the remaining eight forecasts being permuted.

I understand that to mean this, that the appellant, having selected Mr. So-and-so's pools for that week and decided he will work upon that, looks through the 12 matches and picks out four matches of which he thinks he could with a considerable amount of confidence forecast the results. As to those four he undoubtedly uses his skill and knowledge, and as to the eight, what happens to them is that a mathematical rule is applied to them, changing their order in different ways, and it is, I think, a matter of chance whether, as to the other eight, any particular competitor—we are assuming some person wins a prize—does win that prize or not; that is to say, whether the other eight are winning numbers or not is a matter of chance. So far as the four are concerned, it is not, and that is clearly stated in the case, because para. (vii) says this:

On receipt of information as to the matches to be the subject of future weeks pools, the appellant exercised skill based on his knowledge of football form and on his knowledge that over the past 10 years the proportion of "home" wins in football matches was 50.52 per cent. and that the balance 50.48 per cent. were about equally divided between "away" wins and "draws."

He used that skill based on his knowledge in selecting which pools to enter and

which matches to select for the forecasts which are constant throughout. So that everybody in the set got the same four forecasts which were certainly based, as this case states, upon care and what is called skill; and he then used the appropriate set, including in that set 70 groups of members, 70 times 20. The first point that is made here by counsel for the respondent is made upon that; he says it is obvious that as to eight out of twelve matches this is pure chance. Be it so. Supposing that as to two-thirds of the matches it is chance, but as to one-third it is skill, is that a lottery? The answer must be "No," if one pays attention to the definition of LUSH, J., of a lottery. It is clearly not. One-third is a very substantial portion of the whole, and it is found to be true that if every competitor—one of these competitors we must assume had won a prize—has had one-third of his selections made for him as the result of skill, it cannot be said that the whole thing is the result of chance or substantially nothing but chance, and upon that point counsel for the respondent fails to satisfy me so far that this was a lottery; I think it clearly was not.

We now come to the next point which he makes, which is based upon para. (viii) of the case:

The appellant arbitrarily selected the group or set in which a member was to be included and the member exercised no skill or judgment and had no say as to the group or set into which he was placed by the appellant.

That, I think, raises a more difficult question. It is quite true that the winner, the person who wins a prize, by which I understand—I may be right or wrong about this, but I do not know that it is vital—that nobody can do more than win one-twentieth of the prize because the prize goes to a group and all that one individual would be entitled to would be one-twentieth of the amount. The person, who is a member of a group which is a winning group and, therefore, gets a substantial sum of money, has been put into a group without any calculation by anybody. We have not been told how it is done, but I think it is common ground. Certainly counsel for the appellant has failed to bring home to my mind or bring before me any evidence to show that any kind of skill or calculation is exercised in putting Mr. Brown, who is the gentleman who won the prize, into any particular group. So that Mr. Brown is a gentleman who has had 8 out of his 12 selections, which he is supposed to have made, made for him entirely by chance. They just happen to be the right ones, or more nearly right than anybody else's; they are not necessarily all correct. But there remains the fact that Mr. Brown, as to the other four of his selections, has benefited by the use of skill; and if it is to be assumed, as I think it is in this case, that the skill of the appellant was the skill of my imaginary Mr. Brown, then Mr. Brown as to one-third at least has used his skill, and I think myself that is the answer to the point of counsel for the respondent.

This is not a case in which I pretend that I hold a very strong and clear opinion, and I say no more than that I am not satisfied that that fact which is stated quite clearly in para. (viii) of the case puts into the category of a lottery that which I am quite clear apart from that matter was not a lottery. And I remind myself that I am dealing with a criminal case, and I do not think the courts are, or should be, astute to make a man a criminal unless the facts are clear. I see no reason why, sitting in this court, I should not apply the ordinary principles which are required to be applied by every jury that ever tries any criminal case, that is, that the prosecution must make out their case. I am not satisfied that they have shown that this was a lottery for that reason. That, really, is the whole of the case here, and those are the arguments as I understand them. I can only say that in my opinion it is not clear that this scheme was a lottery. It is said by counsel for the respondent, and he referred to some authorities on the matter, that the skill that was used here was really used only as to part of the scheme, and that you may divide the scheme into two. All that has been done by way of skill has been to eliminate a certain number of members of the public from the list of competitors. But those are not the facts of this case at all, and, in my opinion, the answer to that point is that in this case there was no initial stage which could be separated from any other stage. The whole thing is one scheme and one indivisible scheme. That, I think, is the answer to the point of counsel for the respondent.

We have been referred to some authorities, and I think it is necessary, quite shortly, to look at them, although I am bound to say that I do not derive very

much assistance from them, except one, which lays down the broad principle, and which is really on all fours with the judgment of LUSH, J., to which I referred. The facts of these other cases are so different from the facts of this case that it is very difficult to derive assistance from them. *Hall v. Cox* (2), to which we were referred, was a decision which is clearly binding upon us, because it is a decision of the Court of Appeal. In that case the facts can be very shortly stated. A newspaper contained "an offer of a money prize for a correct prediction of the number of births and deaths in London during a named week. Competitors . . . were to fill in the projected numbers on coupons," which they cut out of the paper. This is what A. L. SMITH, L.J., said, at p. 200 :

I have arrived at the conclusion that this prize competition is not a lottery. The result, no doubt, depends largely on chance, but not entirely, and the cases shew that to constitute a lottery it must be a matter depending entirely upon chance. There is an element of skill in the inquiry in this case dependent on the investigation of the returns for previous years and the consideration of the increase of population, the death rate, and suchlike statistical investigations. The conditions give the returns for the corresponding week of the previous year, and they are given as a starting-point from which a competitor may estimate, as well as he can, the probable numbers for the week named.

It seems to me that what was lacking in that case was this : A person could get tolerably near, might expect to get tolerably near, to the exact number of births in a particular week as the result of using skill of the nature referred to by the Lord Justice. Nobody could be sure. Indeed, nobody was even likely to get the exact number of births and deaths in a given week at all, and the same thing may be said here. It is very unlikely that any person even if he used any amount of skill would get all the 12 results right, but the use of skill enables him to have a very much better chance of doing it than the person who does not use skill, and therefore I think that takes the matter out of the category of drawing prizes out of the hat, that is to say, as LUSH, J., observed, drawing lots. That is that case, and that case is binding upon us.

The Director of Public Prosecutions v. Phillips (3) to which we were referred next was, I think, the first case under this particular Act. For some reason or other, *Hall v. Cox* (2) was not cited in that case at all. It was what is known as a "snowball" case. The facts were totally different from the facts of the present case ; they had no relation to them, and it was held that the person who obtained a large sum of money in that case would get it purely as the result of chance ; no skill was used at all. I very much doubt whether that case is of any assistance at all in deciding the present case. It is principally interesting for a delightful judgment by the late LORD HEWART, L.C.J., but I do not think it helps me very much in the present case.

Coles v. Odhams Press, Ltd. (4) was a case of a crossword puzzle, and the head-note, on p. 416, is :

A newspaper published an advertisement of a cross-word puzzle competition with a money prize, for which a competitor entered by posting his solution along with a specified fee to the office of the newspaper. The puzzle was so constructed that in a number of instances a clue could be satisfied by only one word having no alternative, while in other instances the clue suggested two or more alternative words which might not all be equally appropriate. The competition editor had prepared beforehand a test solution of the puzzle, and the prize was to be awarded to the competitor whose solution happened to correspond most closely to that of the competition editor, although if all the solutions sent in were examined and compared on their merits, the solution of that competitor might not be found to be intrinsically the best.

In that case it was held that the scheme was a lottery, and it would not be becoming in me to doubt the correctness of that decision, since I was a party to it. But the facts there were, in my opinion, obviously as widely distinct from the facts of this case as it is possible to imagine. There, the first thing to consider was : What is the right word ? The answer was : Nobody can tell. Nobody knows what they are aiming at. You are not aiming at the right word at all ; you are aiming at trying to guess what a gentleman with no particular skill, and who is unknown to you and unnamed, will think is the right word. There, as LORD HEWART, L.C.J., said, you get all the elements of a lottery. Not only is there no consideration by the editor—whose decision was to be final—of the merits of the various solutions sent in, but he was debarred from making any such examination by reason of the fact that he had already decided what

the winning word was to be, and that was put in an envelope, and all that had to be done afterwards in order to decide which was the best was to open the envelope. On the facts of that case, I do not think it is of much assistance in the present case.

A I had intended to refer, and I do now refer, to *Scott v. The Director of Public Prosecutions* (1). I have already read the most material passage from the judgment of LUSH, J. That judge went through the matter with great care and came to the conclusion that the scheme in that particular case was not a lottery. The facts, according to the headnote on p. 868, were :

B The proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word ; that all the sentences reaching the editor of the newspaper should receive careful consideration [that, of course, distinguishes it at once from the case with which I have just been dealing] and that the decision of the editor as to the prize-winners should be final :—*Held*, that as the competition was one involving some degree of skill on the part of the competitors, . . . [it was not a lottery].

ATKIN, J., as he then was, in giving his judgment in that case agreed, and he referred to *Hall v. Cox* (2) in these words, at p. 879 :

C In order to succeed the prosecution have to establish that the winning of a prize depends entirely upon chance. "The result no doubt depends largely upon chance but not entirely, and the cases shew that to constitute a lottery it must be a matter depending entirely upon chance" ; *Hall v. Cooper* (2) per A. L. SMITH, L.J. This is a decision by the Court of Appeal which, as far as I am aware, has never been questioned, and is binding on us.

D He agreed with LUSH, J. It was argued in that case that the skill must be literary skill, that unless the editor had literary skill it could not be said that his decision was of any value, and ATKIN, J., said, at p. 880 :

E I do not agree that literary skill is essential. Any kind of skill or dexterity, whether bodily or mental, in which persons can compete would prevent a scheme from being a lottery if the result depended partly upon such skill or dexterity. Many innocent puzzles or parlour games require no literary skill and yet lend themselves to competition not merely the result of chance. It seems to me impossible, having in view the conditions and taking into account the prize-winning examples, to say that no varying degrees of skill and ingenuity can be shewn or would be shewn in complying with the terms of the proposal.

F CHANNELL, J., agreed. On one point he was disposed to take a different view from the other members of the court, but that was upon a point which does not arise in this case at all. He agreed that so far as the first, second and third prizes were concerned the competition could not be held to be a lottery. He was disposed to think there were some other prizes offered which might come under the heading of consolation prizes—they were called consolation prizes—and that those might come within a different category. It seems to me that that is a very strong decision.

The only other case to which I think it necessary to refer is a Scottish case, *Strang v. Adair* (5), where the LORD JUSTICE-CLERK (LORD ATCHISON), said, at p. 65 :

G The question to be decided is whether this competition, . . . [it was a starting price points pool] falls within the legal definition of a lottery. There is no statutory definition. The generally accepted definition is that of HAWKINS, J., in *Taylor v. Smith* (6), " . . . a 'distribution of prizes by lot or chance' . . . " This definition was expressly accepted by LORD SANDS in the case of *Barnes v. Strathern* (7). In other cases the definition has been interpreted as meaning "that to constitute a lottery it must be a matter depending entirely upon chance," [and he refers to *Hall v. Cox* (2)]. This dictum was quoted and accepted as binding by ATKIN, J., in *Scott v. The Director of Public Prosecutions* (1). I do not, however, read this dictum as meaning that the fact of skill or knowledge in the initial stages of a competition will necessarily exclude the competition from being a lottery, if in the progress of the competition the element of chance becomes so predominant that in a practical sense any initial skill or knowledge ceases to be operative and becomes of no effect in determining the result.

With the most profound respect, I agree with every word of that. It seems to me clearly right, and it is based upon that that I made the observations I did at the commencement of my judgment, that the court will look to the

real substance of the matter and say : Does the skill, if skill is proved, really affect the result ?

I come to the conclusion in this present case that the skill which was undoubtedly exercised, and found as a fact by the justices, did affect the result. For that reason, I think quarter sessions were wrong in holding that this was a lottery, and that this appeal ought to be allowed.

CASSELS, J. : I agree. If the appellant was conducting a lottery, he was rightly convicted. If the scheme was not a lottery, the appeal succeeds. The only element of chance which the justices have found to be present in the scheme was the placing of the members in a particular group. If the member was in a winning group he won, and that depended not upon anything which the member did but upon the choice of the appellant. I do not think that you can select one part of a scheme and say that because chance enters into that part, the whole is a lottery, any more than you can say that some scheme is not a lottery because there happens to be a minute element of skill discoverable somewhere. A scheme must be looked at as a whole. If chance predominates and is the one outstanding feature, then it comes within the definition of a lottery as laid down by the cases. For instance, it has been decided that it is mere chance that a person will solve a puzzle, of which there are several solutions, in exactly the same way that someone else has already solved it. In this case, the justices found that the appellant exercised skill based upon his knowledge of football form, and on his knowledge of what has happened in the football world during the past 10 years. Several pools are available to the public. The appellant used his skill in choosing the pool for the members of the club to enter, the matches for the four constants, and the manner in which the remaining 8 forecasts should be made. It is true that these remaining 8 were changed and were not constant throughout the group, but they were not made haphazard but were based upon the appellant's knowledge. The reason why they were changed was that it would not be practical for all the members of the club to make exactly the same forecasts throughout. So far, there is no doubt about skill, and the justices have not found otherwise. On the element of chance, which decides which group a club member shall be in turning the whole scheme into a lottery, the club members left it to the appellant to make the selection for them, and the result of subsequent events determined whether the selection was successful or not. The same thing might be found in many other transactions between persons about which no question of a lottery could possibly arise. The appellant's scheme was not vitiated by this incident.

On these facts, the justices came, in my view, to a wrong determination and decision in point of law, and this appeal must be allowed.

Appeal allowed with costs of appeal from quarter sessions. Order of quarter sessions reversed.

Solicitors : *Ashby, Rogers & Fournier* (for the appellant) ; *Solicitor for the Metropolitan Police* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

BENABO v. THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF WOOD GREEN.

[KING'S BENCH DIVISION (Humphreys and Cassels, JJ.), June 11, 12, 1945.]

Public Health—Housing—Insanitary house—House let as two separate tenements—Two parts of house rated by local authority as separate dwellings—Statutory notice to carry out repairs—Failure to comply with notice—Work carried out by local authority—Right of appeal to county court not exercised—Validity of notice and demand—No separate notices required—Housing Act, 1936 (c. 51), ss. 9, 10, 15, 23, 188.

The local authority in whose area a house was situated, which was suitable for occupation by persons of the working classes within the meaning of the Housing Act, 1936, served a notice upon the appellant landlord to carry out certain specified repairs to various parts of the building. At the date of the notice the house was let by the appellant to two separate tenants, one of whom occupied the ground floor and the other the upper floor.

The house was not structurally divided, both tenants using the same entrance door, hall and internal corridor. The local authority had, however, rated the two parts of the house as separate dwellings. The appellant failing to carry out the work required by the notice, the respondent local authority proceeded to do the work through some contractors. The appellant also did not comply with the demand of the respondent local authority to pay for the expenditure incurred by them, nor did he exercise his right to appeal to the county court against either notice or demand. In default of payment proceedings were taken summarily before the magistrates and the respondents obtained an order against the appellant for the repayment of £75 10s. 0d. and costs. On appeal it was contended for the appellant that the notice and the demand which followed it were not valid since separate notices and separate demands in respect of each tenant were required, and that the appellant was entitled to know the costs of the separate items. It was further contended that the work was not properly carried out, and was not necessary, and that some repairs specified by the notice were not carried out at all :—

HELD : (i) though the house was divided into accommodation for two separate families, and though it was rated as separate dwellings, the appellant landlord was not entitled to separate notices and separate demands under Part II of the Housing Act, 1936.

(ii) by the express provisions of the Housing Act, 1936, s. 15, the appellant was entitled to raise the matters complained of on appeal to the county court within the time prescribed by the section. The appellant not having done so, it was not within the power of the magistrates to adjudicate upon such matters, and their decision was, therefore, correct.

[EDITORIAL NOTE.] It is held here that for the purpose of the Housing Act, 1936 the fact that a house consists of several dwellings for the purpose of rent restriction or rating does not entitle the landlord to separate notices in respect of each dwelling. The Act is concerned with "houses," not "dwellings," and only one notice is necessary.

Questions relating to the amount and necessity of the works carried out by the local authority in lieu of the landlord are not within the jurisdiction of the justices on the hearing of a summons for recovery of the sum due, but should form the subject of an appeal to the county court, on receipt of a notice or demand, under sect. 15 of the Housing Act.

FOR THE HOUSING ACT, 1936, see HALSBURY'S STATUTES, Vol. 29, p. 565.]

Case referred to :

*(1) *West Ham Corpn. v. Benabo (Charles) & Sons*, [1934] 2 K.B. 253 ; Digest Supp. ; 103 L.J.K.B. 452 ; 151 L.T. 119.

APPEAL by way of case stated from a decision of the magistrates, sitting at Tottenham, made on an information laid under the Housing Act, 1936. The facts are fully stated in the judgment of HUMPHREYS, J.

Marcus Grantham for the appellant.

G. D. Squibb and *S. E. Pocock* for the respondents.

HUMPHREYS, J. : The appellant had control of a house known as 80, Winkfield Road, Wood Green, which was of a type suitable for occupation by persons of the working classes within the meaning of the Housing Act, 1936. The respondents are the local authority for the district in which that house is situated. The Housing Act, 1936, s. 9, provides :

Where a local authority . . . are satisfied that any house which is occupied, or is of a type suitable for occupation, by persons of the working classes is in any respect unfit for human habitation, they shall . . . serve upon the person having control of the house a notice requiring him . . . [within a stated time] to execute the works specified in the notice . . .

That was done in this case. Sect. 10 provides that if a notice under the last section is not complied with :

. . . then, after the expiration of the time specified in the notice . . . the local authority may themselves do the work required to be done by the notice . . .

By sub-sect. (3) of that section it is provided :

Any expenses incurred by the local authority under this section, together with interest . . . may . . . be recovered by them . . . summarily as a civil debt, from the person having control of the house . . .

The facts, in addition to those I have stated, are, that the notice in question was served on the appellant, Benabo, and was not complied with. Thereupon the local authority under sect. 10 proceeded to do the work through some contractors, and, having thereby incurred an expenditure of £75 10s. 0d., they took out a summons in the local police court to recover that amount summarily as a civil debt as being expenses incurred by them under sect. 10. On the hearing of the summons the legal representative of the appellant contended that the money could not be recovered because the demand was bad. It was said to be bad because the notice was bad, since it, and the demand which followed it, related, not to a house, but to more than one house—to two houses. That point having been raised, the justices have stated a case for our opinion upon the matter.

I think it is possible that an extremely short answer might have been made to these contentions, namely, that where the house is, what it is like, and how it is divided up, is purely a question of fact, in each case for the tribunal to decide. But the justices thought that as it was a question which had been strenuously argued before them as a question of law, it would be right and proper to ask this court for its opinion.

It is necessary to read the stated case about this house in order to decide the matter. Para. 8 of the case says that it is a house "which is occupied by persons of the working class." Para. 9 says it was :

... built and used originally as a private dwelling-house for one family only, but at the date of the service of the notice and for a considerable time prior thereto it was let by the appellant as two flats to two separate tenants, one of whom occupied the ground floor and the other the upper floor.

The case then goes on to explain that they are not flats in the ordinary meaning of that expression, and para. 10 says :

No structural alterations in respect of the separate letting of the ground and upper floors had been carried out : a cooker and sink had been installed in one room on the first floor ; there was one external water closet used by both tenants and their families, and both tenants and their families used the same entrance door, hall, and internal corridor.

In fact, this was a house which was used by two separate families. The landlord, the person having control, had let certain rooms in the house to one person and certain other rooms to another person. Does that make the house two houses ? In my opinion, emphatically not. It remained one house. I think that is the answer, and a complete answer, to this point.

It is said : " There are two dwellings here ; there are two families dwelling in this house, and if there are two dwellings there must be two houses." Reference is made to the Rent Restriction Acts and to the Rating Acts. Under the Rating Act it is perfectly true that the local authority have rated the two parts of this house as separate dwellings since two sets of people are paying separate rents and occupying separately certain rooms. It may be—I do not decide it one way or the other—that for the purposes of the Rent Restriction Acts there may be two dwellings here ; but I search in vain in this statute we are dealing with for any indication that the Act is concerned with dwellings as such at all. This part of the Act is concerned with houses. The object of the Act is not to apportion rent or to decide who is to pay the rates of these premises, it is to enable the local authority to put into a habitable state that which is not fit for human habitation. That is, the whole house *qua* house. It does not matter who occupies it. It might not have been occupied by anybody at all. It clearly would come within the terms of sect. 9 if it is a house which, in the words of the section, is " of a type suitable for occupation by persons of the working classes." I do not myself derive the least assistance in answering the question whether this is one house or two houses from a consideration either of the Rent Restriction Acts or from the fact, as stated in the case, that the rating authority has rated both the occupiers in respect of the particular part of the house they occupy.

The only other thing which need be said on that point is to refer to a matter brought to our attention by counsel for the respondents. He points out in sect. 188 of the Act there is a definition of the word " house " :

" House " includes any yard, garden, outhouses and appurtenances belonging thereto or usually enjoyed therewith.

Then, by subsect. (3), it is provided :

For the purposes of any provisions of this Act relating to the provision of housing accommodation [that refers to Part V of the Act : the part we are dealing with is Part II] the expression "house" includes, unless the context otherwise requires, any part of a building which is occupied or intended to be occupied as a separate dwelling.

A I think that is not a bad illustration of what I was saying, namely, whether you call it a dwelling or whether you call it a house, for some purposes a particular place may be two houses or two dwellings, but for another purpose it may be one house or one dwelling.

B I think counsel for the respondents is right in drawing our attention to that section and arguing from it that it cannot be that the provision applies for the purposes of Part II of the Act, because it is strictly confined to Part V of the Act. If it had been the intention of the legislature to apply it to Part II of the Act they would have said so. That is the answer which I make to the first point put forward here, the answer being that the notice served is a notice in accordance with sect. 9, and, therefore, is a perfectly good notice. It is to be observed also that it is a notice which goes into the most minute detail as to the work required. The fact that it has not been complied with is the basis of the demand which follows exactly the terms of the notice. I do not think it is suggested that if the notice is good the demand is bad. It is said C they were both bad because both in law relate to two houses. For my part I agree if they did relate to two houses they would be bad ; but, in my opinion, they do not. So much for the first point.

The next point taken was this. It is said there are not sufficient details of the expenses incurred as stated in the demand, and there ought to be details given to the appellant, as the person in control of the house, of how much work was done to the upper and lower part of the house. With my answer to that point D I think I may also deal with the allegation by the appellant that his contention at the police court, that the work was not necessary at all, was not gone into by the justices. The same complaint is made on the question of details not being given. What happened was this. There was cross-examination upon that point and no doubt the justices were advised by their clerk, and, in my opinion, rightly advised, that such cross-examination was totally immaterial. That E being the view of the representatives of the local authority, there was no discussion of the matter. The local authority did not go into that question because they considered it a question which the justices could not determine. Again, I think the decision of the justices was perfectly right. In order to deal with that point it is necessary to look at sect. 15. I should assume that the questions whether the local authority was right in saying this work was necessary and that sufficient details had been given to enable the person having control F to decide whether the work was necessary, and matters of that sort, and also the decision as to whether the work had been done so as to render the demand reasonable because the expenditure was reasonable, are questions which ought to be decided by some tribunal and not left to the *ipse dixit* of the local authority. But a complete answer to that point is that the framers of this Act have taken the same view by providing a tribunal which is to decide all such matters. Sect. 15 says :

G Any person aggrieved by (a) a notice under this part of this Act requiring the execution of works [that applies to the notice] (b) a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice [that relates to the demand] . . . may . . . [within a certain period] appeal to the county court within the jurisdiction of which the premises to which the notice, demand or order relates are situate, and no proceedings shall be taken by the local authority to enforce any notice . . . before the appeal has been finally determined.

H It is quite clear that it was open to the appellant here to appeal to the county court against this notice. These are matters which would have been within the jurisdiction of the county court judge who would have to decide upon evidence brought before him whether the work was reasonably necessary, and other matters of that nature. The fact that there is an appeal to the county court upon those points is in law the best proof that, if that appeal is not made, it is not open to the person having control of the house, to rely on that point in any subsequent proceeding for the recovery of the amount spent by the local authority. I find the statute has said so in terms. By subsect. (5) of sect. 15,

it is enacted :

Any notice, demand or order against which an appeal might be brought to a county court under this section, shall, if no such appeal is brought, become operative on the expiration of the period of twenty-one days . . . [after the service] and shall be final and conclusive as to any matters which could have been raised on such an appeal . . .

I do not think there is any need to say anything more about that point. There was a right of appeal against the notice and against the demand. Sect. 15 says that matters which could be raised on appeal against the notice must be so raised, if they are to be raised, by appeal to the county court, and it is too late to raise them on the demand. But that does not matter in this case because there was no appeal against the notice or the demand. Quite clearly, an appeal could have been brought on those matters. Both at common law and on the ordinary interpretation of statutes, and by the express language of sect. 15 (5), it is beyond argument that the justices had no jurisdiction to enquire into these matters.

The last point is this. It is said that in point of fact part of the work, the expenses of which are sought to be recovered here from the appellant, was never done. That is a matter, which, obviously, could not have been tested on appeal from the notice. The notice is a notice to do work. The demand is a demand for expenditure incurred as a result of the work having been done. But there could have been an appeal against the demand on that point, although there could have been no appeal against the notice. The time to make an appeal against the demand was when the demand was made. An appeal is given by subsect. (5) against the demand just as an appeal is given against the notice.

Those are the points, and the only points, raised by counsel for the appellant. We have been referred to one authority, *West Ham Corpn. v. Charles Benabo & Sons* (1), a judgment of ATKINSON, J., with which I entirely agree. The judge there had to decide certain matters under the Housing Act. But the facts of the case were totally different. The case related, in the first place, to a block of houses. What was sought to be recovered were the expenses incurred in putting into proper order a block of houses. The Act speaking of a house only ATKINSON, J., said, the demand was bad because it ought to have related to a house and not to a great many houses. It being bad there was no need to go to the county court. I think that the judgment of ATKINSON, J., is of no assistance in this case. In my opinion, the appeal fails on all points here, and should be dismissed.

CASSELS, J. : I agree. I do not think because a house is divided into accommodation for two or more separate families that entitles the owner to separate notices and separate demands under Part II of the Housing Act, 1936. The facts in this case are entirely different from the facts in *West Ham Corpn. v. Charles Benabo & Sons* (1). That was a case in respect of work carried out by a local authority on 23 separate houses differently situated in one street. The authorities sent in one demand which was not signed by the town clerk. The action was brought to recover one total sum. In the case we are considering now, the appellant was duly served with the necessary notice and did not comply with it. He took no step of those available to him under sect. 15 of the Act. When the work was done and the demand for the recovery of the sum of £75 10s. 0d. and interest was served, he took no notice of it. That took the parties to the magistrates' court where an order was made for payment forthwith.

The appellant has come to this court to contend that there were two separate dwellings in this house which would be regarded as two separate dwelling-houses under the Rent Restriction Acts, because two separate families were occupying them, and because two separate rents were paid, and because there were two separate assessments, and the owner would have a difficulty in calculating the apportionment of the cost of the repairs between the two separate parts of the house so as to decide the percentage increase of rent he could demand. The order of the magistrates was said, therefore, to be wrong in law, and there should have been two demands and particulars of expense incurred in respect of each part of the dwelling house. The magistrates came to a very clear decision : "The house was not in fact two separate dwellings." On the facts, I think that is a correct determination in law.

It would be oppressive if a local authority, administering this part of the Housing Act, 1936, and dealing with a neglectful landlord, had to serve him with separate notices and demands in respect of every room he had let separately. I agree with my Lord that there can be only one result in this case, and that is that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Montague Adler & Arnold* (for the appellant); *Harold Chubb*, town clerk, Wood Green (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

DELBERT-EVANS v. DAVIES AND WATSON.

B [KING'S BENCH DIVISION (Humphreys and Oliver, JJ.), May 14, 15, 1945.]

Contempt of court—Court of Criminal Appeal—Newspaper comments between judgment of Central Criminal Court and hearing of appeal against conviction by Court of Criminal Appeal—“Pending cause.”

C The applicant for a writ of attachment of the editors of two London newspapers for contempt of court was tried and convicted, on Nov. 29, 1944, at the Central Criminal Court on an indictment containing 13 counts. The applicant, then a registered medical practitioner, was found guilty on 10 of the charges and sentenced by the judge to a long term of penal servitude. The two newspapers, after the trial but before it was known whether there would be an appeal, published accounts of the alleged criminal activities of the applicant during a number of years. The statements made in these articles did not purport to be, and were not in fact, reports of the evidence given at the trial but were represented as the result of enquiries made by the reporters. Substantially, however, the reports did not go much further than the evidence and certain statements made by the police officers in court after the verdict had been given and before sentence had been passed. The appeal of the applicant, which was an appeal against conviction was heard and dismissed by the Court of Criminal Appeal on Feb. 14, 1945. The question for the determination of the court was whether the publication of any matter, which would amount to a contempt of court if it had been published before the applicant was tried by the jury, could be said to be calculated to interfere with the due course of law and justice, *i.e.*, calculated to prejudice the fair hearing of the applicant's appeal by the Court of Criminal Appeal:—

F HELD: (i) during the time between the conviction of an accused person on indictment and his appeal to the Court of Criminal Appeal the case was still *sub judice* and any improper statements published in the interval might justifiably give rise to proceedings for contempt of court.

R. v. Payne (1), *R. v. Parke* (2) and *Dunn v. Bevan*, *Brodie v. Bevan* (3) applied.

G (ii) the statements in the articles complained of were not relevant to the matter to be decided by the Court of Criminal Appeal and in fact did not go materially farther than the evidence given at the trial. In the circumstances the publications did not amount to contempt of court.

H [EDITORIAL NOTE. It is held here that it may be contempt of court to publish comments on a criminal trial before the time for appealing has run out. The powers of the Court of Criminal Appeal include the power to award a *venire de novo* formerly exercised by the Court for Crown Cases Reserved (*R. v. Dickman* (1910), 5 Cr. App. Rep. 135), and the court is not, therefore, limited to deciding questions of law. The embarrassment caused by having read some newspaper comment upon a case is not necessarily confined to jurors, and judges are equally entitled to protection against subconscious influence. Newspapers which publish comments while a case is still pending do so at their peril, and for this purpose a case is pending until an appeal has been dismissed, or the time for appeal has run out. As WILLS, J., put it in *R. v. Parke* (2) “It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.”

AS TO CONTEMPT OF COURT BY PUBLISHING ARTICLES IN NEWSPAPER PENDING TRIAL, see HALSBURY, *Hailsham Edn.*, Vol. 7, pp. 9-13, paras. 12-14; and FOR CASES, see DIGEST, Vol. 16, pp. 20-24, Nos. 152-208.]

Cases referred to :

- * (1) *R. v. Payne*, [1896] 1 Q.B. 577 ; 16 Digest 23, 190 ; 65 L.J.Q.B. 426 ; 74 L.T. 351.
- * (2) *R. v. Parke*, [1903] 2 K.B. 432 ; 16 Digest 22, 179 ; 89 L.T. 439 ; *sub nom. R. v. Parke, Ex p. Dougal*, 72 L.J.K.B. 839.
- * (3) *Dunn v. Bevan, Brodie v. Bevan*, [1922] 1 Ch. 276 ; 16 Digest 20, 153 ; 91 L.J.Ch. 299 ; 127 L.T. 14.
- * (4) *Hunt v. Clarke* (1889), 58 L.J.Q.B. 490 ; 16 Digest 24, 200 ; *sub nom. Re O'Malley, Hunt v. Clarke*, 61 L.T. 343.
- (5) *Re Clements and Costa Rica Republic v. Erlanger* (1877), 46 L.J.Ch. 375 ; 16 Digest 15, 92 ; *sub nom. Costa Rica Republic v. Erlanger*, 36 L.T. 332.
- (6) *Crane v. Public Prosecutor*, [1921] 2 A.C. 299 ; 14 Digest 538, 6090 ; 90 L.J.K.B. 1160 ; 125 L.T. 642 ; 15 Cr. App. Rep. 183.
- (7) *R. v. Editor and Publisher of "The People," Ex p. Hobbs* (1925), 69 Sol. Jo. 494.

EX PARTE MOTIONS by the applicant for an order for a writ of attachment for contempt of court of Major David Percy Davies, editor of the NEWS OF THE WORLD and Arthur Ernest Watson, editor of the DAILY TELEGRAPH AND MORNING POST. Owing to a technical error only one motion was served. The court decided to treat the matter as though two separate motions had been correctly served, one against the editor of the NEWS OF THE WORLD, the other against the editor of the DAILY TELEGRAPH AND MORNING POST. The facts and arguments are fully set out in the judgment of HUMPHREYS, J.

Tristram Beresford, K.C., F. H. Lawton and A. S. Diamond for the applicant.

Valentine Holmes and Arthian Davies for the respondent Davies.

Valentine Holmes for the respondent Watson.

HUMPHREYS, J. : In this case there was tried at the Central Criminal Court, and the trial concluded on Nov. 29, 1944, a person who was then a registered medical practitioner of the name of Dr. Delbert-Evans, upon an indictment which charged him with other persons, first of all with conspiracy with three named persons to procure the miscarriage of various women by the use of instruments or other means. In counts Nos. 2 to 8 he was charged with actually using an instrument with intent to procure the miscarriage of seven different women during the year 1944. Counts Nos. 10 to 13 charged him with using an instrument with intent to procure the miscarriage of four other women who were named. He was convicted on ten counts of that indictment and acquitted on two counts. After the verdict of the jury, in accordance with the usual practice, the police officer in the case went into the witness box and stated the history of the applicant in this case, his military service, his medical qualifications and what may be called his medical history and other matters which were properly mentioned and not in any way prejudicial to the applicant. He then stated that the police had statements of nineteen other women—I think that was the number mentioned—who said the same thing had been done to them by the appellant. The judge, therefore, had before him a man who was, and had been for a long time a professional abortionist. By the verdict of the jury he had been concerned not in one but in, I think, eleven different cases of named women with regard to whom attempts, successful or otherwise, had been made to procure their miscarriage by instruments or other means. That man was a person with regard to whom the police were entitled not only to give facts but to say what was the general view of the police as to the man's character, good or bad. It was plain that the police took the view that this man was, and had been for a long time, a professional abortionist, and a person whom they had regarded as such for a considerable time. It was in those circumstances that the judge passed a sentence of five years penal servitude, and that sentence the applicant is at the present time serving. That happened on Nov. 29. Upon Dec. 3 the NEWS OF THE WORLD, which is a Sunday newspaper, published certain matters with regard to that trial and with regard to the applicant which are complained of in these proceedings. On Dec. 12 the applicant, being then an appellant to the Court of Criminal Appeal or, at all events, a person who had every intention of being an appellant to the Court of Criminal Appeal because he intended to appeal—it is not quite clear whether his notice of appeal had been sent in or not, but he was well within time—swore an affidavit asking this court to grant leave to him to take proceedings for contempt of court against the editor of the NEWS OF THE WORLD.

The application based on that affidavit was made to this court on Dec. 21,

and upon Feb. 14, 1945, the Court of Criminal Appeal, being seized of the appeal, heard and dismissed the appeal. The appeal which was brought to the Court of Criminal Appeal was not an appeal against sentence but was an appeal against conviction founded, as we are told at the Bar, upon some questions of law, which, of course, may have included such matters as alleged misdirection or misreception of evidence.

A In applying for leave to move for the committal for contempt of the editor of this newspaper, counsel for the applicant, who also had appeared at the trial, argued the case at considerable length. It is apparent that the court, as then constituted, consisting of VISCOUNT CALDECOTE, L.C.J., and CASSELS, J., had considerable doubt whether they ought to grant leave at all. Very little was said in the course of the proceedings as to the particular matter complained of in the newspapers, but much time was occupied in discussing the question of whether a person, who has been convicted by a jury and who is or intends to be an appellant to the Court of Criminal Appeal, and about whom at that time a newspaper has published defamatory matter which it is alleged may amount to a contempt of court, has the right to come to the court and ask for the committal of the editor of the newspaper, or whether the law is—and it is a pure question of law—that after his conviction by a jury the proceedings are so much to be considered as at an end that no proceedings for contempt of court can be instituted, since the whole object of such an application is to deal with a possible miscarriage of justice—I suppose that is the right word to use—as the result of the prejudice which is introduced into the matter by the alleged offending newspaper. It was argued—upon one side; it was an *ex parte* application—and it was somewhat doubted by this court whether it was not too late to make the application which was then before the court on the ground that it could not be said that any comment made after conviction by a jury was calculated to prejudice the fair hearing of any proceeding which might be taken by the applicant as an appellant.

D After argument and after a number of cases had been cited, and in the course of which certainly no special attention was paid and the attention of the court, I think, was not directed at all, to what has been regarded for many years as the leading case upon contempt of court, namely, *R. v. Payne and Cooper* (1), VISCOUNT CALDECOTE, L.C.J., said this :

E Mr. Beresford, we are inclined to give you leave to move upon your submission which has been clearly made : The proceedings are pending at any time when there is an opportunity for appeal.

and that was the decision of the court, and so it is that this matter has come before us.

F These proceedings were opened by counsel for the applicant as raising a question of law, which he told us, as far as he knew, had never been raised before, and it is that question of law upon which this court thinks first of all it is our duty to express our view. The question of law is confined to a case in which the facts are as they are in this case, and as far as I am concerned—I am only expressing my own view—I say nothing about the law of contempt generally or the law of proceedings for contempt as it applies in civil cases. I confine myself to cases of the nature of the one which is before us. I think the question may be put in this way. Where a man has been convicted on indictment of a criminal offence and is or probably will be an appellant to the Court of Criminal Appeal against that conviction, in law can any comments made by a newspaper in relation to the case be made the subject of proceedings for contempt ?

G Having heard counsel for the editor of the DAILY TELEGRAPH AND MORNING Post, I think it unnecessary to say very much about the matter, because counsel said that put in that way he had great doubt whether he was in a position to argue to the contrary, and his real answer to the motion which is made for the committal of the editor of the NEWS OF THE WORLD in this case is that there was no contempt of court at all on the facts of this case, and even if the court were to hold that there was something which might amount to contempt of court, this is not a case in which the court would make any order against him.

H All that I find it necessary to say about the matter is to refer to and found myself upon two of the many cases to which we have been referred. The first one is *R. v. Parke* (2). The facts of the case it is not necessary, I think, to state.

The point raised in the case again is quite different from any point raised in this case. The matter actually decided was that the court has jurisdiction to attach the publisher of a newspaper for contempt of court, notwithstanding that at the time of the publication the person charged has not yet been committed for trial. There are some observations to be found in the judgment of WILLS, J., who delivered the judgment of the court consisting of LORD ALVERSTONE, L.C.J., WILLS and CHANNELL, JJ., which are worthy of reiteration. At the bottom of p. 436 WILLS, J., observed :

The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression “contempt of court.” If it be once grasped that such is the nature of the offence, what possible difference can it make whether . . . [the person has been committed for trial or is going to be committed for trial].

The other passage which I desire to refer to in that judgment is this. WILLS, J., says, at the bottom of p. 437 :

Great stress has been laid by Mr. Danckwerts [who was senior counsel in the case] upon an expression which has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the court. We think undue importance has been attached to it. It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.

The next matter which I think ought to be referred to is *Dunn v. Bevan, Brodie v. Bevan* (3), which was tried before SARGANT, J., as he then was. In the course of his judgment in that case that judge took occasion to deal with the law of contempt rather thoroughly, and he said this, on p. 284 :

It seems to me that the law is pretty well settled in these cases now. I do not deal, of course, with the case of a report which amounts to scandalising the court by making attacks upon the judge who presided at the trial—that is entirely out of the question here, and there is nothing in the circular to be complained of by the judge who tried the case. The only other sort of contempt which I think could effectively be established against the plaintiffs is that they were doing something which was interfering in some sort of way with the administration of justice. But as to this the principle is put thus in a well known work—OSWALD ON CONTEMPT OF COURT, 2nd Edn., p. 62 : “Proceedings are pending immediately the writ is issued, and as long as any proceedings can be taken. But when the cause is dead or ended, comments may be made . . .

and then SARGANT, J., refers to cases which dealt with a matter which really does not arise here, a question of applying for a new trial in a civil case.

I find it sufficient to found myself upon the observations of the judges in those two cases, but *R. v. Payne and Cooper* (1) to which I have already referred, was a judgment of this court in which the judges who composed the court went a long way in drawing attention to the undesirability of any such proceedings as those in the present case being taken except upon very clear grounds. We have been reminded of some passages in the judgment of LORD RUSSELL OF KILLOWEN, C.J., to the following effect. LORD RUSSELL OF KILLOWEN, L.C.J., said, at p. 580 :

I wish to express the view, which I entertain, that applications of this nature have in many cases gone too far. No doubt the power which the court possesses in such cases is a salutary power, and it ought to be exercised in cases where there is real contempt, but only where there are serious grounds for its exercise. Every libel on a person about to be tried is not necessarily a contempt of court ; but the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending.

Later on his Lordship approved of the judgment of COTTON, L.J., in *Hunt v. Clarke* (4) who, after referring to a judgment by SIR GEORGE JESSEL, M.R., in *Re Clements, Republic of Costa Rica v. Erlanger* (5) said, at p. 493 :

. . . there should be no such application made unless the thing done is of such a nature

as to require the arbitrary and summary interference of the court in order to enable justice to be duly and properly administered without any interruption or interference, that is what we have to consider . . .

and in that particular case while COTTON, L.J., thought that there was a contempt of court proved, he added that the contempt may be technical. He thought in that case that there was not any such interference or any such fear of any such interference with the due conduct of the action or any such prejudice to the defendant in question as to make it desirable that the court should make any order. WRIGHT, J., in agreeing with LORD RUSSELL OF KILLOWEN, M.R., said this, at p. 581 :

I agree with all that the Lord Chief Justice has said, and I only wish to add that, in my opinion, in order to justify an application to the court the publication complained of must be calculated really to interfere with a fair trial, and, if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the court. If the publication is found to be likely to interfere with a fair trial, a second question arises, whether, under the circumstances of the case, the jurisdiction which the court in that case possesses ought to be exercised, not so much for punishment as for preventing similar conduct in the future. That is the rule which I wish to adopt with regard to applications of this nature.

A consideration of those authorities leads me to this question : Can the publication of any defamatory matter, or any matter which admittedly would amount to a contempt of court if it had been published before the man had been tried by the jury in this case, be said to be calculated to interfere with the due course of law and justice—calculated to prejudice the fair hearing of, in this case, the appeal ? To my mind one must remember what are the powers of the Court of Criminal Appeal in regard to these matters. If the Court of Criminal Appeal existed for the sole purpose of deciding questions of law which come before it, the answer might well be in the negative. It might be said that it is inconceivable that any court considering a pure question of law could be affected by anything written in a newspaper about the character of one of the parties in a civil or a criminal case. It is, of course, quite inconceivable that any such question could be raised, and it is inconceivable that, if one of the judges happened to have read the particular newspaper in question, it could have the smallest effect upon him. That is not true of the Court of Criminal Appeal. The Court of Criminal Appeal has many functions to perform, and one of the powers which it possesses, as was decided by the House of Lords in *Crane's case* (6), is that when the Court of Criminal Appeal finds that proceedings on an indictment are void for some reason, it has the power to order a trial of the indictment in question and, therefore, the Court of Criminal Appeal has the power which used to exist in the court for the consideration of Crown Cases Reserved of awarding *venire de novo*. Now that means that in any case (because no one can tell what the argument is going to be before the court) it may happen that the Court of Criminal Appeal may direct that a jury shall be sworn to try the issue on the indictment which has never been properly tried. So that it is quite a fallacy to treat this matter as if all that the Court of Criminal Appeal could do was to decide a question of law. It may be true in a sense that they are deciding a question of law, but they may decide it in the sense that a jury must try the question of fact. Therefore, any matter which is published between the date of the conviction and the date of the hearing by the Court of Criminal Appeal may be matter which may come to the attention of a person who has to try the guilt or innocence on that indictment of that person or individual. In my opinion, the consideration of that fact is sufficient answer to the question : can it possibly prejudice the fair trial of an accused person ? The answer is : it certainly may. It is unlikely because cases of *venire de novo* do not happen every day, but they have happened, if my recollection is correct, three or four times at the very least since I have been a judge, and it is always a possibility, be it remembered, that the court may order that. But there is another matter I desire to say a few words about. I think it is a fallacy to assume that the only object of punishment for contempt of court in a criminal case is to prevent a juror from reading matter which he ought not to know anything about, that is, a juror who is trying the particular person. There is the judge to be considered, and while I am not saying for a moment that any person sitting in a judicial capacity, who may, be it remembered, not be a High Court judge at all, but a

chairman of quarter sessions, who may or may not be a lawyer, or a recorder, or may, of course, be one of the judges of the King's Bench Division, would be affected, I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I am not saying for a moment that it is likely that any judge would give a decision which he would not have given but for information which had been improperly conveyed to him, it is embarrassing to the judge that he should be told matters which he would much rather not hear and which make it much more difficult for him to do what is his duty, and if I may repeat once again the words which I have already read from the judgment of WILLS, J., in *R. v. Parke* (2), at p. 436 :

The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it.

It seems to me that the bringing before, or doing something which may have the result of bringing before, the minds of judges who have to try an appeal in a criminal case matter which they do not desire to know, and which, if it is forcibly brought to their attention, is likely to prejudice them in the fair and impartial consideration of the case, is wrong. Whether that is right or not, I cannot say ; it is my own opinion and I express it as such, and no judge with long criminal experience, I venture to think, will fail to be able to recall instances in which it has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will make the task of a judge more difficult.

Those are the reasons why, in my opinion, there is ample authority for saying that during the time between the conviction of an accused person on indictment and his appeal to the Court of Criminal Appeal the case is not ended at all ; the case is still *sub judice*. The case is pending, to use the expression which has been used in many cases and in many judgments, and the publication of improper matter may amount to a contempt of court.

It is said that there is an authority to the contrary and that is *R. v. Ainsworth and Odhams Press, Ltd.* (7). I have not seen the report ; it is much too large to handle, but I believe it was the editor or somebody connected with the newspaper THE PEOPLE, and it is reported in THE TIMES newspaper of Apr. 7, 1925. It was a case of an appeal from a conviction ; I think Hobbs was the name of the person who was convicted ; it is *Ex parte Hobbs*, who was no doubt the applicant in the case. He had been convicted, I think it was, at the Central Criminal Court of a criminal offence and he appealed to the Court of Criminal Appeal, and so far as I was able to follow from the reading by counsel for the respondent Watson of that report, the judgment of the court in that case, which was a judgment that no order ought to be made against the editor of that newspaper, was based upon this, that the court considered that the articles which were published were not calculated to prejudice the fair hearing of the appeal, and nothing more. In my view, the decision of that case is no authority for the proposition that in some other case what is published by some other newspaper may not amount to a contempt of court and be punishable as such.

That is all I desire to say upon the question of law which was, on the argument of counsel for the applicant, really the sole question which we had to consider. I would say in passing that I entirely agree with the summary of the law of contempt which is to be found in HALSBURY'S LAWS OF ENGLAND, 2nd Edn., Vol. 7, beginning at p. 2. I do not want to read the passages because they are long. I entirely agree with them, and I do not think there is anything there contrary to the views which I have expressed as being my own views.

Why I find myself in disagreement with the argument of counsel for the applicant is that it seems to me, having decided that question of law, that we are only at the beginning of this case. The only opinion I have expressed is that on the dates in this case it is no answer for the editor of the NEWS OF THE WORLD to say : "I only published this article after this man had been convicted." That is no answer. I still have to look at the article and see whether, in my opinion, it amounted to a contempt of court, and whether it amounted to a

contempt of court which this court ought to deal with, having regard to and always remembering those very strong observations made by LORD RUSSELL OF KILLOWEN, L.C.J., in *Payne's* case (1).

For that purpose I look at the trial. I have said that, in my opinion, the judge had before him enough to make it perfectly clear, and his sentence shows that he did have in his mind quite clearly, that it was a case not of a man who had on one occasion broken the law, but of a man who had for a long period, whether
 A it was over the twelve months of one year or the much longer period of several years really does not matter, made a practice of living on the proceeds and the very great proceeds of the practice of abortion. That was the man he had to deal with, and that was the man he sentenced. In those circumstances, the first thing to be said is that the NEWS OF THE WORLD, so far as I know, published a perfectly accurate summary of the proceedings at the trial, and, amongst
 B other things, published accurately what the judge said in sentencing the then accused person, but it is said that this passage in the form of a headline is a contempt of court. It begins: "Doctor unmasked." That is true enough. "Scotland Yard were after him for 20 years." That is an exaggeration; certainly nobody had said in the course of the case that Scotland Yard had been after him for 20 years, but the police had said that they had 19 separate women who had made statements to the police that he had been doing this, and those
 C 19 were in addition to the eleven in respect of whom the jury had found that he had been doing this. I doubt whether it could be said that the statement was very inaccurate if it had substituted for the figure "20" the word "many." Now the next thing that is said is this. The article in question says of the applicant: "The first complaint the police ever received against Delbert-Evans was over 20 years ago"—that is a complaint only. "Without evidence to justify an arrest, they were patient." That may be true or untrue. If it is
 D untrue, it may be that the applicant has a right to bring an action for damages for libel on the ground that it is untrue that the police 20 years ago had any complaint made to them, but I cannot myself conceive any circumstances in which a Court of Criminal Appeal, hearing an appeal against conviction only and not an appeal against sentence, could be affected, even if they had read it, by such a statement as that in this case, and I am dealing only with this case and the facts of this case. The next part of the article is apparently objected
 E to, but I do not know why. "Without evidence to justify an arrest they were patient, and when he was suspected along with Lewis early this year," and then it mentions the names of the police officers who were connected with the case. I can see nothing wrong in that at all, as it seems to me.

Now the next matter which is objected to is this:

F The principal question still puzzling Scotland Yard is the whereabouts of the fortune which Delbert-Evans is believed to have amassed . . . the police believe he is only pretending poverty and has, in fact, hidden most of his earnings.

Again I say I cannot imagine the mind of anybody being prejudiced on the question which had to be decided, the question of whether he was properly convicted or not, by the statement that the man had, according to the evidence in the case, received very large fees from women and had put the money away and not spent it. That is really what it comes to, and I have the gravest doubt
 G whether there can be found in this particular article, which is the only one I have to deal with, anything which could be said to be contempt of court in the circumstances of this case. What I am quite clear about is that even if it could be said that those statements did amount or might amount to a contempt of court, no harm has been done to anybody. The applicant appealed to the Court of Criminal Appeal, and the court heard his appeal and dismissed it.
 H There was no evidence to suggest that the members of the Court of Criminal Appeal who heard that appeal were, I will not say, in the habit of reading the NEWS OF THE WORLD, but it is extremely unlikely that if any member of the court had read it, they would have been in the least interested in that matter as regards the question they had to decide.

My own view of this matter is that no order should be made at all on these proceedings in regard to the alleged contempt by the editor of the NEWS OF THE WORLD. I would add this. In my view, newspapers which choose to publish or editors of newspapers who choose to publish comments upon a criminal case

while it is still pending, and a criminal case is still pending while the time for appealing has not run out at least, and most assuredly in the case of a man who is appealing or is proposing to appeal—if they choose to comment on the facts of the case other than upon matters which have been given in evidence in open court, they do so at their peril. I should have no sympathy with any editor who found himself, as the result of having some special person in his employment to deal with this class of news, in the position of having overstepped the line and saying things which might prejudice, in the view of the court which had to deal with the matter, the fair hearing by the Court of Criminal Appeal. I think it would be very much better for them to wait until the case is finally over to make any observations they wish to make about the case, and I think a criminal case may be said to be finally over when the Court of Criminal Appeal has heard and determined the appeal, and after that time they are in no peril of being dealt with for contempt of court. They are the best judges as to whether they are inviting an action for libel and whether they desire it or not, but so far as proceedings for contempt are concerned, there is no longer any question of that matter. A

I have given judgment somewhat at length in this case because there is that one matter which I have already said I feel very strongly about, and that is that it must not be assumed that jurors are the only people who are to be protected from the annoyance of matter being presented to them which is quite inadmissible and which is most embarrassing to any person who has to decide a matter, as he desires to do it, judicially, which means impartially and upon the evidence. The result, in my opinion, is that there should be in this case no order made upon the motion. I am not dealing at all with costs at the moment. B C

OLIVER, J. : I agree with my Lord that that should be the result of this proceeding, and also with everything he has said about what has been called the question of law in this case. In my view, contempt of court can be committed, on the authorities, at any time until the case is ended, and that it is not ended until after the hearing and decision of the appeal, if any. I fully agree with my Lord (and this is a matter in which I share his view as to its importance), that jurors are not the only people whose minds can be affected by prejudice, in my view, it is absurd to suggest that judges' minds could not be affected by prejudice. One of the evils of inadmissible matter being disseminated is that no one can tell what effect a particular piece of information may have upon his mind. He cannot be sure himself ; his mind is not a thing with regard to which it can be said exactly what material brought it to any particular view at any moment. I can think of no better word than the word my Lord used : why should one be embarrassed by having matter such as this put into one's mind, the effect of which it is impossible to estimate or assess. As an illustration, the Court of Criminal Appeal has recorded, not once but many times, its thorough disapproval of evidence which is sometimes introduced by police officers at the end of a case when a man has been convicted, when all sorts of allegations have been made against the man's character—allegations in the nature of hearsay and allegations which are not supported by evidence at all. What is the reason for that ? It can only be that the judge who, after hearing the evidence, has to pronounce sentence, may have his judgment quite unconsciously influenced by matters which he has no right to consider, and if there be an object beyond that, it might well be this, that such matter ought not to appear before the Court of Criminal Appeal itself in case there should be an appeal. D E F G

Having said that—and speaking for myself I could not be more emphatic on the matter—I pass on to say this. There being jurisdiction in us to hear this matter, it becomes a question whether in this case and on the facts of this case we ought to interfere by attachment. Not all defamatory matter can amount to contempt of court. I am not going through the cases but that appears in case after case. Whether in any particular case defamatory matter amounts to contempt seems to me to be a question in each case of fact, of degree and of circumstances. Obviously, far less would amount to contempt of court if it was published before the hearing by a jury than would be required to amount to contempt of court before hearing by a judge or the Court of Criminal Appeal. Publication at the end of a notorious trial of all sorts of gossip about a man H

who has been convicted is, of course, highly undesirable. I associate myself with my Lord's observations when he said that editors who publish such things do so at their peril. If such matter is published there may be, of course, actions for libel. The editors are the best judges as to whether it is worth while, but whether the things which they publish are false or true, the risk is incurred of proceedings for contempt. On the facts of this particular case, I agree that what was published does not amount to contempt of court. The appeal in question was only an appeal against conviction. The matter published went, as far as I can see, only to the question of sentence. I fully agree with what my Lord has pointed out, that when the matter comes to be analysed, what was published is very little worse than what was proved. The man was proved to have been an habitual abortionist and proved to have made his living in that despicable fashion. It is not much worse to say he has been doing it for 20 years than to say he has been doing it for two years. I do not think it can be said to be calculated to bring about an interference with the administration of justice. I only desire to add this. Much is said to-day about the value of freedom of the Press, but I would point out that our decision in this case comes to no more than this, that everything the public has a right to know about a trial of this kind can be published, *i.e.*, everything that has taken place in open court; and beyond that there is no reason whatsoever to go.

Motions refused with costs.

Solicitors: *Samuel Coleman* (for the applicant); *Roche, Son & Neale* (for the respondent Davies, editor of the NEWS OF THE WORLD); *Alfred Cox & Son* (for the respondent Watson, editor of the DAILY TELEGRAPH AND MORNING POST).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

R. v. JUSTICES OF THE PEACE FOR SUNDERLAND, *Ex parte* LESLIE HODGKINSON.

[KING'S BENCH DIVISION (Humphreys and Oliver, JJ.), May 15, 17, 31, 1945.]

Bastardy—Affiliation order—Second application—First application dismissed on merits—Fresh evidence produced by complainant on second application—Jurisdiction of justices to hear second application—Order made by justices without hearing further evidence for the defence—Order not made judicially.

On Feb. 17, 1945, the mother of a bastard child applied to the justices for an affiliation order against L.H. After hearing the evidence on both sides, the justices dismissed the application on the merits. On Mar. 6, 1945, a second summons was issued in the same court and was heard on Mar. 17 by a bench of magistrates which included three who had been present at the previous hearing. Fresh evidence was called for the mother. During the cross-examination of L.H., the justices stopped the case and made an order against him. Although they were informed that L.H. wished to call other witnesses, they declined to hear further evidence on his behalf. It was contended by L.H. that (i) the justices had no jurisdiction to hear the second application, because the matter was *res judicata*, the first application having been dismissed on the merits; (ii) the order was not made judicially as the justices had determined the issue in favour of the mother before the case for L.H. had been fully presented to them:—

HELD: (i) the justices had jurisdiction to hear the second application, and, on fresh evidence being produced, to make the order in question. (*R. v. Machen* (1) followed.) The right of appeal, given by the Criminal Justice Administration Act, 1914, s. 37 (2) from a refusal by a court of summary jurisdiction to make the order asked for, did not impliedly take away from the mother any previously existing right which she might have to make a second application to a court of summary jurisdiction. (*McGregor v. Telford* (7) followed.)

(ii) since the justices had been informed that L.H. wished to call further witnesses but had declined to hear their evidence, the order had not been made judicially.

(iii) an order of *certiorari* quashing the conviction should be made, and an order of *mandamus* should be made, directing the justices to hear and determine the application according to law.

[EDITORIAL NOTE.] This case discusses the question whether there is jurisdiction to grant an affiliation order after a previous dismissal on the merits. The court holds that the ordinary considerations of *res judicata* in criminal and civil proceedings are inapplicable, since bastardy proceedings are the creation of statute, and holds on authority that there is jurisdiction to make the order on fresh evidence produced, basing its decision on *R. v. Machen* (1). The *ratio decidendi* of that case has been the subject of much judicial disagreement, some judges refusing to recognise dismissal for want of corroborative evidence as dismissal on the merits, but the case has been repeatedly followed, and the law as there decided was held, in *McGregor v. Telford* (7), to be unaffected by the new right of appeal given to the mother by sect. 37 (2) of the Criminal Justice Administration Act, 1914. As to the importance of fresh evidence, HUMPHREYS, J., observes, at p. 178 *post*, "I myself would not hold that justices are bound to hear a second application founded solely upon evidence already heard by the court and held by them to be insufficient."

AS TO SECOND OR FURTHER APPLICATIONS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 585, 586, para. 806; and FOR CASES, see DIGEST, Vol. 3, p. 390, Nos. 281-2 8.]

Cases referred to:

* (1) *R. v. Machen* (1849), 14 Q.B. 74; 3 Digest 390, 281; 18 L.J.M.C. 213; *sub nom. Jones v. Machen*, 3 New Sess. Cas. 629.

* (2) *R. v. Jenkin* (1796), Lee *temp.* Hard. 300.

* (3) *Ex p. Westerman* (1851), 16 L.T.O.S. 420; 3 Digest 390, 283.

* (4) *R. v. Harrington* (1864), 9 L.T. 721; 3 Digest 399, 334; 28 J.P. 485; *sub nom. R. v. Herrington*, 3 New Rep. 468.

* (5) *R. v. Gaunt* (1867), L.R. 2 Q.B. 466; 3 Digest 399, 335; 8 B. & S. 365; 16 L.T. 379; *sub nom. R. v. Grant*, 36 L.J.M.C. 89.

* (6) *R. v. Hall & Gillespie* (1887), 57 L.T. 306; 3 Digest 390, 284.

* (7) *McGregor v. Telford*, [1915] 3 K.B. 237; 3 Digest 390, 285; 84 L.J.K.B. 1902; 113 L.T. 84.

MOTION for an order of *certiorari* to remove, for the purposes of quashing, an order made by the justices of the peace for Sunderland, on Mar. 17, 1945, adjudging that Leslie Hodgkinson is the father of a bastard child born to Margaret Brown on Nov. 11, 1944, and ordering him to pay the sum of 7s. 6d. a week for the maintenance of the child until it shall attain the age of 16, and to pay further sums of money. The facts are set out in the judgment of HUMPHREYS, J.

W. A. L. Raeburn for the applicant.

P. H. M. Oppenheimer (for R. N. Bibby-Trevor on war service) for the respondent.

HUMPHREYS, J.: The grounds upon which relief is sought are two, the first being stated as follows: When the matter came before the justices for determination on Mar. 17, 1945, it was *res judicata*, having already been heard and determined on the merits on Feb. 17, 1945. The material facts and dates are as follows: On Nov. 11, 1944, Margaret Brown gave birth to a bastard child of which it was alleged the applicant was the father. On Feb. 17, 1945, a complaint made by her to that effect was duly heard and determined by the Sunderland justices, when, after hearing evidence called for each side, the justices dismissed the said complaint upon the merits. On Mar. 6, 1945, a second summons was issued, which was heard and determined upon Mar. 17. Upon the hearing of such repeated complaint, objection was taken to the jurisdiction, on behalf of the applicant, on the ground that the matter was *res judicata*. The clerk to the justices, while agreeing that the complaint had previously been dismissed on the merits, expressed the opinion that the intention of the complainant to call fresh evidence entitled her to have her case heard again and the justices so ruled. Fresh evidence was in fact called for the complainant and in the result the justices made the order now impugned.

Counsel for the applicant, in support of the motion, was not able to refer us to any case in which the court had quashed an order in bastardy made by justices on the ground that there has been a previous dismissal on the merits even after a full hearing; but he relied upon certain *dicta* to be found in the reports and upon the doctrine of *res judicata* as applied to ordinary civil and criminal proceedings, and argued that the matter is open for judicial decision by this court since there is no direct and clear authority to the contrary. I do not think that the considerations applicable in the case of criminal proceedings or in civil actions are of any assistance in this matter. Bastardy proceedings

are the creation of statute and may be said to have their origin in the powers conferred upon guardians of the poor, to whom was chargeable the maintenance of an illegitimate child, to recover from the putative father the whole or part of these costs of maintenance. The main object of ordering payments by the putative father is still to provide for the support of the child. The relevant statute is the Bastardy Laws Amendment Act, 1872, which, after providing in sect. 3 for the issue and service of a summons upon the man alleged by the complainant to be the father of the child, enacts in sect. 4 that :

A . . . the justices . . . shall hear the evidence of [the complainant] and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father . . .

B and may order certain payments to be made by him. The statute is silent as to any order to be made by the justices if they are not satisfied that the necessary proof has been given.

The earliest case cited in argument was *R. v. Machen* (1), decided in 1849, in which the judgment of the court was delivered by LORD DENMAN, C.J. In that case a *mandamus* was asked for, requiring justices to hear and determine an application made to them on Feb. 27, on behalf of Hannah Jones, a single woman, for an order in bastardy upon White, the putative father of her bastard child. The justices refused to hear the case on the ground that they had on the previous Jan. 30 heard and determined the same matter, they having on that occasion dismissed the case on the ground, as stated in the affidavit in support of the rule, that they considered the evidence of the complainant not sufficiently corroborated. It was, however, sworn by one of the justices and by the clerk to the justices that the first application had been dismissed on the merits and that this had been proved before the justices on Feb. 27. The rule was made absolute. That decision has stood for 96 years. It has never been overruled ; on the contrary, it has been repeatedly followed and declared to be a binding authority. It is true that the *ratio decidendi* has been the subject of a somewhat remarkable divergence of judicial opinion. It would seem that some judges have regarded a dismissal for lack of sufficient corroboration as not amounting to a dismissal upon the merits. However this may be, I am content to abide by the language of LORD DENMAN, C.J., as reported. LORD DENMAN professed to found himself upon *R. v. Jenkin* (2) decided by LORD HARDWICKE in 1736. In that case the court quashed an order by justices declaring that the alleged putative father was not the reputed father of the bastard and acquitting him of the same, on the ground that the order was *ultra vires*, since the justices had no power to make a final order of discharge in a bastardy case. LORD DENMAN, C.J., then referred to the limited powers conferred by the Act then in force, and continued as follows :

E We cannot, therefore, see that the legislature intended them to have any power to adjudicate finally against the mother. Their dismissal of the application is rather in the nature of a nonsuit in an action ; in which case the plaintiff may come again better prepared. We are far from saying that the dismissal is to have no weight ; but we think that the justices cannot refuse to hear the second application. If it should appear to them that the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with much suspicion, and sift it accordingly : but we do not think that the dismissal can operate as a bar to further inquiry.

No language could be clearer or more precise. ERLE, J., who was party to the decision in *Machen's* case (1), had the matter before him again in 1851, in *Ex p. Westerman* (3). The headnote reads :

H A second application may be made for an order of affiliation, although the first was dismissed on the merits after a full examination . . .

ERLE, J., considered the matter concluded by *Machen's* case (1) and so held. In 1864 *R. v. Harrington* (4) was decided. In that case the first application by the mother was dismissed, " she not being prepared with corroborative evidence." A second application and hearing followed and an order of affiliation was made. A rule being obtained upon the ground that the dismissal of the first application was a bar to any subsequent application, the rule was discharged with costs by COCKBURN, C.J., BLACKBURN and MELOR, JJ. Some of the *dicta* in that

case seem at first sight to support the argument of counsel for the applicant, particularly the following passage in the judgment of COCKBURN, C.J., at p. 721 :

If there has been a hearing upon the merits, and a dismissal upon the merits, and if that be brought to the notice of the justices upon a second application, and there is no other evidence produced, I think that ought to be a sufficient answer, and if in this case it had been brought to the attention of the justices that the case had before been dismissed upon the merits, and that there was no other evidence in support of the application than was before submitted to them, I should have been disposed to give effect to the present application.

It may be that the governing words in that passage are :

... and that there was no other evidence in support of the application than was before submitted.

I myself would not hold that justices are bound to hear a second application founded solely upon evidence already heard by the court and held by them to be insufficient. The judgments of BLACKBURN and MELLOR, JJ., deal with the meaning of the expression "upon the merits." I find it difficult to accept as completely accurate the report of the judgment of BLACKBURN, J., in that case, having regard to the clear expression by him in a later case of his view of the effect of the decision in *Harrington's* case (4). It is sufficient to say that, in my judgment, the case cannot be regarded as any authority for the proposition that the dismissal of one application, even on the merits, deprives the justices of jurisdiction to hear a further complaint on fresh evidence. The report in the JUSTICE OF THE PEACE differs somewhat as to the language used in the judgments ; for instance, COCKBURN, C.J., is reported to have said (at p. 486) that, if the matter had been already fully heard and determined, the principle of *res judicata* would apply ; but I think it is tolerably clear that he was using that expression, if he used it at all, as referring to the attitude to be adopted by the justices in a case where they were invited to overrule their previous decision upon the same evidence. It is to be observed also that, according to the report in the JUSTICE OF THE PEACE, upon an application for costs being made COCKBURN, C.J., said :

I think we must consider this as an attempt to overrule *R. v. Machen* (1), and must discharge the rule with costs.

Gaunt's case (5), decided in 1867, seems to me to be precisely in point on the present motion. The first application by the mother was dismissed, partly owing to the evidence of one of the witnesses for the defendant. That witness was afterwards convicted of perjury in giving that evidence. A second complaint by the mother was heard, in spite of objection, and an order was made. BLACKBURN, J., in the course of his judgment, referred (at pp. 469, 470) to *Harrington's* case (4) as having decided :

... that the previous inquiry was no absolute bar, although the matter had been fully heard ; but that the justices, on a second inquiry, ought to attach so much weight to the previous decision as to make it, in an ordinary case, practically conclusive.

He then referred to the conviction for perjury and continued :

... the only question on the present application is, whether [the justices] had jurisdiction, and they clearly had, and the rule must, therefore, be discharged.

MELLOR and LUSH, JJ., concurred. Here again at a later point in his judgment BLACKBURN, J., is reported as speaking of the justices treating the matter as *res judicata* ; but it is to be observed that the report of the same case in THE LAW JOURNAL omits those words and substitutes this :

No doubt the justices would regard a previous dismissal of a summons upon the merits as very cogent evidence in favour of the defendant . . .

I think myself that it is dangerous to rely upon the *ipsissima verba* of any judgment not revised by the judge himself.

Finally, in 1887 DAY and WILLS, JJ., had before them *R. v. Hall and Gillespie* (6). In that case the first application of the mother was dismissed on the ground of the insufficiency of the evidence. Fresh evidence having been obtained by the mother, the matter was again heard before the justices, when it was dismissed upon the merits. A few days later the mother again applied for a further hearing on the ground that she had fresh evidence. The justice, being of opinion that the matter was *res judicata* and that he had no jurisdiction, refused

to issue a third summons. The mother obtained a rule *nisi* for a *mandamus* to the magistrate, upon the hearing of which no one appeared to show cause. *Gaunt's* case (5) was cited by counsel for the mother in support of the rule and the court made the rule absolute, giving no further judgment on the matter.

In that state of the law the Criminal Justice Administration Act, 1914, was passed, which by sect. 37 (2) gave, for the first time, a right of appeal to the mother from a refusal by a court of summary jurisdiction to make the order asked for.

- A The effect of that alteration in the law was considered in *McGregor v. Telford* (7). It was argued that the new right of appeal given to the mother removed the substratum of the judgment in *Machen's* case (1). The court, however, held that the Act does not impliedly take away from the mother of a bastard child any previously existing right which she may have to make a second application to a court of summary jurisdiction. That case is clearly binding upon this court. I express no opinion as to the correctness of the *obiter dictum* of LORD READING,
- B L.C.J., upon the oft-disputed *ratio decidendi* of the decision in *Machen's* case (1).

Upon a consideration of the authorities, I am of opinion that the justices in this case had jurisdiction to hear the second complaint of Margaret Brown and, on fresh evidence being produced, as it was, to make the order in question.

- Unfortunately that conclusion does not dispose of the motion. Counsel for the applicant has a second ground, as follows; that the order was not made judicially, the said justices having stopped the case and determined the issue
- C in favour of the complainant before the case for the defence had been fully presented to them. That ground is based on the uncontradicted affidavit of the solicitor for the then defendant, now the applicant. I read from that affidavit the latter part of para. 5 and the subsequent paragraphs:

I addressed the said justices (three out of six of whom had been sitting on the said previous occasion) and called the applicant as my first witness. (6) The solicitor for the complainant had not long begun to cross-examine the applicant when the chairman of the bench said something in an undertone to the said clerk, who thereupon intimated that the said justices did not wish to hear any more. The said justices then retired. (7) Upon the said justices returning to the court after an interval of about ten minutes, the said chairman announced that they had found that the applicant was the father of the complainant's child and that an order would be made against him. (8) I at once called attention to the fact that such decision had been made without affording the applicant an opportunity of fully presenting his defence. To this the said chairman answered that I should have told the said justices that I was proposing to call witnesses other than the applicant, and that the bench had had two lengthy hearings of the case and had "listened patiently to a lot of nonsense." The said justices then adhered to their decision and proceeded to fix the amount of the order.

- That affidavit is uncontradicted, and, so far as the attitude of the justices in adhering to their decision is concerned, it is actually corroborated by the affidavit of the clerk to the justices. It is plain, therefore, that the justices, after being made aware that the defendant had in attendance and wished to call other witnesses, declined to hear those witnesses and decided against him. In the circumstances, in my opinion, the order made by the justices cannot stand and the order of *certiorari* must go, but I think it must be accompanied by an order of *mandamus* to hear and determine the complaint according to law.

- F OLIVER, J.: I have had an opportunity of reading the judgment that my Lord has just pronounced, and I desire to say that I entirely agree with it and would seek to add only one word. Technically there is nothing to prevent an application being re-heard in certain cases. That right, however, should obviously only be exercised in cases where there is fresh evidence of a serious kind. It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision.

- H Order of *certiorari* granted. Order of *mandamus* made directing the justices to hear and determine the mother's application according to law. No order as to costs.

Solicitors: *Isadore Goldman & Son*, agents for *R. R. Crute & Son*, Sunderland (for the applicant); *Taylor, Willcocks & Co.*, agents for *Nesbitt, Cook & Carter*, Sunderland (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

R. v. MCGREGOR.

[COURT OF CRIMINAL APPEAL (Singleton, Wrottesley and Tucker, JJ.),
April 16, 1945.]

Criminal Law—Practice—Breach of recognisance—Nature of breach to be stated—Opportunity to be given to accused to call evidence—Procedure.

In Oct., 1944, on a charge of housebreaking the applicant was bound over for two years and placed on probation, there being no previous conviction against him. The indictment was endorsed as follows: "Bound over £5, 2 years. Cummings." On Jan. 25, 1945, the applicant was brought before the chairman of the London Sessions on a charge of having broken his recognisances. No counsel appeared to present the case for the prosecution. The applicant was not told the nature of the breach of recognisance nor did the probation officer give evidence as to what was the nature of the breach of recognisance alleged against the applicant. The chairman, however, found that the applicant had broken his recognisances and sentenced him to fifteen months' imprisonment with hard labour. The applicant appealed against this sentence:—

HELD: (i) when the applicant was bound over, he should have been informed of the nature of his recognisances.

(ii) on a charge subsequently of having broken his recognisance, the applicant must be told the nature of the breach alleged against him and be asked whether he desired to give evidence, call witnesses or give any explanations from the dock.

R. v. Pine (1) followed.

(iii) counsel should always be instructed in cases like this to present the case for the prosecution.

[EDITORIAL NOTE. This case discusses the procedure to be observed when an accused is brought up for breach of recognisance. The conditions attached to binding over should have been endorsed on the original indictment, and precise evidence of the nature of the breach alleged should be given. Counsel should be instructed to present the case, which should not be left to the probation officer.]

AS TO NECESSITY OF PROOF OF BREACH OF RECOGNISANCE, see HALSBURY, *Hailsham Edn.*, Vol. 9, pp. 234, 235, para. 332; and FOR CASES, see DIGEST, *Supp. Criminal Law*, No. 3009a.]

Cases referred to:

- **(1) R. v. Pine* (1932), 24 Cr. App. Rep. 10; Digest Supp.
- (2) R. v. Lewis* (1942), unreported.

APPLICATION by Robert John McGregor for leave to appeal against a sentence of fifteen months' hard labour passed on him by the chairman of the London Sessions on Jan. 25, 1945, for breach of recognisances. The facts are fully set out in the judgment of the court delivered by TUCKER, J.

R. Hendry White for the applicant.

TUCKER, J. [delivering the judgment of the court]: This is an application or was originally an application, for leave to appeal against a sentence of 15 months' hard labour which was passed upon the applicant for breach of recognisances, that is to say, he had been bound over for two years on Oct. 25, 1944, and he was brought before the sessions on Jan. 24, 1945, for a breach of those recognisances.

In Oct., 1944, he had pleaded guilty to offences of shopbreaking. He had broken a window in Oxford Street and entered the premises, in another case he had got through the roof of a bombed building, and in another case he had attempted to break and enter the first shop, and a comparatively small quantity of goods had been stolen. For these offences he was bound over for two years. On Jan. 25, 1945, it was alleged that he had broken his recognisances, and he was brought before the chairman of the London Sessions. On that occasion no counsel appeared in the case at all, but the probation officer went into the witness box and was sworn. He said:

McGregor, my Lord, was placed on probation on Oct. 25, last. He was assisted with money for clothing and given an opportunity to seek work. I understood that he had a chance to start work at the London and North Eastern Railway, but he failed to take up that employment. Previously he had been concerned with the woman Myers with whom he is now before the court, and who is on probation. He has a wife

in Ireland. He promised me that he would not have any more to do with Myers, but that he would save money and send money home to his wife in Ireland. I did not see him again and a warrant was applied for and he is now before you on a breach of probation. [The chairman: Q.—Has he any record?] A.—No, my Lord, he was not in trouble previously.

Another probation officer was sworn, who gave evidence with regard to another person, Myers, who is not now before the court, and then the chairman said to McGregor: "Do you want to ask Mr. Cummings any questions, McGregor?" and the prisoner said: "No, my Lord." A similar question was asked of the other prisoner, Myers, and the chairman said: "You, McGregor, must go to prison for 15 months with hard labour." That is the beginning and end of the proceedings that took place on that occasion, and those proceedings appear to us to have violated in many respects what has been laid down in this court to be the proper procedure to be followed on these occasions.

It is to be observed, in the first instance, that the appellant was never told precisely what was the breach of recognisances alleged against him. He was not told what it was he had been bound over to do and in what way it was alleged that he had failed to comply with his promise. The probation officer, when called into the witness box, did not give any precise or clear evidence as to the precise nature of the breach which was alleged against the appellant. Furthermore, and most important of all perhaps, the appellant was never asked whether he desired to give evidence with regard to this matter or to explain his conduct with regard to the alleged breach, nor was he asked whether he had any witnesses to call or whether he wished to give any explanation from the dock.

All those matters are elementary matters of procedure going to the root of the administration of justice, which have been referred to on more than one occasion by this court. They were dealt with by AVORY, J., in *R. v. Pine* (1) where, after dealing with the question as to whether or not there had been sufficient evidence of the breach of the recognisance, AVORY, J., said, at p. 13:

In our opinion, even assuming that there was any proper evidence of the conviction at Acton petty sessions and of the alleged breach of recognisance—which is at least doubtful—this conviction cannot stand, in view of the fact that the appellant had no opportunity of making any answer to the allegation that he had committed a breach of his recognisance. On that ground the order for detention in a Borstal Institution must be quashed.

Earlier on in his judgment he had drawn attention to the fact that "there does not appear to have been any formal charge that he had broken the terms of the recognisance."

The matter was again before this court recently on Feb. 23, 1942, in *R. v. Lewis* (2), in which CASSELS, J., said:

For that reason he was brought once more before the court of quarter sessions for Essex, where the deputy chairman dealing with this matter listened to the evidence upon one side. It is true he gave this young man an opportunity to cross-examine, but he omitted altogether to give to the appellant any opportunity of going into the witness box to deal with the allegations of so-called misbehaviour himself, or to say upon oath, as he doubtless could have said, what really had taken place. In the meantime, let it be borne in mind, it was 18 months after he had been bound over, and the offence for which originally he had been bound over was stealing a few shillings from the gas meter in his father's house. In those circumstances, the deputy chairman and the justices who were sitting with him, without giving him the opportunity to explain upon oath what it was that had happened, came to the conclusion that this was a case where this young man required the discipline which is usually associated with three years' residence in a Borstal Institution.

In that case the court quashed the sentence on the ground of the failure to carry out that essential part of the administration of justice.

There is one other matter to which the court desires to draw attention, and that is that no counsel appeared to present the case before the court on behalf of the prosecution. In our view, it is right, proper and desirable that in cases of this kind, just as in cases where people are sent under the Criminal Justice Administration Act, 1914, s. 10, to be dealt with as suitable for Borstal treatment, it has been said that counsel should always be instructed. Similarly in cases where prisoners are brought before the court for breach of recognisance, counsel should also be instructed so that they can make proper inquiries into the matter and lay the case before the court in a way in which it should be laid. In these circumstances, this sentence is quashed.

The original indictment in this case shows the order that was made when he first pleaded guilty to the offences of breaking and entering. We observe endorsed upon that indictment the fact that the prisoner was bound over in the sum of £5 for 2 years concurrent, but there is nothing to indicate on this indictment that he had been placed upon probation or that any particular condition had been attached to that binding over. That should be done in all cases where that course is taken. What is written on the indictment is: "Bound over £5, 2 years. Cummings." Apparently from the shorthand note it appears that Mr. Cummings is the probation officer, and that, no doubt, was a shortened way which would be intelligible to the clerk of the peace that he had been put on probation and under the care of Mr. Cummings. We think it would be desirable that indictments should be endorsed rather more fully than that, because it would not be apparent to anyone who did not know the particular gentleman's name.

Appeal allowed. Sentence quashed.

Solicitor: *The Registrar, Court of Criminal Appeal* (for the applicant).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

EDMUND HANDCOCK (1929) LTD. v. FURNESS-HOULDER ARGENTINE LINES, LTD., THE PRINCESA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., with Trinity Masters), April 17, 1945.]

Shipping—Contract of towage—Cardiff tug owners' towage rates—Normal assistance—Different rates for "towage or assistance of steamers not normal"—Steamship towed into Cardiff docks—Port engine of tow out of order—Whether rate for "steamers not normal" applicable.

On Aug. 10, 1944, the twin-screw steamer *Princesa*, owned by the defendants, was taken in tow by four tugs of the plaintiff company and was towed from Cardiff Roads into the Queen Alexandra Lock at Cardiff. On that day the port engine of the *Princesa* was out of action, of which fact the plaintiffs were aware when the tugs were asked to be in attendance. According to the Cardiff Tug Owners' rates for "steamers, Cardiff, Penarth and Barry" the charge for normal assistance into dock was £60. For "towage or assistance of steamers not normal and auxiliary vessels docking and undocking" a different rate was chargeable. Neither rate applied to "steamers or vessels ashore, in distress or not under control." The plaintiffs took the view that the *Princesa* was, in the circumstances, a "steamer not normal" and claimed a sum of £404 17s. 9d. for towage. The question for the determination of the court was whether the fact that the port engine of the *Princesa* was, at the material time, out of use, rendered her "a steamer not normal"; or, alternatively, whether that fact made the assistance given to the vessel an "assistance not normal":—

HELD: (i) on the true construction of the clause the words "not normal" must be attached to the word "steamers" and not to the word "assistance."

(ii) at the material time the vessel was a normal steamship, and the fact that some of her gear was out of order did not render her abnormal in the sense that higher rates would be applicable for her towage.

[EDITORIAL NOTE. This case decides what is a "steamer not normal" for the purpose of Cardiff towage rates. The table of rates contains the phrase "Rate for towage or assistance of steamers not normal and auxiliary vessels docking or undocking." It is held that the abnormality applies to the steamer and not to the towage, and that a normal vessel does not become abnormal merely because some of her gear is out of order. The phrase is intended to cover certain self-propelled vessels which are inherently abnormal, such as floating cranes or dredgers.]

AS TO CONTRACT OF TOWAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 658-660, paras. 838-840; and FOR CASES, see DIGEST, Vol. 41, pp. 674-679, Nos. 5048-5077.]

ACTION by the plaintiffs, Edmund Handcock (1929), Ltd., claiming £404 17s. 9d., in respect of towage services rendered by them to the defendants, Furness-Houlder Argentine Lines, Ltd., the owners of the twin-screw steamship

Princesa. The facts and arguments are fully set out in the judgment.

R. E. Gething for the plaintiffs.

F. A. Sellers, K.C., and *Owen Bateson* for the defendants.

LORD MERRIMAN, P.: On Aug. 10, 1944, the defendants' twin-screw steamer *Princesa* was taken in tow in Cardiff Roads by four tugs of the plaintiff company, and was towed from Cardiff Roads into the Queen Alexandra Lock at Cardiff. The steamship was 8,731 tons gross, 5,543 tons net; she was 440ft. in length, 61ft. in beam, and I have been given the figures of her draft, which were quite ordinary for a vessel of that character. She was, in common parlance, an ordinary steamship of her class, and, when I say "an ordinary steamship," I do not forget that, in the Regulations for Preventing Collisions at Sea, the words "steam vessel" there include any vessel propelled by machinery. But on the day in question she had one defect at any rate which was that her port engine was out of action, a fact of which, without, as far as I am aware, any comment being made on it, the plaintiff company had been apprized when the tugs were asked to be in attendance. Whether she had been in tow or not from her last port, which was Avonmouth, she had, at any rate, been attended by a tug on her voyage from Avonmouth to Cardiff Roads.

For this service, which, as far as I have been informed, lasted some 15 minutes in time and covered about a mile in distance, the plaintiffs claim £404 17s. 9d. The defendants, on the other hand, say that the proper charge is £60. Both these rival figures are arrived at from a table of charges headed, "Cardiff Tug Owners. Rates for Steamers, Cardiff, Penarth and Barry." If this contract comes within the schedule of rates for normal assistance from Cardiff Roads to, amongst other places, Queen Alexandra Lock, it is common ground that the defendants' figure of £60 is the right one; if, on the other hand, this was the towage of a steamer not normal and docking there as an abnormal steamer, then it is common ground that the figure claimed by the plaintiffs is the right one. The sole question in this case is this: which of those two rates is applicable on this contract.

I would only add that it has, from the first, been common ground, and has been admitted on the pleadings, that the port engine was out of action. I need know nothing else than that. I am quite prepared to add the supplemental fact of which I have been informed, that it cost £3,800 to repair it. That really adds nothing at all to the admission that the port engine was out of action. Masses of paper have been produced, with details of figures and reports, which have really got no bearing whatsoever on the case, except so far as I can see, to increase the costs, and a belated attempt was made to drag in the details about some repairs which were afterwards done to the starboard engine and, indeed, to the steering gear. When it was pointed out that none of these matters were raised by the pleadings, and counsel for the plaintiffs was asked whether he wished to amend his pleadings in that respect, the amendment was disclaimed, and all that material is irrelevant.

I come back, therefore, to the sole question in this case: Does the fact that this vessel's port engine was, at the material time, out of order and out of use, make her a case of a steamer not normal; or, alternatively, on another interpretation of the contract, does it make the assistance rendered to her, assistance which was not normal?

Again, I have had a couple of bundles of letters, some of which I have looked at under protest, showing the rival contentions, some of them, on any view of the matter, erroneous, which the solicitors on either side, or the parties, have indulged in after the event. It is really common ground that the only thing that matters ultimately is what view the court takes of the proper interpretation of this piece of paper.

The three categories into which the charge for assistance falls in accordance with this table of rates is, at the one end of the scale, that headed "Normal Assistance from Cardiff Roads" to certain docks, or *vice versa*, and from Barry Roads to certain docks, or *vice versa*. At the other end of the scale there is the provision that:

All the above rates will not apply to steamers or vessels ashore, in distress or not under control.

It is a clumsy phrase, but I think it is perfectly clear that what is intended is

that none of the above rates will apply to steamers or vessels in such a condition, that the service is a salvage service and not a towage service. Those are the two extremes: Salvage, and normal assistance, strictly limited geographically, from Cardiff Roads to one set of docks and from Barry Roads to another set of docks, in respect of something which can be called normal assistance by a tug. The remuneration for that in this case was, as I say, £60.

I ought to have added to the general statement of the facts that it is conceded that, however well found this vessel might have been, in all respects it would be quite ordinary on the day in question, in the conditions then prevailing, for her to have asked for four tugs, and that the actual length of time occupied and the absence of any untoward incident also might have been expected had she been in every respect completely equipped with her engines. I am bound to say also that I have been advised, and the contrary is not asserted, that, although it is common for a vessel in tow, in circumstances like these, to assist her tugs with her own engines, there is no obligation whatsoever upon her to do so. Under the towage contract in fact she could insist upon being towed in without the use of her own engines if she wished to do so, and I suppose, correspondingly, there can be no dispute that if the use of her engines was thought to be inconvenient, the tugs themselves might protest and ask her not to use them in a way that hampered the towage contract. Those, I take it, would be ultimately matters of seamanship about which there could not really be any dispute. But what is said here is that this is not a question of the abnormality of the service; this is a question of the abnormality of the vessel to which the service was rendered, and I am referred to the passage which immediately follows the table of rates for normal assistance and I am directed to this phrase:

Rate for towage or assistance of steamers not normal and auxiliary vessels docking or undocking.

I think there can be no doubt, and nobody has suggested that there can be any doubt, that the words "docking or undocking" are intended simply to bring back in three words the detailed geographical sentence at the head of the table immediately above "from Cardiff Roads to" certain docks on the one hand and from Barry Roads to certain other docks on the other hand, or *vice versa*. That is what is meant by the words "docking or undocking"; it is meant to bring in the same geographical area of contract without repeating it. I do not think there is any difficulty about that. But the rest of the phrase is, I am bound to admit, worded in such a way as to raise as much difficulty as possible.

Counsel for the defendants, to take his contention first, says that the words "not normal" ought to be attached to the word "assistance" so that you get a clean-cut contrast between the normal assistance in the preceding table and the abnormal assistance provided for in the rates in the two succeeding lines.

I am unable to accede to that view; I do not think it is possible to distort the sentence so as to take the words "not normal" from the rather peculiar position in which they are placed and attach them, as they would have to be attached, not merely to "assistance" but to "towage," so as to make it read in effect, "Rate for," (if I may substitute "abnormal" for "not normal") "abnormal towage or assistance of steamers and auxiliary vessels docking or undocking." It is attractive but I do not think it will do. I do not think one can dismember the sentence like that and re-write it, because that is what it comes to. I think I have to construe it upon the basis that the abnormality is attached to the word "steamers" and to nothing else.

I am more inclined to that view because of the introduction of the words "auxiliary vessels." It seems to me to be quite a sensible provision to contrast with "normal assistance" assistance given in docking auxiliary vessels. I know that these vessels are becoming less and less common, particularly in the ranges above 2,000 net registered tons: that is all the more reason for providing for them as an abnormal towage. I take it that, from the tug's point of view, they are much less handy to deal with. After all, though I do not pretend to go into the detail of this, anybody can see for himself that there are many respects in which, in the process of getting into and out of a dock basin, they may be very much less handy tows than an ordinary steamship under her own power. Therefore one sees a business reason for putting them in a separate category. They are only half-steamships after all; they are

more sailing ships than steamships, but I suppose they could come within the category of steam vessels because, as I have already said, the Navigation Rules define those words as including any vessel propelled by machinery. An auxiliary vessel is propelled by machinery, and she is also of course propelled by sail, but she may be propelled by machinery. That is why special provision is made for her, and that also, in my opinion, emphasises the point that it is to the character of the vessel and not to the nature of the service that the quality of abnormality is intended to be attached in this sentence.

- A How then, can one make sense of a "steamer not normal"? Counsel for the plaintiffs says that there is only one way in which you can make sense of it, and that is by saying that she is normal if she is exercising all her usual powers; in other words, if she is a normal steamer when she has her starboard and her port engines working, she is not a normal steamer if she has only her starboard engine working, and that is the whole point in the case. But I do not think
- B that is right. Nobody can dispute that the *Princesa*, if she had had her port engine in use (apart from anything else which is not material in this case), would be a normal steamship; nobody could dispute that and nobody does dispute it. But, if any other construction is possible, I do not think one can say that a normal steamship which is at the moment not exercising all her normal powers, or has not all her normal equipment in working order, is the same thing as an abnormal steamship.

- C The question is whether one is driven to that conclusion, which to me, I am bound to say, seems very far-fetched and improbable. I do not think I am driven to any such conclusion. I think there are vessels propelled by machinery which it is intended to cover by those words. In the course of the argument, and upon advice from those who are here to advise me in these matters, two outstanding instances of steam vessels within the meaning of the navigation rules, for which it may be eminently desirable to make special towage provisions, have been mentioned—I am told that there are others which are not so common, but which could be mentioned. These are, floating cranes, which are often
- D self-propelled by steam, and dredgers, and one can very well understand the business of putting them in the same sort of category as auxiliary vessels for the purpose of attaching special towage rates to them.

- E That seems to me to be the natural interpretation of this sentence, and, when one has arrived at that conclusion, one has got something very like a business interpretation of the whole document. You get what is called normal assistance, that is to any ordinary ship, in the specified geographical area, and you get your rates fixed by the ton. At the other end of the scale you have got salvage services pure and simple (to which towage rates *ex hypothesi* would not apply but it may be just as well to make it plain), and in between those two you have towage or assistance to steam vessels which, in their own inherent character,
- F are not normal, and to auxiliary vessels which are, after all, only partly steam vessels. That seems to me to be the proper interpretation of this contract, and I am not prepared to make what I consider would be a strange and fanciful interpretation by saying that a perfectly normal steamship which happens for the moment to have some of her gear out of order, whatever it may be, is an abnormal steamship, and impose particular rates in respect of her. That
- G being so, I think the defendants' contention is right, and I give judgment for them accordingly.

Judgment for the defendants with costs.

Solicitors: *Ingledeu, Brown, Bennison & Garrett*, agents for *Ingledeu & Sons*, Cardiff (for the plaintiffs); *Middleton, Lewis & Clarke* (for the defendants).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

GORNALL v. GORNALL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), February 21, 1945.]

Divorce—Maintenance—Lunatic spouse—Order made by magistrates during marriage—Husband to pay weekly sum towards wife's maintenance—Husband granted decree absolute on account of wife's insanity—Husband's liability after decree—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190—Poor Law Act, 1930 (c. 17), s. 19—Matrimonial Causes Act, 1937 (c. 57), s. 10 (2).

On Nov. 30, 1943, the petitioner husband obtained a decree *nisi* against his wife on the ground of insanity. A decree absolute was pronounced on June 6, 1944. Since 1931 the wife had been detained in a mental institution, and, on Feb. 25, 1931, an order was made by the Manchester magistrates under the Poor Law Act, 1930, s. 19, that the petitioner husband should pay to the local authority the sum of 10s. per week towards the maintenance of the wife so long as she should remain a lunatic and chargeable on the funds of the local authority. The sum payable under the order was subsequently increased to 15s. per week. In July, 1943, before the decree *nisi* was granted, the Official Solicitor, acting as guardian *ad litem* for the respondent wife, had forwarded to the petitioner a suggested form of clause to be embodied in the order pronouncing the decree *nisi*, whereby the petitioner was to undertake to continue the existing arrangements for the maintenance of the respondent until the date of the decree absolute; thereafter the petitioner was to make an allowance for maintenance of £45 17s. 6d. per annum which amount would be applied to the costs of the Official Solicitor's yearly visit to the respondent, for the provisions of extra comforts for the respondent, and towards repayment to the public assistance committee of the costs of the maintenance of the respondent. The petitioner had objected to the proposed undertaking on the grounds (i) that the magistrates' order for the payment of 15s. per week to the local authority was still operative although the parties had ceased, since the decree absolute, to be husband and wife; (ii) that considerations of convenience and economy rendered it expedient that any review of the amount payable towards the expenses of his wife's maintenance should be conducted before the local magistrates rather than before the High Court. An application for maintenance having been made:—

HELD: (i) the petitioner, having obtained a decree absolute, was no longer one of the relatives bound, under the Poor Law Act, 1930, s. 19, to contribute towards the support of his ex-wife. Though the magistrates' order remained technically in force until discharged by the magistrates themselves, the order ought to be discharged, since the local authority were no longer entitled to demand payment by way of contribution to the support of the respondent. The proper course to be adopted would be for the local authority to apply for the discharge of the order unless the petitioner chose to so himself.

Bragg v. Bragg (1) distinguished.

(ii) in the circumstances, the balance of convenience was in favour of incorporating all the ancillary relief to which the respondent was entitled in the order, and the order of the High Court in the form prepared by the Official Solicitor should be made.

[EDITORIAL NOTE.] Since incurable insanity became a ground for divorce, under the Matrimonial Causes Act, 1937, it has become the practice to include in the decree *nisi* a consent order for payment of a sum by the petitioner to cover a yearly official visit by the Official Solicitor, extra comforts for the patient, and the cost of maintenance in an asylum. It is held here that the High Court has jurisdiction to make this order, notwithstanding the existence of an order for maintenance during lunacy made by the magistrates under sect. 10 of the Poor Law Act, 1930. The order of the magistrates should, however, be discharged, on the application of the local authority or the petitioner, for there is no longer any liability on the husband to maintain under the Poor Law Act. The decision in *Bragg v. Bragg* (1) is to be distinguished, since there the magistrates' order was made in proceedings between the husband and wife, and not as here, between the local authority and the husband.

AS TO ORDERS TO SUPPORT WIFE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 783-785, paras. 1238-1242; and FOR CASES, see DIGEST, Vol. 27, pp. 565-568, Nos. 6237-6256.]

Case referred to :

** (1) Bragg v. Bragg*, [1925] P. 20; 27 Digest 565, 6242; 94 L.J.P. 11; 132 L.T. 346.

APPLICATION as to maintenance by the Official Solicitor acting as guardian *ad litem* of the respondent wife. The facts are sufficiently set out in the judgment.

A *B. Stewart Horner* for the Official Solicitor as guardian *ad litem* of the respondent wife.

R. T. Barnard for the petitioner husband.

PILCHER, J.: The facts of the case can be shortly stated. On Nov. 30, 1943, the petitioner obtained a decree *nisi* against his wife on the ground of insanity. In granting the decree *nisi* the President referred the question of maintenance to chambers. A decree absolute was pronounced on June 6, 1944.

B Since 1931 the wife has been detained in a mental institution, and on Feb. 25, 1931, an order was made by the magistrates of the City of Manchester at the instance of the local authority, referred to in the order as the Lord Mayor, Aldermen and Citizens of Manchester, that the husband, the present petitioner, should pay to the local authority the sum of 10s. per week towards the maintenance of the wife so long as she should remain a lunatic and chargeable on the funds of the local authority. The sum payable under the order was later increased by a further order to 15s. per week. In July, 1943, before the decree *nisi* was granted, the Official Solicitor, in accordance with his usual practice, forwarded to the petitioner's solicitors a suggested form of clause to be embodied in the order pronouncing the decree *nisi*. The clause was as follows :

D And the petitioner undertaking to continue the present arrangements for the maintenance of the respondent until the date of the decree absolute herein it is further ordered by consent that the petitioner do thereafter during the joint lives of the parties and until further order make an allowance to the respondent for maintenance of £45 17s. 6d. per annum and that the said allowance be paid by weekly instalments to the public assistance officer or other proper officer of the city of Manchester council and that the said officer do apply the said amount as follows : (a) in making a payment out of the first moneys coming into his hands each year of a sum of 7s. 6d. to the Official

E Solicitor as the cost of an official visit to the respondent and (b) in making a payment out of the next moneys coming into his hands of the sum of £6 10s. 0d. to the medical superintendent of the County Mental Hospital, Prestwich, Lancs, or the medical superintendent of any hospital where the respondent may be resident (whose receipt shall be a sufficient discharge) to be applied for the provision of extra comforts for the respondent and (c) as regards the balance of the said amount in or towards repayment to the public assistance committee of the costs of the maintenance of the respondent.

F The solicitors for the petitioner took exception to the clause, and a prolonged correspondence ensued. Ultimately the petitioner agreed to pay the sum of 7s. 6d. per year in respect of the cost of the official visit and also the sum of £6 10s. per year for extra comforts, but objected to the payment provided for under (c) of the proposed clause, this payment being in effect a contribution of 15s. per week towards the maintenance of the lunatic wife. The grounds of the objection were (i) that the magistrates' order for the payment of 15s. per week to the local authority was still operative in spite of the fact that since the decree absolute the parties had ceased to be husband and wife, and (ii) that considerations of convenience and economy rendered it expedient that any review of the amount to be paid by the petitioner towards the expenses of his wife's maintenance should be conducted before the local magistrates rather than before this Division of the High Court.

H The argument presented to me on behalf of the petitioner was founded on the well known case of *Bragg v. Bragg* (1). Counsel for the petitioner submitted that the situation which had arisen in this case was analogous to that which arose in *Bragg v. Bragg* (1). He submitted that the dissolution of the marriage in this case did not automatically discharge the magistrates' order, and contended that so long as this order remained operative no order ought to be made in this Division in respect of the wife's maintenance.

The matter had been before the registrar, who made a report on June 20, 1944. From this report it would seem that the registrar had at first been

mind to make an order in the form suggested by the Official Solicitor. In the result, however, he decided that no order should be drawn up for 28 days after decree absolute and that if by that time the order of the magistrates had not been discharged he would report to the court. The registrar clearly took the view, and he so stated at the conclusion of his report, (i) that the order of the magistrates remains in force until discharged, and (ii) that no order can be made by the High Court for the respondent's maintenance whilst the magistrates' order is in force. It is clear that the second conclusion arrived at by the registrar as typed in his report cannot be supported. The power of the High Court to make an order of the kind contemplated notwithstanding that the magistrates' order still remains in force cannot be doubted. It may well be, however, that what the registrar intended to convey was that no such order ought to be made, and I will deal with the matter upon the assumption that the passage in the report to which I have referred should be so read. A

Bragg v. Bragg (1) decided that a magistrates' order for maintenance obtained by a wife on the grounds of the husband's desertion was not *ipso facto* discharged by reason of the fact that the wife had subsequently to the making of the order had her marriage dissolved on the ground of her husband's adultery and bigamy. The case also decided that the magistrates were not compelled upon proof of the dissolution of the marriage to discharge the order but were entitled to exercise the discretion granted to them by the Summary Jurisdiction (Married Women) Act, 1895, s. 7, in arriving at a decision as to whether or not to discharge the order. The Divisional Court took the view that the magistrate had exercised the discretion reposed in him judicially and were moreover of opinion that on the facts of that particular case considerations of expediency and economy rendered it desirable that the husband should continue to pay maintenance under the magistrate's order to a woman who was in fact no longer his wife. The first distinction which springs to the mind between the facts in *Bragg v. Bragg* (1), and those of the present case is that the magistrates' order in *Bragg v. Bragg* (1) was an order obtained in matrimonial proceedings between husband and wife, whereas the magistrate's order in the present case was obtained in proceedings between the local authority and the husband under the Poor Law Act, 1930, s. 19 (1), which is in the following terms, omitting unnecessary words: B C D

Where a married woman . . . being a lunatic, is removed to any institution for lunatics the council of the county or county borough to which she becomes chargeable may complain to a petty sessional court having jurisdiction in the county or county borough, and upon any such complaint the court may make an order upon the husband to pay such sum . . . towards the cost of the relief of his wife as having regard to all the circumstances of the case, appears to them to be proper, and shall by the order determine how and to whom the payments shall from time to time be made. E

The order in the present case directed the husband to make the payments weekly to: F

. . . the lord mayor, aldermen and citizens of the said city for the time being or to some or one of them for the maintenance of his said wife in the said asylum for and during so long a time as she shall be therein confined as a lunatic and shall be chargeable to the said lord mayor, aldermen and citizens of the said city, or until the defendant shall be lawfully ordered to the contrary, such weekly sum appearing to the court after due consideration of the case to be the proper sum to be paid by the defendant. G

There is, I think, no doubt that the registrar was right in saying that in the case before him, as in *Bragg v. Bragg* (1) the order of the magistrates remains technically in force until it is discharged by another order of the same court. In form the payment under the order is made to the local authority and not to the respondent. It is true that the order provides that the payment is to be applied by the local authority for the maintenance of a woman described in the order as the petitioner's wife, and that such woman is no longer his wife. Proof of this fact before the magistrates would in the present case enable the husband or the local authority upon application to the magistrates to obtain the discharge of the order. In my view moreover, upon any such application the magistrates would be bound to discharge the order, because an ex-husband is not one of the relatives who under the Poor Law Act, 1930, s. 19, is bound to contribute towards the support of his ex-wife. Whilst, therefore, it is accurate H

to say that the magistrates' order remains technically in force until it is discharged by the magistrates themselves, it is quite clear that it is an order that ought to be discharged. Under the provisions of the Poor Law Act the local authority are not entitled to demand payment by way of contribution to the support of a lunatic from the ex-husband of such lunatic, and in the circumstances the local authority's proper course is in my view to apply to have the order discharged unless this course is adopted by the petitioner himself.

- A There being, in my opinion, no doubt as to the powers of the High Court itself to make the order in the form suggested by the Official Solicitor, I have equally little doubt that an order in this form ought to be made notwithstanding that the magistrates' order remains technically in force. The considerations of expediency which existed in *Bragg v. Bragg* (1), and were recognised by the magistrate and the Divisional Court are in this case conspicuous by their absence. The statutory provisions governing the payment of maintenance in cases where
- B a marriage is dissolved on the ground of insanity are contained in the Matrimonial Causes Act, 1937, s. 10 (2), and the Judicature (Consolidation) Act, 1925, s. 190. Under these enactments a husband who has divorced his wife on the ground of her insanity may be ordered to pay maintenance "to such person having charge of the respondent as the court may direct." The section to which I have referred therefore provides in terms for the relief sought in the
- C present case, and places a liability on an ex-husband which does not exist under the Poor Law Acts. It is well known that in almost every case where divorce is sought on the ground of insanity the interests of the respondent are safeguarded by the Official Solicitor, who acts as guardian *ad litem* of the lunatic. In this type of case it is the well-nigh invariable practice of the Official Solicitor before the petition is heard to get in touch with the petitioner and also with the local authority chargeable with the maintenance of the respondent lunatic, with the
- D happy result that in most cases on the granting of the decree *nisi* a consent order is incorporated in the decree providing for the payment by the petitioner of the cost of a yearly official visit by the Official Solicitor, of extra comforts, when they can be appreciated, for the respondent, and also for the payment of an appropriate sum towards the expense of the respondent's maintenance in the asylum. This practice was instituted when incurable insanity first became
- E a ground for divorce, and the experience gained since the passing of the matrimonial Causes Act, 1937, indicates that the system works smoothly and satisfactorily. In the present case it is conceded that an order will have to be made in the High Court providing for the payment by the husband of the cost of the yearly official visit and the cost of extra comforts for the respondent. There can, I think, be no doubt that quite apart from the more important matters which I have referred to the balance of convenience in this type of case
- F is in favour of incorporating all the ancillary relief to which the respondent is entitled in one order, and that an order of the High Court in the form prepared by the Official Solicitor should here be made. I have already indicated my view that an application should be made to the Manchester magistrates for the formal discharge of the maintenance order made against the petitioner.

Order accordingly. Petitioner to pay costs of application.

- G Solicitors : *Official Solicitor* (acting as guardian *ad litem* for the respondent wife); *Vizard, Oldham, Crowder & Cash* (for the petitioner).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

CHURCHMAN v. CHURCHMAN.

[COURT OF APPEAL (Lord Goddard, Lord Merriman, P., and du Parcq, L.J.),
May 4, June 8, 1945.]

Divorce—Connivance—Husband's petition—Knowledge of wife's adultery—Whether attempted collusive bargain for damages amounted to connivance at adulterous association—Burden of proof—Presumption of law against existence of connivance not reversed—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178—Matrimonial Causes Act, 1937 (c. 57), ss. 1, 4. A

The parties were married on Dec. 28, 1940. Prior to her marriage, the respondent wife had been the mistress of the co-respondent whom she had intended to marry. In Feb., 1941, the respondent left the appellant husband and went to live with the co-respondent. The appellant strenuously objected to her adulterous association with the co-respondent and tried unsuccessfully to persuade her to return to him. Then ensued a series of overtures by the appellant to the co-respondent with the object of coming to some arrangement concerning the question of damages. Various meetings took place, and by a letter dated Mar. 28, 1942, the appellant suggested an agreement whereby the appellant would undertake, in consideration of the co-respondent paying an agreed amount of damages, to divorce his wife without bringing any action of any kind against the co-respondent. These negotiations broke down and nothing in the nature of a corrupt bargain was concluded. On Dec. 31, 1943, the appellant filed a petition against his wife and the co-respondent praying for £1500 damages and for a dissolution of the marriage on the ground of the wife's adultery with the co-respondent. The judge took the view that, in the circumstances, the presentation of the petition was not tainted by collusion. He held, however, that the petitioner had acquiesced in and concurred in the continuance of his wife's adultery from Feb., 1942, onwards, and that such connivance constituted a bar to the relief sought. In so holding the judge did not deal expressly with the question whether he regarded the connivance at the continuance of the adultery as amounting by ratification to connivance of the earlier adultery :— B C D

HELD : (i) assuming that the Matrimonial Causes Act, 1937, imposed upon the petitioner the burden of satisfying the court of the absence of connivance, this did not mean that the presumption of law against the existence of connivance had been reversed. Once the issue of connivance had been raised, the incidence of the burden of proof as a determining factor of the whole case was only of importance if the court found the evidence so evenly balanced that it could not come to a definite conclusion. Then the onus would determine the matter. E

Lloyd v. Lloyd and Leggeri (2), *Poulden v. Poulden* (3) and *Germany v. Germany* (4) overruled. F

(ii) it was of the essence of connivance that it preceded the event and, generally, the material event was the inception of the adultery, and not its repetition, although the facts might be such that connivance at the continuance of an adulterous association showed that the petitioner must be taken to have connived at it from the first. G

Gipps v. Gipps and Hume (1) explained.

(iii) the appellant's attempt to make a collusive bargain for damages in respect of an admitted wrong could not be held to have effected a notional conversion of what was in fact strenuous objection on his part to the early stages of the adulterous association into connivance at any stage of the association, whether past or future. The appeal must, therefore, be allowed.

Qu. : whether in a case where there was a real basis for a claim for damages and the husband intended to prosecute his petition for divorce, the fact that he had received and retained the money paid under a collusive bargain for damages barred him once and for all from saying that he had not connived at his wife's adultery. H

[EDITORIAL NOTE.] It is here held that the change in the burden of proof of connivance effected by sect. 4 of the Matrimonial Causes Act, 1937, has not the effect of raising a presumption of law that the petitioner is guilty of connivance, which must still be strictly proved. The burden of proof of innocence is put on the petitioner,

since the facts must be peculiarly within his own knowledge. It is of the essence of connivance that it should precede the inception of the adultery, but connivance at continuance of association may well indicate connivance at the commencement. It is held here, however, that where there was at the inception a strong objection to the association, a subsequent attempt by the husband to make a collusive bargain for damages with the co-respondent does not effect a notional conversion of the objection into connivance.

AS TO CONNIVANCE AND COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-678, paras. 995-1003; and FOR CASES, see DIGEST, Vol. 27, pp. 327, 328, 334, 335, Nos. 3061-3070, 3141-3144, Digest Supp., Husband and Wife, 3087a, 3092a.]

Cases referred to;

- A * (1) *Gipps v. Gipps and Hume* (1864) 11 H.L. Cas. 1; 27 Digest 327, 3064; 4 New Rep. 303; 33 L.J.P.M. & A. 161; 10 L.T. 735.
- * (2) *Lloyd v. Lloyd and Leggeri*, [1938] P. 174; [1938] 2 All E.R. 480; Digest Supp.; 107 L.J.P. 90; 159 L.T. 258.
- B * (3) *Poulden v. Poulden*, [1938] P. 63; [1938] 1 All E.R. 508; Digest Supp.; 107 L.J.P. 27; 158 L.T. 231.
- * (4) *Germany v. Germany*, [1938] P. 202; [1938] 3 All E.R. 64; Digest Supp.; 107 L.J.P. 124; 159 L.T. 487.
- * (5) *Attygalle v. R.*, [1936] A.C. 338; [1936] 2 All E.R. 116; Digest Supp.; 105 L.J.P.C. 79; 154 L.T. 620.
- (6) *Robins v. National Trust Co.*, [1927] A.C. 515; Digest Supp.; 96 L.J.P.C. 84; 137 L.T. 1.
- C * (7) *Gifford v. Gifford and Freeman* (1926), 43 T.L.R. 141; Digest Supp.

APPEAL by the petitioner husband from a decision of DENNING, J., dated Dec. 13, 1944, dismissing the petition for divorce on the ground of adultery committed by the petitioner's wife. The facts are fully set out in the judgment of the court, delivered by LORD MERRIMAN, P.

The appellant appeared in person.

D C. A. Marshall-Reynolds for the co-respondent.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and William Laye for the King's Proctor as *amici curiae*.

LORD MERRIMAN, P. [delivering the judgment of the court]: This is a husband's appeal from a decision of DENNING, J., dismissing his petition for divorce on the grounds of his wife's adultery. The petition charged the wife with committing adultery with the co-respondent between Feb., 1941, and July, 1942, and contained a claim for £1,500 damages against the co-respondent. The wife filed no answer. The co-respondent filed an answer containing a simple denial of the adultery. As the parties were only married on Dec. 28, 1940, it was impossible, without the leave of the court, to present a petition before the corresponding date in 1943. The husband in fact took out an originating summons in June, 1943, but beyond filing an affidavit in support of the summons, he appears not to have pursued the matter, but instead to have presented his petition immediately after the expiration of the three years, namely, on Dec. 31, 1943.

The suit was contested. The husband, the wife and the co-respondent all gave evidence. There was no dispute about the fact of the adultery or the duration of the adulterous association and the judge held that the charge was proved as alleged. The sole contest was on the issue of damages. The co-respondent relied in diminution or extinction of the claim for damages upon certain negotiations which took place between the parties before the presentation of the petition, the substance of which was disclosed in the course of the husband's own examination-in-chief. There was no plea alleging either collusion or connivance and it may be assumed that neither the wife nor the co-respondent desired to defeat the husband's prayer for divorce, as distinct from the claim for damages. Nevertheless, by virtue of sect. 178 of the Judicature Act, 1925, as amended by the Matrimonial Causes Act, 1937, s. 4, it was the duty of the judge, in the circumstances of this case, to enquire whether there had been any connivance at the adultery or whether any collusion existed between the parties and only if satisfied on the evidence not merely that the adultery was proved, but that the petitioner had not in any manner been accessory to or connived at the adultery and that the petition was not presented or prosecuted in collusion with either of the respondents, to pronounce a decree of divorce. The judge found that there was nothing to suggest that the present suit was tainted by

collusion, but he was not satisfied that the husband did not connive at the continuance of the wife's adultery and accordingly dismissed the petition. The questions for this court are whether the judge was right in his finding as regards connivance and, if not, whether he ought nevertheless to have dismissed the petition on the ground of collusion.

Owing to a dearth of official shorthand writers at the time of the trial there was no shorthand note of this case. As regards the evidence, however, we have had the benefit of a very full note taken by the judge, and in the absence of any other note of his judgment, he has been good enough to supply the court from recollection with a written summary of the reasons for his decision, the accuracy of which has not been challenged. In addition much of the crucial evidence is given in written documents. It can, therefore, be said with confidence that this court is in full possession of all material necessary for a decision.

The facts may be summarised as follows. The appellant husband obtained a divorce from his former wife in 1938, but for some years before that he had been living in adultery with his present wife. Soon after the husband obtained his divorce the wife first met the co-respondent. In 1939 she announced that she intended to marry the co-respondent and admittedly she became his mistress. The marriage was actually fixed to take place in Jan., 1940. The husband, however, in support of his own suit maintained, rightly as is now established, that the co-respondent was not free to marry her as he had a wife alive from whom, contrary to the co-respondent's repeated assertions, he had never obtained a divorce. Eventually the husband succeeded in persuading the wife that this was so and she agreed to marry him. According to her evidence the marriage was never consummated. However this may be—and in view of their previous relationship the matter is of little importance—it is clear that the wife preferred to live in adultery with the co-respondent, and to enjoy the amenities with which he could afford to provide her, to the bonds of matrimony, straitened as they were by the husband's financial embarrassment. Accordingly in Feb., 1941, the wife left the husband and went to live with the co-respondent, thus beginning the adulterous association charged in the petition. In view of the fact that the judge expressly accepts the co-respondent's evidence about the subsequent events we will assume in his favour that he is telling the truth in saying that he had no share in influencing the wife's decision but, on the contrary, was urging her to remain with the husband. Even so we see no reason to doubt the genuineness of the husband's feelings of resentment expressed in a long letter to the co-respondent of Feb. 26, 1941, from which one passage may be quoted :

When, several weeks ago, you learned that Betty was married, the honourable course of conduct would have been either to drop out or to see me—you did neither. You just continued writing letters to her, tempting and enticing her and still on the basis of your unproved word playing on her feelings. You have made and still make no compromise suggestions such as an interim period—probably such an unselfish safeguard has not occurred to you as being the "right" thing to do in such cases. All you ask is for *your* immediate wants to be satisfied, and for these you use the pretext that they happen to agree with what Betty, owing to your influence and suggestion and enticings, consider *are* hers.

There was evidently a meeting in May, 1941. According to the husband he told the co-respondent that he still wanted his wife and the co-respondent said that it was for the husband to take her. The wife said that she still felt that the co-respondent would get his divorce and make her independent and refused to leave him. The co-respondent, whose version of all interviews the judge expressly accepted, did not contradict this evidence, but he said that at what was probably the same interview the husband demanded money, said that he was going to get a divorce and adopted a very threatening attitude. The judge says that, in any case, on the facts he would not have awarded the husband any damages. In view of what ensued the propriety of this decision cannot be questioned; but that is not to say that as things then stood, in the spring of 1941, the husband had not a case for claiming substantial damages against the co-respondent.

Nothing further occurred for some months, and by the end of 1941, at any rate, the husband had realised that the position was hopeless and had decided to bring proceedings for divorce and to claim damages. It is important to note, however, that only about a year had then elapsed since the marriage. Unless, therefore, he could petition for nullity in respect of the non-consummation

of the marriage, he must, subject to the dispensing power of the court, await the expiration of the statutory period of three years prescribed by the Matrimonial Causes Act, 1937, s. 1; while if he elected to petition for nullity he could not well proceed against the co-respondent for damages for adultery. There is some mention in the evidence of the wife having suggested a nullity suit and of the husband having consulted his solicitor with regard to damages against the co-respondent, but whether he was fully aware of the legal position or not the husband decided to take the law into his own hands and there then ensued a series of overtures on his part to the co-respondent of the most crude and discreditable character, which are the crux of this appeal.

The husband wrote to the co-respondent on Dec. 30, 1941, asking him to inaugurate the new year by an attempt to come to some arrangement in the best interests of everyone concerned and in a letter of Jan. 3, 1942, offered the co-respondent the opportunity of a meeting before putting the advice of his solicitors and counsel into action. They met at Doncaster on Feb. 3, 1942. According to the husband's own account of the matter damages were discussed. The husband mentioned a figure of £4,000, based upon his own financial necessities, while the co-respondent made it clear that he was thinking only in hundreds. The matter was left undecided, but no counter offer having been received from the co-respondent there was another meeting about the middle of March at which the wife also was present. The discussion again was inconclusive. The husband on Mar. 28, 1942, then tried to bring matters to a head by a long letter setting out the details of his liabilities and appealing for the co-respondent's utmost generosity and offering in return any "favour" required by the co-respondent, by which he meant that he would not claim damages in his petition. The husband in this letter expressly disclaimed that he was basing his appeal on the injury done him by the co-respondent, but the falsity of this disclaimer and the true nature of the suggested transaction is made clear by the form of agreement for the co-respondent's signature enclosed in the letter, purporting to "set down and confirm the decisions mutually reached" on matters affecting the husband, the co-respondent and the wife. The document contained the following clause :

You agree to bring no action of any kind in this matter against me individually and also to divorce your wife, Elizabeth Gertrude Churchman, without claiming in your petition any further damages in order that the case may go through without my needing to defend and so in such manner as will permit it to be conducted as quietly as possible with a minimum of publicity to me or others. I in return agree to pay you, within one month from to-day's date, as compensation and in full settlement of damages for the loss of your wife, the sum of (£ . . .).

To this egregious letter the co-respondent returned no reply, but there appears to have been a further meeting in April, at which the co-respondent is said to have mentioned June 6 as a date by which the husband might expect to hear from him. Nothing further occurred, except that on June 4 the husband threatened to wait no longer before putting the law into motion and asked the co-respondent to let him know whether he was "to make any financial side of the question the subject of a claim" or whether the co-respondent preferred mutually to settle the matter personally with the husband or with his solicitors. He added that the former course would naturally involve an unnecessary amount of unpleasantness compared with the latter which, if adopted, would, he imagined, permit the case to go through undefended. He gave the co-respondent until June 14. There was no reply and the husband proceeded with his abortive summons for leave to present a petition.

Again accepting the co-respondent's version, the court is not disposed to quarrel with his colloquial description of these overtures as blackmail. It is clear, however, that nothing in the nature of a corrupt bargain was ever actually concluded. It is only necessary to add that at one of the meetings the co-respondent, on a representation by the husband that he could barely afford the cost of the night's lodging entailed by the journey, gave the husband the sum of £5. It is impossible to regard this as having been paid on account of the bargain desired by the husband, for the parties were never within measurable distance of being *ad idem*. When the petition was presented, and indeed, when it was first decided to present it in due course, instead of proceeding with the originating summons, the negotiations had completely broken down. In these circumstances

the judge held that the presentation of the petition was not tainted, as otherwise it must almost necessarily have been held to be, by collusion. In this he was clearly right. But he held that upon the evidence of the co-respondent as to the interviews and upon the letters the husband from February or March 1942, had tolerated, acquiesced in and concurred in the continuance of his wife's adultery from that time onwards. The judge added, referring to the leading case of *Gipps v. Gipps* (1), that if the husband had actually received the £4,000 there would have been connivance. His state of mind was the same whether he received it or not. The fact that he did not get it, or only got £5, did not alter the position. The judge did not deal expressly with the question whether he regarded the connivance at the continuance of the adultery as amounting by ratification to connivance at the earlier adultery. It would seem that he regarded connivance at any stage of the adultery charged as fatal. The point is of importance because it is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first. This proposition is well illustrated by *Gipps v. Gipps* (1), and it will be necessary to consider more closely the bearing of that case on the present appeal. Before doing so, however, two general observations may usefully be made. First: In the notes of his judgment the judge refers to *Lloyd v. Lloyd* (2). In that case LANGTON, J., at p. 195 ([1938] 2 All E.R., at p. 497), referred with approval to some observations of BUCKNILL, J., in *Poulden v. Poulden* (3), on the change effected in the burden of proof in relation to connivance by virtue of the amendment by the Matrimonial Causes Act, 1937, s. 4, of the Judicature Act, 1925, s. 178, which in turn substantially reproduced, but in different language, the effect of the Matrimonial Causes Act, 1857, s. 31. BUCKNILL, J., appears to suggest that in placing expressly upon the petitioner the burden of satisfying the court of the absence of connivance the legislature had reversed the presumption of law against the existence of connivance—(see also *Germany v. Germany* (4), at p. 206, per LANGTON, J.). As the Attorney-General pointed out in the course of his argument it is vital to a correct approach to the determination of the question of connivance that the effect of the present enactment should be appreciated. That it places the burden of proof upon the petitioner is indisputable; whether a radical change in the law was thereby effected may be open to question. The issue only arises at all if the circumstances are such as to lead to a suspicion of connivance calling for investigation. Once the issue has been raised it might well be thought that, since in most cases of connivance, if not necessarily in all, the facts, including the all important fact of his state of mind, are so especially in the knowledge of the party himself, the burden of dispelling suspicion once aroused^a was always upon the party, even under the former wording of sect. 178. It is worthy of note that in *Gipps v. Gipps* (1) LORD WENSLEYDALE stated the issue raised by the Matrimonial Causes Act, 1857, s. 31, in almost exactly the words of the present enactment. After saying that the law of divorce was now regulated by the new Act of Parliament and that the court was bound to pronounce a decree of dissolution upon certain conditions particularly mentioned in the Act of 1857, he continued, at p. 23:

These are the conditions. That the court is to be satisfied as far as it reasonably can, that the adultery has been proved, and that the petitioner has not been in any manner accessory to, or conniving at, the adultery, and that he has not condoned the same. These are the only material parts of the Act to which it is necessary to advert as applicable to this case.

The fact that LORD WENSLEYDALE in spite of his thus stating the issue in the sense least favourable to the petitioner dissented from the other noble Lords by determining the issue in his favour, in no way detracts from the weight of the passage cited. Incidentally, it is worthy of note that it has always been the practice in the affidavit verifying a petition based upon adultery to require the petitioner's oath that he has not connived at the adultery (see the Matrimonial Causes Act, 1857, s. 41). But it is not necessary to express any final opinion upon the question where the burden of proof lay under the earlier Acts or upon the reasons for the change in the wording. Assuming that the present Act deliberately imposes a new burden upon the petitioner this cannot

in our opinion mean that there is now a presumption of law that he has been guilty of connivance. The same strict proof is required in the case of a Matrimonial offence as is required in connection with criminal offences properly so called. Connivance implies that the husband has been accessory to the very offence on which his petition is founded, or at the least has corruptly acquiesced in its commission, and the presumption of law has always been against connivance. The limited effect of the statutory imposition of the burden of proof upon a party charged with an offence is well illustrated by the case of *Attygalle v. R.* (5). The Ceylon Evidence Ordinance No. 14, 1895, provides by sect. 106 that :

... when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

This enactment was obviously intended to reproduce the corresponding principle of the English law of evidence. This is stated, for example, in the same sense in sect. 376 of *TAYLOR ON EVIDENCE*, 12th Edn., Vol. 1, at pp. 262, 263, and the fact that this very general statement certainly requires qualification is not germane to the present question. The question at issue was whether an operation, at which the two accused and the unconscious subject alone were present, was an illegal operation. The trial judge in his summing-up invoked this section of the Ordinance as laying upon the accused the burden of proving that no illegal operation took place. The Privy Council held that the direction was incorrect and that sect. 106 of the Ordinance notwithstanding, it was not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. We are, therefore, unable to agree with the view expressed in *Germany v. Germany* (4), and the other cases referred to above that a change in the burden of proof, assuming that it has occurred, operates to produce a presumption of guilt of connivance when the presumption has hitherto been the other way. After all, as *DU PARCQ, L.J.*, pointed out during the argument, the incidence of the burden of proof as a determining factor of the whole case is only of importance if the tribunal finds the evidence, *pro* and *con*, so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. In *Robins v. National Trust Co.* (6), *VISCOUNT DUNEDIN* said, at p. 520 :

But if the tribunal after hearing and weighing the evidence comes to a determinate conclusion the onus has nothing to do with it and need not be further considered.

Except in this sense we are unable to accept the view that the presumption of law with regard to connivance has in any way been reversed. Secondly : Much of the difficulty in dealing with the question of connivance arises from the fact that in the past judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery ; and that the court should not allow its judgment to be affected by importing, as principles of universal application, pronouncements made with regard to wholly different circumstances, and so be led to a conclusion contrary to the justice of the case. This observation is relevant to the examination of the leading case of *Gipps v. Gipps* (1), which it is now necessary to make. In that case the parties, who had been married in 1851, separated in 1860. In that year the husband was about to file a petition against his wife and the co-respondent praying for damages and for a dissolution of the marriage on the ground of the wife's adultery with the co-respondent ; but, the co-respondent being anxious to avoid publicity, negotiations took place resulting in an agreement that a sum of £3,000 should be paid by the co-respondent to a mutual friend to abide the event of the petition, that this sum should be in lieu of costs and damages, and that the petition should not contain a claim for damages. The sum of £3,000 was paid accordingly and no claim for damages was made in the petition. Pausing there it will be observed that, in contrast with the present case, the collusive bargain with regard to damages was not merely concluded, but the money was actually paid over. In June, 1861, the case came on for hearing, but the husband consented to withdraw his suit in consideration not merely of the sum of £3,000 already mentioned, but upon

the co-respondent agreeing to secure the further sum of £4,000 payable upon the death of his mother and in the meantime to pay interest at 5 per cent. The petition was called on. No evidence was offered in support of it and it was dismissed. Afterwards the co-respondent refused to implement the agreement in respect of the £4,000. The husband filed a bill in Chancery for specific performance, to which the co-respondent demurred, and WOOD, V.-C., as he then was, in Nov., 1861, allowed the demurrer. In June, 1862, the appellant filed a second petition in the divorce court based upon the fresh acts of adultery of the wife with the co-respondent from Aug., 1861, up to the date of the petition. SIR CRESSWELL CRESSWELL dismissed the petition on the ground that the appellant had connived at the adultery. The principal ground of his decision was that, the husband having already received the £3,000 to cover damages and costs, the agreement for the additional £4,000 could only be regarded as purchase money for giving up his right to a divorce. But there are passages in the judgment which suggest that he regarded the first agreement not only as collusive but also as evidence of connivance. The decision was upheld in the House of Lords by LORD WESTBURY, L.C., and LORD CHELMSFORD, LORD WENSLEYDALE dissenting. The *ratio decidendi* was that the husband, having made a corrupt bargain to forego his right to a divorce in respect of the beginning of the adulterous association, could not afterwards present a petition in respect of the almost inevitable continuance of the same association. But it is to be observed that LORD WENSLEYDALE, at p. 26, objected to the Judge Ordinary's judgment on the ground that :

... there has been no consent to the first adultery, and no connivance in the proper sense of the word, by insisting on and receiving compensation for an admitted wrong. This compensation was paid in an irregular and unauthorised manner; but still its nature is not altered; it is still nothing but a payment of damages for a past injury, wholly inexcusable.

LORD CHELMSFORD, at p. 27, expressly agreed with LORD WENSLEYDALE that the Judge Ordinary was in error in holding that the compromise of the first petition amounted in itself to connivance at the subsequent adultery. It was the withdrawal of the first petition in consequence of a corrupt bargain, which he later attempted to enforce, that was held to have ratified the adulterous association from the outset and to bar relief in respect of its continuance. The actual decision in *Gipps v. Gipps* (1) so far from telling against the appellant, seems to us to be strongly in his favour. In our opinion the judge misdirected himself in basing his decision, as he did, on the following passage in the speech of WESTBURY, L.C., at p. 14 :

Still more must "conniving at" include the case of a husband who, having discovered the adultery of the wife, takes a sum of money from the adulterer upon an engagement not to complain of the acts of the wife, but to abandon his legal remedy, and then leaves the wife in such a situation as cannot but facilitate the continuance or renewal of the adulterous intercourse.

The whole emphasis of this passage is on the words "upon an engagement not to complain of the acts of the wife."

But it is not only in a case where the husband has bargained away his rights that he has been held to have connived at the continuance of the association, if not at its inception. In *Gifford v. Gifford* (7) it was disclosed in the course of the hearing of an undefended petition for divorce founded upon adultery that the husband and the co-respondent had agreed that the co-respondent should pay £2,500 damages, of which £1,750 was to be paid down and the rest later and that the petitioner should claim no further damages from the co-respondent and should put no obstacles in the way of a decree *nisi* being made absolute. At the time when the case was heard it was, of course, impossible for a respondent to take any steps to make absolute a decree *nisi*. This petition was dismissed on the ground that the suit was collusive. The wife and the co-respondent continued to live in adultery and the petitioner, who had retained possession of the £1,750, presented a second petition complaining of the adultery since the date of the former petition. LORD MERRIVALE, P., said that it was obvious that by the original agreement the husband had prevented himself from complaining any more of adultery whether that adultery was past or future. He had received the £1,750 and had spent it. He held that the petitioner once and for all had bargained away his claim which had been met by an agree-

ment and the payment of a sum of money and it was impossible to say that he did not connive. The report does not show whether *Gipps v. Gipps* (1) was considered. It may be that LORD MERRIVALE, P., felt that the circumstances, including the undertaking to facilitate the decree *nisi*, would have justified the dismissal of the first petition on the ground not only of collusion but of connivance. Failing this we should prefer to reserve our opinion as to whether, in a case where there was a real basis for a claim for damages and the husband intended to prosecute his petition for divorce, the fact that he had received and retained the money paid under a collusive bargain for damages barred him once and for all from saying that he had not connived at his wife's adultery. It goes without saying that coupled with other marks of a corrupt intention, the making of a collusive bargain without damages may be cogent evidence of connivance. In this case, for example, the husband admitted that in a letter to the co-respondent dated Dec. 7, 1940, only three weeks before the marriage, he was suggesting that the co-respondent should make some financial settlement on the wife by way of compensation for "breach of promise"; that the reference to "previous conditions" in a telegram which he sent to the co-respondent on Feb. 24, 1941, immediately after the wife had left him, referred to the same suggestion; and that in the first week after the marriage he had borrowed £50 from the wife which he knew could only have come from the co-respondent. If it had been possible to establish a connection between these facts and the subsequent overtures for damages and to draw the inference that the marriage itself was part of a concerted scheme to get money out of the co-respondent the case might have assumed a very different aspect. But nothing of the kind was put in cross-examination by counsel for the co-respondent, nor is it suggested in the judge's judgment. On the contrary, we are satisfied that the appellant was devoted to his wife, as she herself expressly admitted; that he bitterly resented her adultery and did his best at first to bring it to an end. Unlike either of the cases referred to, this petition is in respect of adultery committed during the period from the inception of the adulterous association up to the time of the collusive negotiations, though it also includes a charge in respect of the later period. That the husband made overtures for a bargain of a disgraceful character is indisputable, and if these negotiations had reached fruition his petition would have been liable to dismissal on the ground of collusion. But the question in this appeal is whether the husband's attempt to make a collusive bargain for damages in respect of an admitted wrong can be held to have affected a notional conversion of what was in fact strenuous objection on his part to the early stages of the adulterous association into connivance at any stage of the association, whether past or future. We are unable to hold that such a conclusion is justified either by principle or authority, and this appeal must be allowed.

Appeal allowed; decree nisi pronounced; leave granted to apply for a decree absolute as from June 13, 1945. Co-respondent to pay £60 towards the petitioner's costs.

Solicitors: *Shaen, Roscoe & Co.* (for the co-respondent); *The King's Proctor.*
[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COWEN v. COWEN.

[COURT OF APPEAL (Scott, du Parc and Morton, L.JJ.), July 16, 1945.]

Divorce—Nullity—Agreement by parties to use contraceptives for limited period—

Wife wishing to have child—Husband persisting in use of contraceptive—

Coitus interruptus—Whether marriage consummated—Matrimonial Causes

Act, 1937 (c. 57), s. 7 (1) (a).

The parties were married in 1932 and went to live in Persia. Because of the danger of child-bearing for a European woman in Persia, they agreed to take steps to prevent conception, and for this purpose the respondent used a contraceptive. In May, 1937, the parties came to England on leave and the petitioner pressed the respondent to abandon the precaution against conception in order that she might have a child. The respondent refused. From 1937 to 1939 the parties were again in Persia and, although conditions had improved there, and the petitioner was willing to have a

child, the respondent insisted on continuing the use of contraceptives. In 1939 the petitioner came to England and wrote a letter to the respondent requesting him to "live a normal married life" with her. This request was ignored. The petitioner subsequently returned to Persia. Owing to the war contraceptives became practically unobtainable, and the respondent then resorted to the practice of *coitus interruptus*. The respondent's continued refusal to give the petitioner an opportunity of becoming a mother led to disputes and the petitioner left him in 1944. The petitioner then sought the dissolution of her marriage on the ground of non-consummation:—

HELD: (i) sexual intercourse could not be regarded as complete when its natural termination was either artificially prevented or deliberately discontinued.

(ii) though the petitioner had consented to the use of a contraceptive at first, her acquiescence, for a limited period only and for good reasons, was no bar to the relief prayed for.

[EDITORIAL NOTE.] The Matrimonial Causes Act, 1937, which by sect. 7 (1) made a marriage voidable where it has not been consummated owing to the wilful refusal of the respondent, contains no definition of consummation. One of the chief objects of marriage is the procreation of children (see the judgment of SIR WILLIAM SCOTT in *Lindo v. Belisario* (1795), 1 Hag. Con. 216, at p. 231), and it is held, therefore, that intercourse in which the husband uses a contraceptive or practises *coitus interruptus* cannot be regarded as consummation, since the procreation of children is intentionally prevented. It is to be observed that there may, however, be consummation notwithstanding the incapacity of the wife to conceive (*L. v. L.* (1922) 38 T.L.R. 697), since sterility has never been recognised as a ground for nullity proceedings; in such circumstances the element of deliberate avoidance of issue is absent.

On the question of acquiescence by the wife as a bar to relief it is held that the agreement not to have normal intercourse was for a limited period and for satisfactory reasons. It is, therefore, in this case no bar to the nullity decree, but each case must be decided on its own facts.

AS TO GROUNDS FOR NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 639-645, paras. 934-945; and FOR CASES, see DIGEST, Vol. 27, pp. 265-271, Nos. 2328-2404.]

Case referred to:

**(1) D—e v. A—g (falsely calling herself D—e)* (1845), 1 Rob. Eccl. 279; 27 Digest 267, 2350.

APPEAL by the petitioner from a decision of PILCHER, J., dated Apr. 24, 1945. The facts and arguments are sufficiently set out in the judgment of the court, delivered by DU PARCQ, L.J.

Gilbert Beyfus, K.C., and *John Busse* for the appellant.

D. A. Fairweather as *amicus curiae* for the respondent.

DU PARCQ, L.J. [delivering the judgment of the court]: The wife, who is the petitioner in this case, prays for a decree that her marriage with her husband is null and void. The ground which she alleges is that, in the words of the Matrimonial Causes Act, 1937, §. 7 (1) (a):

... the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage.

The petition was not defended. PILCHER, J., who heard the case, found that the marriage had been consummated, and dismissed the petition. The facts are not in dispute or in doubt, and it is important that it should be understood that PILCHER, J., accepted the wife's evidence, and that there is no hint in his judgment that he entertained the slightest suspicion of her truthfulness or sincerity. The question which he had to decide was one of law and construction.

PILCHER, J., stated the facts carefully, and we may summarise them very briefly. The parties were married in 1932. They were both young. At first they lived in Persia, and the danger of child-bearing for a European woman in Persia was then so grave that they agreed to take steps to prevent conception while they were in that country. The husband habitually used a rubber sheath when intercourse took place. In May, 1937, the spouses came to England on leave and the wife pressed her husband to abandon this precaution against conception, in order that she might have a child. He refused. From the end of 1937 until the spring of 1939 they were in Persia, and although conditions had improved there and she was willing to have a child, her husband persisted in

his habitual practice. In the spring of 1939 the wife came to England, and wrote a letter to her husband in which she begged him, to use her own words, to live "a normal married life" with her. He ignored this request. She returned to Persia, and the only change in their relations which took place was that, after the outbreak of war, and owing to the difficulty of obtaining such articles as the husband had previously used, he had recourse to the practice of withdrawal before emission, or *coitus interruptus*. This occurred on but a few occasions.

A Relations between the spouses became strained. The husband's reiterated refusal to give his wife an opportunity of becoming a mother led to disputes. Finally, in 1944, she left him and began the present proceedings..

PILCHER, J., expressed his opinion in the following words :

So far as I am aware, the question of fact for consideration in every nullity case is simply whether or not the marriage has been consummated, and the party who wishes to establish that the marriage has been consummated has, as far as I know, always had to show that there has been some penetration, some effective penetration, of the female by the male organ. Once he has established that there has been complete penetration he has made out his case, and that quite irrespective of whether an appliance like a sheath has been used which would effectively prevent one of the purposes for which marriage was ordained, namely, the procreation of children.

The Matrimonial Causes Act, 1937, contains no definition of the word "consummate," and Parliament no doubt intended it to be understood in the sense in which it had hitherto been employed by judges dealing with matrimonial causes in this country. Before the framing of the 1937 Act the question whether a marriage had been consummated usually arose in connection with the particular question whether one of the parties was lacking in capacity to consummate the marriage. Thus, it is no doubt true to say that normally the question was whether penetration by the male organ could be, and had been, effected.

Before 1937, the question whether the emission of semen into the body of the female was necessary in order to constitute such complete penetration as would amount to a consummation of the marriage could only arise if, through some malformation of the husband's organs of generation, such emission was rendered impossible. In such a case we have no doubt that an ecclesiastical court would have held that a husband suffering from such malformation was impotent, and that the marriage to which he was a party was voidable at the wife's instance.

This, we think, necessarily follows from the generally recognised truth that one of the chief ends of marriage is the procreation of children. This truth is insisted upon by all writers of authority as fundamental to the rule that inability to consummate a marriage renders it voidable. (See OUGHTON'S *ORDO JUDICIORUM* (1738), Tit. CXCVIII, sect. 17; SHELFORD'S *TREATISE OF THE LAW OF MARRIAGE AND DIVORCE* (1841), ch. III, sect. III, p. 201). It is true that sterility in man or woman has never been a ground for avoiding a marriage. Apart from

the fact that in many cases it would even now be impossible to prove that a spouse is incurably sterile and that in earlier days such proof would almost always have been impossible, there are obvious reasons of a religious and social character why sterility should not of itself be a sufficient reason for a decree of nullity. But in order that intercourse should be complete, it is well established that there must be what Dr. LUSHINGTON referred to as *vera copula*. He said, in *D—e. v. A—g.* (1), at p. 298 :

Sexual intercourse, in the proper meaning of the term is ordinary and complete intercourse ; it does not mean partial and imperfect intercourse . . .

We are of opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated.

Further, we would point out that if the judgment of PILCHER, J., were right, a wife who was ready and willing to consummate the marriage in the fullest sense, but refused to permit intercourse in a manner which deprived her of the opportunity of bearing children, would be subject to what seems to us to be an obvious and an intolerable injustice. We say this because it would seem to follow from the judge's reasoning that she would have no answer to a petition

by the husband founded on an allegation that she had wilfully refused to consummate the marriage. With respect, we think that this reasoning is unsound, and that if a husband were bold enough to pray for the annulment of his marriage on such a ground, the answer would be that it was he, and not his wife, on whom the blame for failing to consummate the marriage must rest. With regard to this aspect of the matter, it may be observed that in the precedent of a "Libel for impotence," at p. 385, which is contained in COOTE'S PRACTICE OF THE ECCLESIASTICAL COURTS, published in 1847, it is alleged that the petitioning wife was "willing to be carnally known, in order to become a mother" by her husband. A

Mr. Fairweather, who addressed us as *amicus curiae*, suggested that it might be proper to refuse relief to the petitioner on the ground that her conduct showed that she had acquiesced in and approved her husband's course of conduct. If the petitioner had never made any objection to the measures he adopted or requested him to have normal relations with her, she would certainly not be entitled to the relief which she claims. It may be that relief might properly be refused to a wife who over a long period consented to such imperfect intercourse as was here proved, and only objected to it at a later date, without being able to adduce any excuse or justification for her earlier consent. Each case must be dealt with on its own facts, in the light of established principle. In the present case we are satisfied (as, we think, PILCHER, J., was satisfied) that the petitioner had consented to the practice of which she ultimately complained for reasons which sufficiently explain her consent, and for a limited period only, and that it would be unjust to refuse her relief on the ground that she did not refuse to submit to this imperfect intercourse from the first. It is well settled that delay in itself is not a bar to relief. For these reasons, we are of opinion that the appeal succeeds. The petitioner is entitled to the relief prayed. The appeal is allowed with costs here and below, and the judgment of PILCHER, J., must be set aside. B

Appeal allowed with costs. Decree nisi granted, dated as of Apr. 24, 1945. C

Solicitors: *J. Hampson Fogg* (for the appellant); *Joynson-Hicks & Co.* (for the respondent). D

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

BEEVOR v. BEEVOR. E

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn-Collins, J.),
May 17, 1945.]

Divorce—Desertion—Refusal by wife of marital intercourse—Husband leaving wife—Husband petitioning on ground of desertion—Cross-prayer by wife for desertion—Husband's departure desertion.

The parties were married on Apr. 4, 1923. A son was born to them in Feb., 1925, and from that time onwards the respondent wife consistently refused to have sexual intercourse with the petitioner husband in spite of his warning that he would leave her if she persisted in the refusal. The petitioner had treated her with affection and tolerance but, as she still continued in her refusal, he left the matrimonial home in May, 1940. From the evidence it was found that the respondent had developed an invincible repugnance to the sexual act. The petitioner filed a petition for divorce on the ground of desertion, contending that the respondent's course of conduct drove him away and that, therefore, she was the deserter. The respondent contended that the departure of the petitioner constituted desertion and asked for the dissolution of the marriage:— F

HELD: the evidence led to the same conclusion as though the respondent wife had been rendered structurally incapable of intercourse by some accident or disease and that afforded no ground for the petitioner to leave her. The petitioner, therefore, by his departure had deserted the respondent, who was entitled to a decree. G

[EDITORIAL NOTE. Refusal of intercourse by a wife owing to invincible repugnance, and not to wilful refusal, is here held to be a defence to a petition by the husband for desertion. Being no ground for the husband to leave the matrimonial home, it is, further, ground for granting a decree *nisi* to the wife. H

As to DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-656, paras. 964, 965; and FOR CASES, see DIGEST, Vol. 27, pp. 372-375, Nos. 3607-3633.]

Case referred to :

** (1) Synge v. Synge, [1901] P. 317 ; 27 Digest 375, 3631 ; 70 L.J.P. 97 ; 85 L.T. 83 ; affg. S.C., [1901] P. 180.*

PETITION by the husband for divorce on the ground of desertion, the wife respondent in her amended answer denying desertion and pleading desertion on the part of the petitioner and in the cross-prayer asking for a divorce to be pronounced in her favour. The facts are fully stated in the judgment.

Victor Russell for the petitioner.

A *R. T. Barnard* for the respondent.

HENN-COLLINS, J. : The petitioner, who is the husband, alleges that his wife deserted him in or before May, 1940, and the respondent wife, by her amended answer, alleges that it was the petitioner who deserted her, and she prays a dissolution accordingly.

B The material facts, as I find them, are that the parties were married on Apr. 4, 1923, and lived together, not only without open breach, but one may say in amity, down to the parting in May, 1940. In Feb., 1925, a son was born to them. From that time onwards the respondent consistently refused to have sexual intercourse with her husband. He warned her time and again that if she persisted in her refusal he would leave her, as he found the state of things intolerable. He had borne with it so long, and had treated her with such affection and tolerance, that perhaps she did not believe that he would carry out his threat ; and in spite of her promise to amend her ways, given at the instance of members of her family, her refusal continued. The result was that in May, 1940, the petitioner left the matrimonial home.

C The petitioner's contention is that his wife's course of conduct drove him away, and that, therefore, she was the deserter ; while the wife contends that his departure was desertion on his part.

D Assuming that the wife's refusal was wilful and without excuse, it is clear on the authority of *Synge v. Synge* (1) that she could not have got a decree of restitution of conjugal rights. Her behaviour would have excused the husband's departure. It follows that she could not get a decree of dissolution, now that that remedy is available for desertion for three years.

E But the converse proposition, that the wife in those circumstances is the deserter, by no means follows. The court of first instance in *Synge v. Synge* (1) perhaps thought that it did, but this was *obiter* ; and the Court of Appeal, while affirming the court below, expressly refused to decide the point. The Court of Appeal can, therefore, scarcely have thought that the one proposition followed the other as the night the day.

F But these propositions do not arise for decision unless I am satisfied that the wife's refusal was wilful, and without excuse. That she was at one time capable of submitting to the sexual act goes without saying, for she bore her husband a son ; but I believe the husband's evidence that this was the result of one single act of intercourse, during some 17 years of married life. The wife's sexual proclivities must from the first have been extremely underdeveloped, and having heard her own account of her refusal of intercourse from after the birth of the child, I have formed the opinion that she developed an invincible repugnance to it. It was not, I am satisfied, that she dreaded conception, or that, intercourse being merely distasteful to her, she was selfish about it ; but that something for which she was quite unable to account inhibited her, even at the risk of alienating a husband whom she valued and esteemed.

G What is the result ? It is, in my judgment, as though the wife had been rendered structurally incapable of intercourse by some accident or disease. That would have afforded the husband no excuse for leaving one whom he had vowed to keep in sickness and in health ; and, therefore, I must find that he deserted her.

H There will, accordingly, be a decree *nisi* upon the wife's amended answer ; and she is entitled to her costs. The prayer of the petition will be rejected.

Petition dismissed. Decree nisi with costs granted to the wife.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Becke, Green & Stops*, Northampton (for the petitioner) ; *Botterell & Roche*, agents for *Chamberlin, Talbot & Bracey*, Great Yarmouth (for the respondent).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

BRETHERTON v. UNITED KINGDOM TOTALISATOR CO., LTD.
 [KING'S BENCH DIVISION (Lord Goddard, Humphreys and Cassels, JJ.),
 June 14, 22, 1945.]

Gaming and Wagering—Football pools advertised in newspaper—Pools conducted on credit system—Whether a prize competition “for forecasts of the result . . . of a future event”—Proviso in Betting and Lotteries Act, 1934, s. 26 as to conducting a “competition” in connection with a bookmaker’s trade inapplicable to facts of the case—*Betting and Lotteries Act, 1934 (c. 58), s. 26.*

The respondent company advertised in a newspaper a “coupon” with particulars of different football pools. The advertisement invited readers to fill in coupons relating to any one or more of a series of football matches to be played on the following Saturday, with their respective forecasts of the results. The sums staked on the forecasts varied according to the pool, or pools, chosen by the entrant, and had to be sent to the respondent company after the matches had been played. From the total of the stakes thus contributed, the respondent company deducted a percentage for commission and expenses and divided the balance among those whose forecasts turned out to be correct, or most nearly correct. An information was preferred by the appellant against the respondent company for unlawfully conducting through a newspaper a competition in which prizes were offered for forecasts of the results of future events, namely, football matches, contrary to the Betting and Lotteries Act, 1934, s. 26 (1). Being of the opinion that the case was governed by a previous decision, the magistrate dismissed the information and stated a case for the opinion of the High Court:—

HELD: (i) on the proper construction of the Betting and Lotteries Act, 1934, s. 26, the scheme conducted by the respondent company was a competition in which prizes were offered “for forecasts of the result . . . of a future event” and, therefore, unlawful.

(ii) the proviso to sect. 26 had no application here as the competition was conducted through a newspaper.

Elderton v. United Kingdom Totalisator Co., Ltd. (1) not followed.

[EDITORIAL NOTE.] A Divisional Court here decides that *Elderton’s* case (1) was wrongly decided, and that a football pool conducted through a newspaper is unlawful within the Betting and Lotteries Act, 1934, s. 26. The money won can properly be called a “prize” in the sense in which that word is used in connection with a sweepstake, with which a football pool has much in common, and the entrants are in “competition” with each other.

With regard to the proviso to sect. 26 protecting pool betting operations carried on by a bookmaker, it is suggested by the court that the purpose of the proviso is to ensure that sect. 26 is not construed as prohibiting that which is regulated by a former part of the Act.

FOR THE BETTING AND LOTTERIES ACT, 1934, s. 26, see HALSBURY’S STATUTES, Vol. 27, p. 292.]

Cases referred to:

* (1) *Elderton v. United Kingdom Totalisator Co., Ltd.*, [1935] Ch. 373; Digest Supp.; 104 L.J.Ch. 105; 152 L.T. 549.

* (2) *A.-G. v. Luncheon and Sports Club, Ltd.*, [1929] A.C. 400; Digest Supp.; 98 L.J.K.B. 359; 141 L.T. 153.

(3) *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C. 647; 42 Digest 659, 680; 66 L.J.Ch. 726; 77 L.T. 284; *affg. S.O. sub nom. West Derby Union Guardians v. Metropolitan Life Assurance Society, West Derby Union Guardians v. Priestman*, [1897] 1 Ch. 335.

APPEAL by way of case stated, under the provisions of the Summary Jurisdiction Acts, from a dismissal of an information under the Betting and Lotteries Act, 1934, s. 26 (1), by a metropolitan police magistrate. The magistrate was of opinion that on the facts the case before him was indistinguishable from a decision of EVE, J., in *Elderton v. United Kingdom Totalisator Co., Ltd.* (1), on the construction of sect. 26, and that he was bound by that authority.

Valentine Holmes for the appellant.

Gilbert H. Beyfus, K.C., and *T. Elder Jones* for the respondents.

LORD GODDARD [delivering the judgment of the court]: This is an appeal by way of special case stated by the chief magistrate of the police courts of the

metropolis, who dismissed an information preferred by the appellant against the respondent company for that on Feb. 26, 1944, it did unlawfully conduct through a newspaper called *THE WINNER*, a competition in which prizes were offered for forecasts of the results of future events, to wit, football matches which had not then been played, contrary to sect. 26 (1) of the Betting and Lotteries Act, 1934. The chief magistrate held that the facts proved before him were indistinguishable from those in *Elderton v. United Kingdom Totalisator Co., Ltd.* (1), and on that point we agree with him. In that case *EVE, J.*, held that the facts did not disclose a breach of the section in question; and accordingly the magistrate dismissed the information, being of opinion that the decision was binding on him. This appeal is brought to test the correctness of that decision.

- A The facts found in the case show that the respondent company advertised in the newspaper a coupon for what is commonly known as a football pool.
- B The coupon consists of a form setting out a number of football matches to be played in the following week, and persons desiring to take part in the pool are invited to predict the winners of the matches or whether the games will result in a draw. A number of different pools with varying stakes are included in the coupon and a participator, called in the coupon an investor, can enter for as many as he likes. When filled in, the investor sends the coupon to the respondent company, but does not send the amount of his stake till the following week. It is unnecessary to set out the details of the scheme, as it is not disputed that it amounts to forecasting results of future events and that, but for the fact that it is conducted through a newspaper, it is not contrary to law. From the stakes contributed by "investors," the respondent company deduct an amount for commission and expenses and the balance is divided between the entrants whose predictions are most nearly correct. Each correct forecast carries so many points, and 70 per cent. of the balance goes to those with the highest points, 20 per cent. to those who come next in the number of points gained and 10 per cent. to the next in order. Thus, if one investor got more points than any other, he would take the whole of the 70 per cent. and, if several got the same number, it would be divided between them; and the same with regard to the 20 per cent. and the 10 per cent.

The material words of the section are :

- E It shall be unlawful to conduct in . . . any newspaper, or in connection with any trade or business or the sale of any article to the public (a) any competition in which prizes are offered for forecasts of the result . . . of a future event . . . [cl. (b) is immaterial]. Provided that nothing in this subsection with respect to the conducting of competitions in connection with a trade or business shall apply in relation to pari-mutuel or pool betting operations carried on by a person whose only trade or business is that of a bookmaker as defined in Part I of this Act.
- F The section, therefore, renders three things unlawful : (i) conducting a particular class of competition through a newspaper ; (ii) conducting it in connection with a trade or business ; (iii) conducting it in connection with the sale of an article to the public. If then this football pool is a competition in which prizes are offered for forecasts of the results of future events, the proviso will not avail the respondent company, because it was conducted through a newspaper.
- G It is contended for the respondent company that this scheme is not a prize competition within the section, but simply pool betting, which is not prohibited by the statute, and in truth the only questions for decision are whether the scheme is a competition and whether prizes are offered for forecasts of future events. In *Elderton's* case (1) *EVE, J.*, held that it was not a competition, but a betting transaction, and so was not prohibited by the Act. He said, at p. 381 :

- H One does not compete with a man with whom a bet is made, nor does the winner regard the money paid by the loser as a prize.

While that may be true with regard to an ordinary bet we are unable to agree with the judge that this scheme is not a competition. With all respect, it seems to us that the entrants are obviously competing against each other for the pool, which all hope to win in whole or in part. If half a dozen people enter for a race, each paying one shilling, the winner to take three-quarters of the pool and the second one-quarter and in the event of a dead heat the pool to be divided, they are all competing one against the other and if the unlikely result happened

that all ran a dead heat, so that they would all only get their stake back, they would none the less be competitors.

Then it is said that the word "prize" is not applicable to the division of a pool as is provided by this scheme. In our opinion, the word is used in the Act to indicate the reward to be given to successful competitors, whether in money or in kind, and it matters not that the reward is provided not by the promoters, but out of the fund subscribed by the participators. The scheme has some of the features of a sweepstake, in connection with which the word "prize" is always used to describe that which the winner will receive.

EVE, J., founded his judgment largely upon the decision of the House of Lords in *Attorney-General v. Luncheon and Sports Club, Ltd.* (2), but, again with all respect, we are unable to agree that that case is in any way decisive of the present. The only question before the House was whether a company which owned and carried on a club and there maintained and operated a totalisator machine for the use of members who desired to back horses was "a bookmaker with whom bets were made" within sect. 15 of the Finance Act, 1926, and so liable to pay betting duty. The company merely took a percentage of all stakes in consideration of the facilities that they provided and the expenses of management and nothing else. It was in no way interested in the result of the races in respect of which the stakes were laid. It was held that, though the company was a bookmaker within the section, it was not one with whom bets were made and accordingly they were not liable to pay duty. That was the whole decision. LORD BUCKMASTER, with whom VISCOUNT SUMNER agreed, thought that by means of the machine the members betted with one another. VISCOUNT DUNEDIN merely stated that there was no bet with the company. LORD BLANESBURGH was doubtful whether the operation amounted to making bets at all, regarding it as more in the nature of a sweepstake. But, in holding that there was no betting with the company, the House in no way held that the members were not competing among themselves for the pool which was created by means of the machine, as, in our opinion, they clearly were.

It remains to say a word with regard to the proviso to the section. As we have said, it can afford no defence to the present charge, as it has no application when the competition is conducted through a newspaper; but it was argued for the appellant that the proviso showed that Parliament recognised that these pool operations were prize competitions, as otherwise there would have been no necessity for the saving which it effected. On the other hand, the respondents contended that the real object was to allow a bookmaker to carry on another gambling transaction in connection with his betting business. So to hold would be contrary to a well settled rule of construction. A proviso is not to be construed as an enacting provision enabling something to be done which is not to be found in the statute itself: See *per* LORD HERSCHELL in *West Derby Union v. Metropolitan Life Assurance Society* (3), at pp. 655 and 656. It may be used as a guide between two possible constructions of the words to be found in the statute, or it may be inserted, as is sometimes the case, *ex abundanti cautela* to prevent a possible construction which was not intended being placed upon other provisions.

The statute in question here is not an Act to legalise pool betting; that form of betting was and is legal, so long as it is carried on in a manner which does not infringe the provisions of the Gaming Acts. One of the objects of the Act was to regulate it on racecourses. It is much the more probable explanation that the proviso was intended to ensure that sect. 26 was not to be construed as prohibiting that which the former part of the Act merely regulated but did not forbid; but in any case, as we have said, it has no application to the facts of the present case. The result is that the appeal is allowed and the case must be remitted to the chief magistrate with a direction to find the offence proved. The respondent must pay the costs of the appeal.

Appeal allowed with costs. Case remitted to the chief magistrate.

Solicitors: *Pritchard, Englefield & Co.* (for the appellant); *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re FRY, REYNOLDS v. DENNE.

[CHANCERY DIVISION (Vaisey, J.), May 11, 1945.]

Wills—Settlement—Name clause—Female beneficiary required to bear testator's surname—Beneficiary not directly related to testator—Construction—No gift over on breach of condition—Rule against perpetuities—Public policy—Clause void.

A A testator died on Jan. 22, 1919, leaving a widow but no issue. Under his will his widow received an annuity. The tenant for life of the testator's residuary estate was one Agnes Sara Bond who, after the death of the testator married one M. There were two daughters of that marriage. By cl. 7 of the will the testator's residuary estate, subject to the life interest of Mrs. M., was to be held in trust for the eldest daughter, the plaintiff. Accordingly, the plaintiff would become absolutely entitled to the estate in remainder expectant on the death of Mrs. M., subject, however, to cl. 9 of the will which is as follows: "It shall be a condition appurtenant to the taking of the gift of my estate . . . that the person so taking shall take and continue to bear my surname." The question of the validity of cl. 9 arose between the plaintiff on one hand, and, on the other hand, the persons who would be entitled on the testator's intestacy under the law in force when he died, namely his widow and the representatives of his sole next of kin and heir at law:—

HELD: cl. 9 was void and inoperative for the following reasons: (i) on the ground of repugnancy to the antecedent absolute gift, there being no gift over, express or implied, on the breach of the condition.

(ii) if the clause could be given any operation at all, it would necessarily involve an infringement of the rule against perpetuities.

D (iii) the clause was deliberately designed to ensure that the plaintiff should take and use the same surname both throughout her spinsterhood and also while married. The use of different surnames of husband and wife would produce consequences so undesirable that a clause obliging a female beneficiary to bear a prescribed surname while married must be regarded as inoperative on grounds of public policy.

E [EDITORIAL NOTE. The question considered here is the validity of a condition attached to a gift by will that the beneficiary should take and bear the name of the testator. There was no gift over on failure to comply with the condition. The court discusses the inconvenience of requiring a married woman to adopt a name other than her husband's, except for the preservation of an old family name, or in the well-recognised cases of theatre and pen names. On the ground, therefore, of public policy as well as repugnancy and as offending against the perpetuity rule the condition is held void.

F AS TO NAME CLAUSES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 789-792, paras. 1097, 1098; and FOR CASES, see DIGEST, Vol. 35, pp. 705-709, Nos. 55-80.]

Cases referred to:

- (1) *Re Greenwood, Goodhart v. Woodhead*, [1903] 1 Ch. 749; 44 Digest 1032, 8902; 72 L.J.Ch. 281; 88 L.T. 212.
- (2) *Bennett v. Bennett* (1864), 2 Drew. & Sm. 266; 44 Digest 846, 6996; 34 L.J.Ch. 34; 11 L.T. 362.
- G (3) *Gulliver d. Corrie v. Ashby* (1766), 4 Burr. 1929; 35 Digest 707, 68; 1 Wm. Bl. 607.
- (4) *Vandeleur v. Sloane*, [1919] 1 I.R. 116; 35 Digest 707, 67i.
- (5) *Re Evans's Contract*, [1920] 2 Ch. 469; 35 Digest 707, 66; 89 L.J.Ch. 626; 124 L.T. 188.
- (6) *Re Talbot*, [1932] 1 I.R. 714; Digest Supp.
- (7) *Musgrave v. Brooke* (1884), 26 Ch.D. 792; 35 Digest 706, 65; *sub nom. Re Brooke, Musgrave v. Brooke*, 54 L.J.Ch. 102; 33 W.R. 211.
- H (8) *Re Engels, National Provincial Bank, Ltd. v. Mayer*, [1943] 1 All E.R. 506; 168 L.T. 311.
- (9) *Re Chardon, Johnston v. Davies*, [1928] Ch. 464; Digest Supp.; 97 L.J.Ch. 289; 139 L.T. 261.

ADJOURNED SUMMONS to determine a question of construction of a clause in the will of a testator who died on Jan. 22, 1919. The clause was in the following terms:

It shall be a condition appurtenant to the taking of the gift of my estate whether

by the son or daughter or adopted son of the said Agnes Sara Bond or my said nieces or either of them that the person so taking shall take and continue to bear my surname.

The facts are sufficiently set out in the judgment.

Harold Christie, K.C., and Wilfrid M. Hunt for the plaintiff.

C. Montgomery White and L. M. Jopling for the defendants.

VAISEY, J.: I have in this case to determine first the construction, and secondly, the effect, if any, of a clause in the will of the testator, Ernest William Fry, who died on Jan. 22, 1919, leaving a widow but no issue. The widow, who has married again, is one of the defendants. She is in receipt of an annuity under the will. A

The tenant for life of the testator's residuary real and personal estate is a lady whose name at the testator's death was Agnes Sara Bond. She subsequently married one Frank Mann, and I will refer to her as Mrs. Mann. Of that marriage there was issue two daughters, the elder of whom, the present plaintiff, married while still an infant and has since attained the age of twenty-one years. Mrs. Mann has never had a son, and as she is now in her 56th year the possibility of her ever having a son may be disregarded. B

The present question arises between the plaintiff, on the one hand, and on the other hand the persons who would be entitled on the testator's intestacy under the law in force when he died, namely the widow, and two other defendants joined as the representatives of his father, who was his sole next of kin and heir at law. C

In the events which have happened, it will suffice for me to state that, subject to the life interest of Mrs. Mann, the testator's residuary estate was, by cl. 7 of his will, given in trust for the eldest son of Mrs. Mann on his attaining the age of twenty-one years, or, failing such son, then for the eldest daughter of Mrs. Mann who should attain that age or marry under that age, or alternatively (in events which did not and cannot now happen) for an adopted son of Mrs. Mann, or two named nieces of the testator or the survivor of them. D

Accordingly, assuming that Mrs. Mann cannot have a son, the plaintiff is absolutely entitled to the residuary estate of the testator in remainder expectant on the death of her mother, Mrs. Mann, subject however to the operation (if any) of cl. 9 of the testator's will, to which I am about to refer. In earlier proceedings in the matter of the testator's estate the construction of the will was in certain respects determined by LAWRENCE, J., but his order, dated Apr. 14, 1920, neither relates to nor throws light upon the question which it now falls to me to decide. Cl. 9 of the will is in the following words: E

It shall be a condition appurtenant to the taking of the gift of my estate whether by the son or daughter or adopted son of the said Agnes Sara Bond or my said nieces or either of them that the person so taking shall take and continue to bear my surname. F

Nothing is said in the will as to what is to happen to the estate in case of the non-fulfilment of that condition. So far as the language goes, the clause is, in my judgment, mandatory and imperative, in contrast with other expressions of mere precatory to be found elsewhere in the will. I think that the obligation intended to be thereby imposed upon the "taker of the gift" of the estate was meant to arise at, and not before, the taking of it in possession at the death of Mrs. Mann; see *Re Greenwood* (1). G

As to the word "appurtenant," I think it means annexed to or inseparably connected with, and if the testator had been asked whether he was creating a condition precedent or a condition subsequent he would probably have said that it was neither, but somehow concurrent. In my judgment, however, it must be regarded and treated as a condition subsequent; see *Bennett v. Bennett* (2). H

It was rather faintly suggested in argument that the clause contains two severable conditions, one to take, and the other to continue to bear, the name but, if so, the former condition, standing alone, involving a merely formal, and possibly merely momentary, assumption of the name would have well merited the adjective "silly" applied somewhat sweepingly to this type of defeasance provision by LORD MANSFIELD in *Gulliver v. Ashby* (3), in a passage of which the reporter in a footnote indicates his personal disapproval.

I find at least three reasons for holding that the clause is void, and must be treated as though it had been expressed in terms of mere precatory, as in *Vandeleur v. Sloane* (4), *Re Evans' Contract* (5), and *Re Talbot* (6). The clause

is, first, in my judgment void on the ground of repugnancy to the antecedent absolute gift, there being no gift over on the breach of the condition; see *Musgrave v. Brook* (7). The testator has said pretty clearly what he expects the plaintiff to do, but has been silent as to what is to be the consequence of her not doing it. The clause is, secondly, I think, void as infringing the rule against perpetuity, or to put the matter more accurately it would, if it could be given any operation at all, necessarily involve an arrangement of the rule.

- A. The plaintiff's life was not "in being" at the testator's death, and I read the attempted obligation of continuing to bear the surname as not admitting of any intermission during the whole of the rest of her life. It follows, therefore, that the event of discontinuance, upon which (as is suggested) the estate would revert to the heir at law and next of kin, might well occur beyond the permissible limit of time. The plaintiff, though not a life in being at the testator's death, could have been given a life interest conditional upon her taking, and determinable upon her discarding, the surname of Fry, but then the interest by law given in remainder to the persons entitled on an intestacy would have vested immediately, for what it was worth, at the death of the testator, and the possible prolongation beyond such "permissible limit" of uncertainty as to the time when, and precise event upon which, the interest in remainder would become an interest in possession would involve no infraction of the rule. If, however, in such a case the uncertainty had been as to which of several beneficiaries was to take the interest in remainder expectant on the life interest, the rule would have invalidated the disposition. Here the plaintiff is given not a life interest but an absolute interest, and it might well happen that more than twenty-one years after the termination of every life in being at the testator's death it would still be uncertain whether the estate would ultimately belong to the plaintiff through her continuing to bear the surname or would go over on her discontinuance of it.

- D. There is the further point that if, in such a case as this, an implied gift over in favour of those entitled on an intestacy could be read into the will, the absence of an express gift over would have been immaterial in many of the cases in which it has been regarded as vital. On this aspect of the matter, I need only refer to the recent decision of UTHWATT, J., in *Re Engels* (8). At first sight, the case of *Re Chardon* (9) might seem to have some bearing on the case, but when read in the light of the explanatory note in the appendix to TUDOR'S CHARITABLE TRUSTS, 5th Edn., at pp. 701 to 703, it has, I think, no relevance to it at all.

- E. Thirdly, I have formed the view that the clause is, as regards the plaintiff, void on the ground of public policy. I put this view forward with hesitation, remembering that the courts have always been reluctant to extend the application of the principle, and there being, so far as I know, no authority on the point.

- F. A "name clause," or a "name and arms clause," is a well recognised kind of provision, and when applied to a man, though it is usually felt to be irksome does not seem to me, *pace* LORD MANSFIELD, to deserve any more derogatory epithet than that. There may be circumstances in which it could with absolute propriety be applied to a woman: if, for example, she were the sole surviving representative of some notable family. No such circumstances exist in the present case, and we have here a provision deliberately designed to ensure that the plaintiff should take and use the same surname both throughout her spinsterhood and also while married—to a man who would almost certainly have a different surname, and possibly to a succession of men with a number of different surnames.

- G. I am quite well aware that many women, both married and unmarried, make use of pen-names and theatre-names, and there is, so far as I know, nothing to compel a married woman to use her husband's surname, so that the wife of Mr. Robinson may, speaking generally, go by the name of Mrs. Smith if she chooses to do so. None the less, the use of different surnames by a man and his wife cannot fail to be productive of many embarrassments and inconveniences, not only to themselves, their children and relatives, but to their friends and acquaintances, and indeed to society generally. For the wife's use of the prescribed name, unlike the pen-name or theatre-name, must be a continuous use of it for all purposes, and it is not, I think, too much to say that her life might be one long series of dilemmas and predicaments. I say nothing about

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identity cards and ration cards and other temporary war-time regulations, restrictions and requirements, and I will merely give by way of example the signing of the registers when the husband and wife visit hotels, and the entry of particulars when the births of their children are registered.

I understand that in the present case the plaintiff's husband is willing, though reluctant, to change his name to Fry if the plaintiff is obliged to do so, but not every husband could be expected to be equally accommodating and sensible. Still less every prospective husband, and whether or not the clause could be said to be actually in restraint of marriage, I think that a provision calculated to produce consequences so undesirable as those which I have tried to indicate by the coercive and quasi-punitive method of a defeasance ought to be regarded as inoperative on public grounds.

The precedent books show that the right form of a name-clause where the beneficiary is or may become a married woman is to place the obligation not upon her alone but upon her husband as well.

For the reasons which I have given, I hold, and will declare, that the condition in question is wholly void and inoperative, and I will order that the costs of all parties of the application be taxed as between solicitor and client and raised and paid out of the capital of the testator's residuary estate.

Declaration accordingly. Cost of all parties of the application to be taxed as between solicitor and client and raised and paid out of the capital of testator's residuary estate.

Solicitors: *Finnis, Downey, Linnell & Price* (for the plaintiff); *Ellis & Fairbairn* (for the defendants).

[Reported by A. E. BLACK, ESQ., Barrister-at-Law.]

Re DIXON, LLOYD'S BANK, LTD. v. DE KOZINE.

[CHANCERY DIVISION (Vaisey, J.), June 5, 1945.]

Rentcharges and Annuities—Annuity given free of income tax—Statutory variation of tax burden—Will and codicil—Will made before Sept. 3, 1939, giving annuity of £78 free of income tax—Codicil made after that date substituting annuity of £104 for annuity of £78 given by will—Provision made by codicil—Finance Act, 1941 (c. 30), s. 25 (1).

By her will made on Feb. 24, 1939, the testatrix bequeathed an annuity of £78 free of income tax to her sister. By a codicil made on June 27, 1940, the testatrix, after reciting that she had by her will given this annuity of £78 free of income tax, directed that the will should be construed and have effect as if the sum of £104 had been inserted in the relevant clause in place of the sum of £78. In all other respects she confirmed her will. The question to be determined was whether the provision for the payment of the stated amount of £104 per annum free of income tax was made, within the meaning of the Finance Act, 1941, s. 25 (1), by the will or the codicil:—

HELD: upon the true construction of the codicil, the annuity of £78 given by the will was revoked by the codicil, and the annuity of £104 was substituted for it. The Finance Act, 1941, s. 25 (1) did not apply to the annuity of £104 or to any part of it, since the provision for the payment of the annuity was made by the codicil, which was made after Sept. 3, 1939.

Re Sebag-Montefiore (2) distinguished.

[EDITORIAL NOTE.] It was decided in *Re Sebag-Montefiore* (2) that where an annuity bequeathed by will free of income tax is increased in quantum by codicil made after Sept. 3, 1939, it is only to the extent of the increase that the annuity is outside the provisions of sect. 25 of the Finance Act, 1941. It appears from the judgment of LORD GREENE, M.R., however, that a very fine distinction has to be taken between a codicil which leaves the original sum and adds a further sum to it, and one which in effect revokes the original sum and substitutes a new one. The latter form of gift takes the whole gift outside the Act, and the codicil here considered is so construed.

AS TO TAX-FREE PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 28, pp. 14-217, paras. 386-391; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.

FOR THE FINANCE ACT, 1941, s. 25 (1), see HALSBURY'S STATUTES, Vol. 24, p. 119.]

Cases referred to:

(1) *Re Waring, Westminster Bank, Ltd. v. Awdry*, [1942] Ch. 426; [1942] 2 All E.R. 250; 167 L.T. 145,

** (2) Re Sebag-Montefiore, Sebag-Montefiore v. Alliance Assurance Co., Ltd., [1944] Ch. 331; [1944] 1 All E.R. 672; 170 L.T. 395.*

ADJOURNED SUMMONS to determine whether the Finance Act, 1941, s. 25 (1) applied to a certain annuity. The facts are fully set out in the judgment.

Hector Hillaby for the plaintiffs.

B. G. Burnett-Hall and *C. D. Myles* for the defendants.

VAISEY, J.: The testatrix, Grace Gertrude Dixon, made her will on Feb. 24, 1939. The only provision in it which is material for the present purpose is a direction to the trustees out of the income of the testatrix's residuary estate to pay the annual sum of £78 to her sister, the defendant, Madame de Kozine, during her life free of income tax by weekly payments of 30s., with a further direction that all rebates, allowances or repayments which might be made to or recovered by the said defendant in respect of income tax should enure for her benefit, and that she should not account to the trustees for the same or any part thereof. On June 27, 1940, the testatrix made a codicil to her will. After reciting that she had by her said will directed her trustees to pay the annual sum of £78 to the said defendant during her life free of income tax by weekly payments of 30s., she thereby directed that her said will should be construed and have effect as if the sum of £104 had been inserted in the relevant clause in place of the sum of £78, and as if a weekly payment of £2 had been inserted in such clause in place of the 30s. therein mentioned; in all other respects she confirmed her will.

On July 22, 1941, the Finance Act, 1941, became law. Sect. 25 (1) of that Act directs that:

... any provision ... for the payment ... of a stated amount free of income tax ... being a provision which (a) is contained in ... any will or codicil ... and (b) was made before Sept. 3, 1939; and (c) has not been varied or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10s. in the £, have effect as if for the stated amount there were substituted an amount equal to 20/29ths thereof.

On Apr. 4, 1944, the testatrix died; her will and codicil were in due course proved; and the gross income of her residuary estate is estimated to amount to about £270 a year. The question which I have to decide is this: By which of the two instruments, the will or the codicil, was the provision for the payment of the stated amount of £104 per annum free of income tax made? If, and so far as it was made by the will, it was made before Sept. 3, 1939, and is subjected to the substitutionary operation prescribed by the Act; if, and so far as, it was made by the codicil, it was made after Sept. 3, 1939, and is not within the terms of the Act. I am clearly precluded by authority from saying that the provision was made at, and not before, the death of the testatrix (*Re Waring* (1)) and also from saying either (a) that the codicil effects any such "variation" as the section contemplates of the will or of the provision contained in the will, or (b) that the confirmation of the will by the codicil has any bearing on the matter (*Re Sebag-Montefiore* (2)). I am left to choose between two alternative views: (i) that the payment of the £104 was provided wholly by the codicil, and (ii) that it was provided as to £78 part thereof by the will, and as to £26 balance thereof by the codicil. A third view, that the payment was provided wholly by the will, was admitted by counsel to be untenable; and so I think it is.

Unguided by authority I might have thought that the Act was intended to deal only with those cases in which the *quantum* of the "stated amount" had been fixed before the outbreak of war, to the exclusion of those cases in which it was fixed afterwards. This, broadly speaking, is no doubt the effect of it. If the testatrix in the present case had signed her will fixing the *quantum* of the annuity on Sept. 3, 1939, or on any subsequent day, it would have been unaffected by the Act. Logically, I should have thought, the Act would not have applied where, as here, the *quantum* has been fixed by a codicil signed not before but after the outbreak of the war, i.e., when the exceptional circumstances brought about by the war were no longer future and unpredictable, but were present, actual and known. I cannot, however, so regard the matter, for in *Re Sebag-Montefiore* (2) it was decided by the Court of Appeal that where an annuity bequeathed by a will free of income tax is increased in amount by a codicil, it is only to the extent of the increased amount that the bequest, being made by the codicil, is not within the Act. At first sight, this might appear to cover the

present case, but it is plain from the judgment of LORD GREENE, M.R., that very fine lines of distinction have to be drawn, and it is necessary to examine that case somewhat closely. There, the will, dated in 1937, had bequeathed a certain life annuity of £300 free of income tax, and a codicil dated Sept. 25, 1939, directed that it should be "increased to £400." At p. 338 ([1944] 1 All E.R., at p. 675) LORD GREENE, M.R., first deals with the question of whether a mere variation in the amount of the tax-free sum is a variation within the meaning of the section, and after holding that it is not, he expresses the view that the disposition as to the original £300 had not in fact been varied, and then proceeds :

All that the testatrix has done is to add something to the annuity she had already given by the will. The gift of that annuity by the will is in no sense revoked. It still stands and the provision for it is I think "contained" in the will within the meaning of the subsection. It is only the provision for the additional £100 which is contained in the codicil.

I hope that I am correctly interpreting the words which I have just quoted as meaning that the direction to "increase" £300 to £400 has to be regarded as leaving the £300 where it was and adding to it a further £100, or, to put the matter in another way, as augmenting it or increasing its bulk without destroying its identity ; and that I am further justified in supposing that, if the codicil in *Re Sebag-Montefiore* (2) had expressly revoked the bequest of the annuity of £300 and had then bequeathed a new annuity of £400, the decision in that case would, or at any rate might, have been the other way. In that supposition I am fortified by the passage in the judgment of LORD GREENE, M.R., at p. 336 ([1944] 1 All E.R., at p. 674), where he says :

Of course, there may be cases where the provision is, for the purposes of the section, "made" by the codicil and not by the will. For example, if a testator, having bequeathed tax free annuities by a clause in his will, revokes that clause by a codicil and substitutes a list of annuitants containing the name of one of the original annuitants as legatee for an annuity similar in all respects to that originally given, the provision of that annuity would obviously, for the purposes of the subsection, be made in the codicil and not in the will. Another example would be where a testator by his will gave to a legatee a tax free annuity of such an amount as he might by codicil prescribe and subsequently by a codicil prescribed the amount.

Looking now at the terms of the codicil in the present case, I ask myself whether they are more nearly equivalent (a) to leaving the £78 given by the will and either adding to it a further £26 or increasing it by that amount, in which case I must follow the decision in *Re Sebag-Montefiore* (2), or (b) to a revocation of the £78 annuity and the substitution for it of a new annuity of £104, in which case I am free to act in the light which appears to me to illumine the position from the observations of LORD GREENE, M.R., to which I have made allusion. I do not find the choice an easy one to make. It is regrettable when distinctions have to be drawn between cases which are in substance and for most purposes identical. Here, there is apparently nothing but a formal difference between the bequest of an annuity of £78 by the will *plus* the bequest of an additional annuity of £26 by the codicil and the bequest of one single annuity of £104 by the codicil, but I see no escape from the conclusion that the difference is, for the purposes of the Act, important. I have come to the conclusion that I must read the codicil here, having regard to the particular manner in which it is expressed, as in effect wiping out the £78 annuity altogether and putting into its place one new single annuity of £104, and not as leaving the annuity of £78 standing and either "increasing" it by a further £26 or giving a second annuity of £26 as an addition to it. I will, therefore, declare that the annuity of £104 is effectively bequeathed free of income tax and that the provisions of the Finance Act, 1941, s. 25 (1), do not apply to it or to any part of it. As regards the costs, it is rather hard on the persons interested in the residuary estate to have to pay for the solution of a problem for the existence of which neither the testatrix nor her legal advisers can be held to be in any way responsible, but I feel bound to order that the costs of all parties of the application, taxed as between solicitor and client, be raised and paid out of the estate in a due course of administration.

Declaration accordingly.

Solicitors : Peacock & Goddard, agents for Buchanan & Llewellyn, Bourne-mouth (for all parties). [Reported by A. E. BLACK, ESQ., Barrister-at-Law.]

BENTLEY MOTORS (1931), LTD. v. LAGONDA, LTD.

[CHANCERY DIVISION (Evershed, J.), May 16, 1945.]

Practice—Parties—Adding persons as parties—Action to restrain infringement of trade mark—Alleged contract between plaintiffs and third party permitting user of trade mark by third party—Third party employed by defendants—Defendants applying for order to join third party as additional defendant—R.S.C. Ord. 16, r. 11.

The plaintiffs claimed an injunction and other relief for alleged infringement by the defendants of the plaintiffs' registered trade mark, consisting of the word "Bentley." In their defence the defendants, in addition to challenging the validity of the trade mark, referred to a contract, dated Apr. 20, 1932, between the plaintiffs and Mr. Bentley whereby the latter as the defendants alleged, was granted the right of permitting, notwithstanding the registration of the plaintiffs' trade mark, the use and mention of his name in advertisements and otherwise as therein mentioned in connection with complete automobiles or aircraft by any company being the real and substantive employer of Mr. Bentley. Mr. Bentley entered the defendants' employment some time after Apr. 20, 1932 and was, as the defendants alleged, at all times material to the action in their real and substantial employment. The defendants not being parties to the contract of Apr. 20, 1932, the alleged rights of Mr. Bentley under the contract could not be asserted by them against the plaintiffs. The defendants, therefore, asked for an order to join Mr. Bentley in the action, relying on R.S.C. Ord. 16, r. 11, whereby the court had power to add the names of any parties "whether plaintiffs or defendants . . . whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter . . .":—

HELD: one of the main objects of R.S.C. Ord. 16, r. 11, being to render unnecessary any multiplicity of proceedings, the defendants were entitled in the circumstances of the case to the order asked for.

Hood Barrs v. Frampton, Knight and Clayton (1) distinguished.

Montgomery v. Foy, Morgan & Co. (2) considered.

[EDITORIAL NOTE.] The object of R.S.C. Ord. 16, r. 11, was to avoid multiplicity of actions, but not to enable a party to be joined as co-defendant who is merely commercially interested in the defence. Here there was an agreement between the owners of a trade mark and the person sought to be joined under the rule, that he might permit the use of his name by his employers. In an action by the owners of the trade mark against his employers for infringement, such person's rights against the plaintiffs under this agreement can only be effectually settled by joining him as a party.

AS TO JOINDER OF PARTIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 19-21, paras. 15-17; and FOR CASES, see DIGEST, Practice and Procedure, pp. 429-431, Nos. 1243-1266.

See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 215-221.]

Cases referred to:

* (1) *Hood Barrs v. Frampton, Knight and Clayton*, [1924] W.N. 287; Digest, Practice, 429, 1250.

* (2) *Montgomery v. Foy, Morgan & Co.*, [1895] 2 Q.B. 321; 41 Digest 553, 3802; 65 L.J.Q.B. 18; 73 L.T. 12.

PROCEDURE SUMMONS taken out by the defendants asking for an order under R.S.C., Ord. 16, r. 11, that one Mr. Walter Owen Bentley be added as defendant to the action. The facts are fully set out in the judgment.

James Mould for the applicants (defendants in the action).

Basil Drewe for the respondents (plaintiffs in the action).

EVERSHED, J.: This is a summons issued by the defendants asking for an order under R.S.C. Ord. 16, r. 11, that Mr. Walter Owen Bentley be added as defendant to the action.

The action is one claiming an injunction and other relief for alleged infringement by the defendants of the plaintiffs' registered trade mark No. 528,124, consisting of the word "Bentley." In their defence the defendants, in addition to challenging the validity of the trade mark (a matter which, as I understand, is also being litigated in separate proceedings) have referred to a contract dated

Apr. 20, 1932, and made by the plaintiffs and Mr. Bentley, whereby it is alleged that Mr. Bentley was, and now is, granted the right of permitting, notwithstanding the registration of the trade mark, the use and mention of his name in advertisements and otherwise as therein mentioned in connection with complete automobiles or aircraft by any company being the real and substantial employer of Mr. Bentley. It is alleged that at all times material to this action Mr. Bentley was in the real and substantial employment of the defendants.

It is to be observed that the defendants were not parties to this contract of Apr. 20, 1932. Mr. Bentley in fact entered the defendants' employment some time after its date. It follows, therefore, that whatever rights Mr. Bentley may have under the contract to grant to other persons or companies, in whose real or substantial employment he may happen to be, the privilege of using his name, notwithstanding the registration of the trade mark "Bentley," such rights of Mr. Bentley cannot be asserted against the plaintiffs by the defendants.

It is an established principle of our law that in general, and apart from cases falling within the ambit of the law of trusts, the terms of a contract are only enforceable by the parties thereto. Thus, if A. acting in his own interest or for his own purposes and not as agent or trustee for B. makes a bargain with C. which includes a promise by C. to treat B.'s debt to him, C., as discharged or satisfied, and if nevertheless C. subsequently sues B. for payment of the debt due to him, C., B. cannot rely upon the promise of release made by C. in his contract with A., whose remedy is, unless he is made a party to C.'s action against B., to sue C. for breach of contract and in that action to restrain C. from further prosecuting his claim against B. in breach of the contract. So in this action, if the suit by the plaintiffs against the defendants is a breach of the plaintiffs' contract with Mr. Bentley, the remedy of the latter, unless he is added as a defendant, is to bring an independent action against the plaintiffs and seek in that action an injunction to prevent the further prosecution by the plaintiffs of their claim against the defendants. The question on this summons resolves itself, therefore, into this, whether Mr. Bentley should be left to obtain, if he can, his remedy in separate proceedings, or whether he should now be joined as a party to the present action in order that he may, by counterclaim, seek therein to enforce his contract with the plaintiffs.

The material words of the rule are :

The court or judge may, at any stage . . . order that the names of any parties . . . whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added . . .

The cause or matter with which the present action is concerned is the alleged wrongful use by the defendants of the plaintiffs' mark. That use, if restrained, would, it is alleged, constitute an infringement of Mr. Bentley's rights under his contract with the plaintiffs. In other words, the right of the plaintiffs to restrain the use of the name by the defendants is involved with and depends upon Mr. Bentley's right to prevent the plaintiffs from committing a breach of his contract with them. Mr. Bentley, as counsel for the applicants has informed me, is willing and anxious, and, indeed, intends, to assert his claim against the plaintiffs. I am expressing no view as to the soundness of this claim, but it is conceded by counsel for the respondents that it cannot be treated as frivolous or unsubstantial. The circumstances of this case therefore fall, in my judgment, within the terms of the rule which I have read. I think that the joinder of Mr. Bentley is necessary in order that the court may effectually and completely adjudicate upon and settle all the questions involved in the claim by the plaintiffs to prevent the use by the defendants of the word "Bentley" and the alleged infringement by the defendants of the plaintiffs' mark.

It is clear from the cases cited in argument that the rule was not intended to enable a party to be joined as a co-defendant who was "commercially interested" to see that the plaintiffs' claim was energetically resisted, though that claim involved no infringement of his own property or rights. Equally, it is clear that a plaintiff who, having claims against two persons jointly and severally liable to him, had elected to sue one only, cannot be compelled to sue also the other. The joinder of the second defendant would in no way affect the plaintiff's right against the first,

Reference was also made to the decision of EVE, J., in the case of *Hood Barrs v. Frampton, Knight & Clayton* (1). In that case the plaintiffs, who claimed to be entitled as lessees of certain premises, sued the defendants for an account of rents collected from tenants or sublessees of the same premises by the defendants under a contract of agency made by the defendants with the plaintiffs. It was unsuccessfully sought to join as co-defendant in the action a lady who claimed that she, and not the plaintiffs or either of them, was and had at all material times been entitled to the lease of the premises and, therefore, to the rents paid and payable by the tenants. It followed from the facts as I have stated them that the claim of the lady sought to be added could not, even if established, affect the obligations of the defendants under the contract of agency subsisting between the defendants and the plaintiffs. Moreover, leave was in fact given by the judge to the defendants to bring the claimant before the court by the service upon her of a third party notice. The principles above illustrated

do not, in my judgment, cover the facts of the present case.

On the other hand, the case of *Montgomery v. Foy, Morgan & Co.* (2), is an instance of the exercise by the court of the jurisdiction conferred by the rule. In that case the plaintiffs had made a contract of affreightment with certain shippers. The goods, after shipment, having been deposited with a warehouseman, the consignees, who were in fact agents for sale for the shippers, deposited, pursuant to the terms of the Merchant Shipping Act, 1894, the full amount of the freight with the warehouseman, giving him notice to retain the sum deposited under sect. 496 of the Act, and thereby obtained delivery of the goods. The plaintiffs, the shipowners, thereupon brought proceedings against the consignees under a form of procedure which, according to an earlier decision in other proceedings in the House of Lords, was open to them under the Act, for a declaration that they were entitled to the full amount of the freight deposited. The Court of Appeal, under the jurisdiction conferred by R.S.C., Ord. 16, r. 11, stated that the shippers should be joined as defendants in the action. The contract for the payment of the freight had been made between the plaintiffs and the shippers. The shippers alleged that by way of counterclaim against the shipowners they were entitled to various sums for short delivery and otherwise for breach by the shipowners of the contract of affreightment. The ground of the decision was, therefore, this, that the real cause or matter which was the subject of the action was the amount (if any) due to the plaintiffs for freight, and this must rest on the contract of affreightment. Necessarily involved in this cause or matter was the question whether, by reason of the shippers' claim for breach of the same contract, anything, and, if anything how much, was, in fact, due to the plaintiffs in respect of freight.

It is true that KAY, L.J., in the course of his judgment pointed out, at p. 325, that the case was of a peculiar character. Equally, the present case and any other case arising out of the principle above referred to, which disables anyone from suing upon or setting up a contract save the parties thereto, may be regarded as special or peculiar. But if the rule is inapplicable to such cases, the party sought to be joined must proceed by separate action to enforce his claim, and in that separate action obtain, pending its determination, a suspension of the original action. In my judgment one of the main objects of the rule is to render unnecessary such multiplicity of proceedings. Nor, in my opinion, is it material, if the circumstances in other respects justify the joinder, that the plaintiff in the action should not prefer any claims against the party joined and that the practical effect of the joinder is so that the party joined may assert his case by way of counterclaim against the plaintiff. (See *Montgomery v. Foy, Morgan & Co.* (2)).

In the circumstances, therefore, as I have tried to state them, the defendants are, in my judgment, entitled to the order for which they ask in the summons. The costs of the summons will be costs in the action.

Order accordingly. Costs of summons to be costs in the action.

Solicitors : Ashurst, Morris, Crisp & Co. (for the applicants, the defendants in the action); Claremont, Haynes & Co. (for the respondents, the plaintiffs in the action).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

**Re SLAUGHTER'S ESTATE. TRUSTEES CORPORATION
LTD. v. SLAUGHTER.**

[CHANCERY DIVISION (Vaisey, J.), **June 6, 1945.**]

Wills—Construction—Special power of appointment—Power given to testator's son to appoint life interest in settled fund to any wife who might survive him—Power exercised by irrevocable deed—Marriage dissolved on wife's petition—Death of appointor—Appointee not entitled to any interest under appointment. A

By his will the testator conferred on his son, E.S., a power to appoint by deed revocable or irrevocable or by will a life or less interest in a settled fund to or for the benefit of any wife of E.S. who might survive him. The testator died in 1917. In 1931, E.S. married V.S., and on June 20, 1934, he executed a deed irrevocably appointing a life interest in the settled fund to V.S. if she should survive him. In 1937 the marriage was dissolved on the wife's petition, the decree being made absolute on July 12, 1937. On Oct. 7, 1937, E.S. died. The question to be determined was whether V.S., on the death of E.S., became entitled to a life interest in the settled fund under the deed of appointment:— B

HELD: upon the true construction of the testator's will and in the events that had happened, V.S. was not entitled to any interest under the deed of appointment, because she was not the wife of the appointor at the time of his death. C

Bosworthick v. Clegg (1) and *Re Williams' Settlement* (2) followed.

[EDITORIAL NOTE.] It is held here that an interest given under a power to appoint to any wife who might survive the appointor cannot be taken by a divorced wife. This is in accordance with authority, the only decision the other way being *Bullmore v. Wynter* (3). As to this, LAWRENCE, L.J., points out in *Re Williams' Settlement* (2) that in *Bullmore v. Wynter* (3) the controlling qualification was not the status of the survivor, but the fact that there had been a marriage, the words of the devise being "in trust for any husband with whom she might intermarry." D

AS TO DIVORCED WIFE, see HALSBURY, Hailsham Edn., Vol. 34, p. 326, note (r); and FOR CASES, see DIGEST, Vol. 44, p. 873, Nos. 7296, 7297, and Supplement, Settlements.]

Cases referred to:

- * (1) *Bosworthick v. Clegg* (1929), 45 T.L.R. 438; Digest Supp.
- * (2) *Re Williams' Settlement, Greenwell v. Humphries*, [1929] 2 Ch. 361; Digest Supp.; 98 L.J.Ch. 358; 141 L.T. 579.
- * (3) *Bullmore v. Wynter* (1883), 22 Ch.D. 619; 44 Digest 875, 7314; *sub nom. Re Bullmore, Bullmore v. Wynter*, 52 L.J.Ch. 456; 48 L.T. 309.
- * (4) *Re Morrieson, Hitchins v. Morrieson* (1888), 40 Ch.D. 30; 44 Digest 873, 7297; 58 L.J.Ch. 80; 59 L.T. 847.

ADJOURNED SUMMONS to determine a question arising under the testator's will. The facts are fully stated in the judgment. E

N. C. Armitage for the plaintiffs.

L. M. Jopling for the first defendant.

C. Montgomery White for the second defendant. F

VAISEY, J.: The late Sir William Capel Slaughter made his will on Jan. 25, 1916. He died in Mar., 1917, and his will in due course was proved. The question which I have now to decide concerns or arises from a power of appointment conferred by that will upon the testator's son, the late Edward Duff Capel Slaughter. That power arises under the combined effect of cl. 16, 15 and 11 of the testator's will, and I need only say that it was a power conferred upon the testator's son from time to time by deed revocable or irrevocable or by will or codicil to appoint a life or less interest in a settled fund to or for the benefit of any wife of that son who might survive him. G

The facts were that Edward Duff Capel Slaughter married on Apr. 29, 1931, a lady whose name was then Valerie Thorpe Morean Wilson and who is now, under her name of Slaughter, the first defendant in these proceedings. Three years after the marriage, on June 20, 1934, Edward Duff Capel Slaughter executed a deed irrevocably appointing a life interest in the fund to the first defendant if she should survive him; and three years after that his marriage to her was dissolved, H

upon her petition, by a decree which was made absolute on July 12, 1937. There was only one child of the marriage, namely, the defendant Gillian Valerie Slaughter, who is the other defendant in these proceedings. The question has only just become important, because there was a preceding life interest in the testator's widow, who died on Oct. 23, 1944. Edward Duff Capel Slaughter died on Oct. 7, 1937, very shortly after the making of the decree absolute.

The question which arises is : Did the first defendant, on the death of Edward Duff Capel Slaughter, become entitled, subject to the life interest of the testator's widow, to a life interest in the settled fund under the deed of appointment of June 20, 1934, notwithstanding that at the death of the late Edward Duff Capel Slaughter she was no longer his wife by reason of the decree absolute of divorce ? It seems to me that the question is one of construction and depends upon the words which I have already quoted, the problem being to ascertain, "Yes" or "No," was she the wife of the appointor who survived the appointor. I think there is a great deal that might be said in favour of the proposition that when the appointment is made, as it is made here, by a deed, the status of wife, if then existing, makes the appointee a proper object of the power, and that all that she has to do in order to enjoy the benefit of the interest appointed is to survive the appointor. In this case it might have been, though it was not, the fact that the appointment was made as part of the marriage consideration, and it seems rather strange that the lady was precluded from exercising her right of seeking dissolution of her marriage except at the cost of losing the interest which had been appointed to her ; but, in my view, such an argument is not open in this court and I am of opinion that the case is governed by and indistinguishable from the decision of MAUGHAM, J., in *Bosworthick v. Clegg* (1), and the judgment of the Court of Appeal in *Re Williams' Settlement* (2), affirming the decision of EVE, J. I was asked to have regard to *Bullmore v. Wynter* (3), and if that case had stood alone it might, in my opinion, have justified my deciding this case the other way ; but, having regard to the observations which were made upon that case by KAY, J., in *Re Morrieson* (4), I feel very grave doubt as to the extent to which *Bullmore v. Wynter* (3) can be regarded as a satisfactory authority even in a case in which the words were, as they are not here, identical. Kay, J., went so far as to say (at p. 32) that he did not understand the reason of the decision and that if the case had come before him he would have decided it the other way.

I am, therefore, bound in this case to decide the matter adversely to the first defendant and to declare that upon the true construction of the testator's will and in the events which have happened the income of the trust fund is not, by virtue of the appointment made by the deed of June 20, 1934, payable to the first defendant, by reason of the fact that the marriage to her former husband Edmund Duff Capel Slaughter was dissolved in his lifetime, on her petition. I order that the costs of all parties to this application be taxed as between solicitor and client and raised and paid out of the capital of the fund in question.

Declaration accordingly.

Solicitors : *Slaughter & May* (for the plaintiffs) ; *Dawson & Co.* (for the defendants).

[*Reported by A. E. BLACK, ESQ., Barrister-at-Law.*]

HICKMAN AND OTHERS v. PEACEY AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Macmillan, Lord Wright, Lord Porter and Lord Simonds), **January 15, 16, 17, 18, 22, June 20, 1945.**]

Executors and Administrators—Commorientes—Statutory presumption—Contemporaneous deaths—Five persons killed in same house by bomb—No evidence as to moment of deaths—Presumption applicable—Law of Property Act, 1925 (c. 20), s. 184.

On Sept. 14, 1940, a bomb fell upon a house and exploded in the basement. There were 5 people sheltering in an air-raid shelter in the basement and they were all killed. They were (a) the occupier of the house, (b) her daughter, (c) the housekeeper of two brothers who are the two testators next referred to (d) R.L.G., aged 73, the first testator, and (e) his brother, E.M.G., aged 66, the second testator. The first testator, *inter alia*, left

a legacy to the housekeeper and he left the residue equally among his brothers "surviving at the date of my decease." The second testator left £100 to each of his executors of whom the first testator was one, pecuniary legacies to the first testator, to the occupier of the house and to the housekeeper, and the residue equally to three named legatees of whom the first testator was one. The question for the determination of the court was whether the deaths occurred in circumstances rendering it uncertain which of them survived the other or others so as to bring into operation the Law of Property Act, 1925, s. 184 :—

HELD (VISCOUNT SIMON, L.C., and LORD WRIGHT dissenting): in view of the uncertainty which of the deceased survived the other or others, the presumption under sect. 184 of the Law of Property Act, 1925, should be applied and the elder of the deceased brothers must be deemed to have died first.

Decision of the Court of Appeal ([1944] 1 All E.R. 81) reversed.

[EDITORIAL NOTE.] The House of Lords have now, for the first time, construed sect. 184 of the Law of Property Act, 1925, which provides that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority. The precise point at issue is whether this section applies if the circumstances are such as to justify an inference that all the parties died simultaneously.

At common law, the difficulty created by the death of several in a common disaster was met by the principle that a plaintiff who required to show survivorship must prove it affirmatively. To remedy the unsatisfactory state of affairs arising from this expedient the legislature enacted sect. 184 and it is held by the majority of the House, reversing the Court of Appeal, that to exclude the case of simultaneous deaths from the purview of the section would involve a *casus omissus* and in a large number of cases defeat the purpose of the legislation.

No decision is given upon the meaning of the words "subject to any order of the court," but LORD SIMON, L.C., suggests that they may refer to the case of an order made when evidence of age is not available.

AS TO COMMORIENTES, see HALSBURY, Hailsham Edn., Vol. 14, p. 212, para. 354; and FOR CASES, see DIGEST, Vol. 23, pp. 88, 89, Nos. 790-801.

FOR PRESUMPTIONS AS TO COMMORIENTES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 629-634, para. 701; and FOR CASES, see DIGEST, Vol. 22, pp. 171-173, Nos. 1472-1496.]

- * (1) *Drummond's Judicial Factor v. H.M.'s Advocate*, [1944] S.C. 298.
- * (2) *Heydon's Case* (1584), 3 Co. Rep. 7a, 7b; 42 Digest 614, 143.
- * (3) *Re Mayfair Property Co., Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28; 10 Digest 734, 4593; 67 L.J.Ch. 337; 78 L.T. 302.
- * (4) *Wing v. Angrave* (1860), 8 H.L.Cas. 183; 23 Digest 89, 794; 30 L.J.Ch. 65; *affg. S.C. sub nom. Underwood v. Wing* (1855), 4 De G.M. & G. 633.
- (5) *Bradshaw v. Toulmin* (1784), 2 Dick. 633; 38 Digest 689, 306.
- (6) *Mason v. Mason* (1816), 1 Mer. 308; 44 Digest 222, 469.
- * (7) *Underwood v. Wing* (1855), 4 De G.M. & G. 633; 44 Digest 1172, 10149; 24 L.J.Ch. 293; *on appeal, sub nom. Wing v. Angrave* (1860), 8 H.L.Cas. 183.
- * (8) *Re Lindop, Lee-Barber v. Reynolds*, (1942) Ch. 377; [1942] 2 All E.R. 46; 167 L.T. 235.
- (9) *Re Phene's Trusts* (1870), 5 Ch. App. 139; 23 Digest 88, 784; 39 L.J.Ch. 316; 22 L.T. 111.
- * (10) *In the Goods of Beynon*, [1901] P. 141; 23 Digest 91, 834; 70 L.J.P. 31; 84 L.T. 271.
- * (11) *Edinburgh Street Tramways Co. v. Edinburgh Corporation* (1894), 21 R. 688; *on appeal*, [1894] A.C. 456; 43 Digest 354, 113; 63 L.J.Q.B. 769; 71 L.T. 301.
- (12) *Satterthwaite v. Powell* (1838), 1 Curt. 705; 23 Digest 89, 793.
- (13) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; Digest Supp.; 104 L.J.K.B. 304; 152 L.T. 563.
- (14) *Tidy v. Battman*, [1934] 1 K.B. 319; Digest Supp.; 103 L.J.K.B. 158; 150 L.T. 90.
- (15) *Taylor v. Diplock* (1815), 2 Phillim. 261; 23 Digest 88, 791.
- (16) *Lancaster v. Blackwell Colliery Co., Ltd.* (1919), 89 L.J.K.B. 609; 34 Digest 324, 2647; 122 L.T. 162.
- (17) *Newis v. Lark* (1571), 2 Plowd. 408; 44 Digest 435, 2621.

APPEAL by R. Hickman (legatee and devisee), N. C. Levermore (residuary legatee), W. A. Parke (legatee under will of both testators) and E. H. Coe (personal representative of deceased legatee) from a decision of the Court of Appeal (LORD GREENE, M.R., and GODDARD, L.J., LUXMOORE, L.J., dissenting),

dated Dec. 15, 1943, and reported [1944] 1 All E.R. 81, reversing a decision of COHEN, J., dated June 9, 1943. The facts and arguments are stated in the opinions of VISCOUNT SIMON, L.C., LORD MACMILLAN and LORD SIMONDS.

H. Wynn-Parry, K.C., and *C. L. Favell* for the appellants (legatees, devisee and personal representative of deceased legatee).

Sir Walter Monckton, K.C., and *Lindsay Jopling* for the respondents (residuary legatee and personal representatives of the testators).

The House took time to consider its opinion.

A

VISCOUNT SIMON, L.C.: My Lords, this appeal raises an interesting and difficult point which has not hitherto been expressly decided. It discloses a striking difference of opinion, for COHEN, J., in the first court and LUXMOORE, L.J., in the Court of Appeal took one view, in favour of the present appellants, whereas the majority of the Court of Appeal (LORD GREENE, M.R., and GODDARD, L.J.) took the opposite view. I regret to find that this difference of judicial

B

conclusion will also appear in the opinions about to be delivered in this House.

At about 6.30 p.m., on Sept. 14, 1940, when the Battle of Britain was at its height, a small house, No. 5, Upper Cheyne Row, Chelsea, was struck by a high explosive bomb, which penetrated to the basement. It is material to observe that the bomb did not explode until it got inside the house—LORD GREENE, M.R., inferred from the evidence, and I think that the inference was perfectly

C

justified, that it exploded in the basement. The destructive power of such a bomb and of the blast produced by its explosion are, of course, enormous. In the basement there had been constructed a small air-raid shelter, strengthened by sandbags and other structures, and I agree with LORD GREENE, M.R., that the evidence, which was on affidavit, justified the conclusion that there were at the time of the explosion five persons in the shelter. Indeed this is stated as a fact in the first question propounded in the originating summons taken out by

D

the first respondent. They were—

(1) Mrs. Mabel Edith Price Jones, aged 52, the occupier of the house;

(2) her daughter;

(3) Elizabeth Sarah Parke, aged 70, the housekeeper to the two male persons next mentioned, who resided in another house close by, but who used the shelter at No. 5, Upper Cheyne Row because they had no shelter in their own house;

E

(4) Randolph Leigh Grosvenor, aged 73, who may be called "the first testator"; and

(5) his brother Edward Moberley Grosvenor, aged 66, hereinafter called "the second testator."

The house was completely shattered, and all the five persons were killed. Their bodies were so mutilated as to be unrecognisable, and in some cases there was actual dismemberment. Identity had to be established by determining the sex of each victim and by ascertaining what was found on the bodies. LORD GREENE, M.R., and GODDARD, L.J., both reached the conclusion that the correct and indeed the only proper, inference to draw from the facts proved was that all the persons concerned died simultaneously. This conclusion is challenged, and I must return to examine it, but it is convenient first to set out the reason why such a conclusion is vital to the respondents' success.

F

The "first testator" (victim number (4)) by his last will left property in which his brother (victim number (5)) would share if the latter were one of his brothers "surviving at the date of my decease," and also the housekeeper (number (3)) if she survived him. Under the will of the "second testator" (victim number (5)) victims number (1), (3) and (4) would benefit if they survived number (5). If, therefore, the persons concerned died simultaneously, these legacies all failed, for the legatee in each instance would not survive the testator, and (apart from special provisions which do not exist in this case) proof of this survival is essential if the legacies are to take effect.

H

It is evident that the failure of a claimant to prove affirmatively that the person upon whom his title depends survived the testator might arise in either of two ways. He may fail because (as the majority of the Court of Appeal in this case held) the two died at the same time, or because, although they died in succession, it is uncertain which of them survived the other. The second of the alternatives was the one which has frequently arisen in the past, and it has sometimes given rise to controversy and litigation. Accordingly, the Law of

Property Act, 1925, s. 184, enacted :

In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

The interpretation of this section (save as to the words in brackets, which are very obscure but do not affect the present case) seems to me to be clear. A The section establishes a presumption as to the order of a series of deaths when the deaths have arisen in circumstances which render it uncertain which of two or more persons survived the other or others. Before the statute there was no presumption in English law, and by the law of Scotland there is no presumption to this day, *Drummond's Judicial Factor v. H.M.'s Advocate* (1). B The condition which must be fulfilled if the presumption is to apply at all is that there should be a survival of one person beyond the death of another, but that it should be uncertain which was the survivor. So far as the language of the section goes, it seems to me to be manifest that the section does not apply to the case (if such a case is possible, and is proved) where two or more deaths are absolutely simultaneous. Indeed, counsel for the appellants expressly said that he was not contending that if it were adequately proved that deaths were simultaneous, the section would apply. The section, he readily conceded, C deals with a succession of deaths and does not deal with simultaneous deaths.

It is to be observed that, whatever may be the case in similar provisions in the Roman law, sect. 184 is not limited to multiple deaths arising out of a "common disaster." For example, if a husband goes a long voyage and the ship completely disappears in circumstances where his death has to be presumed to have occurred, but there is no material to indicate on what date he was drowned, and if his wife was in a nursing home when he started and subsequently died under an operation, there may be absolutely no means of ascertaining which of them died first. Yet in such a case there is no "common disaster" at all. It is, therefore, a useful provision of the statute law which requires the question of survivorship in such a case, which otherwise remains insoluble, to be determined by asking which of them was the younger. No one in such an instance would suggest that there were grounds for believing that they both died at the same moment of time. But it is in connection with a "common disaster" that these problems more usually present themselves. E If A and B are swept off the deck of a ship by the same wave in a storm and both are drowned, there is usually no material which would justify the conclusion that they both died at exactly the same instant; there may sometimes be sufficient proof that A survived B, e.g., if B was not able to swim and was seen to sink at once whereas A was a fine swimmer who could be observed holding his own for a considerable time. In such a case there would be no uncertainty F as to who was the survivor, and there would be no justification for applying the section. If, however, the facts do not enable a conclusion to be reached as to which of them survived the other, while the circumstances do not justify the conclusion that they both died at the same moment, then the section operates to establish a conventional order of succession.

Something was said in the course of the argument as to the maxim that in order to arrive at the real meaning of a statute it is legitimate to consider what was the mischief or defect for which the previous law had not provided. This proposition is derived from LORD COKE's report of *Heydon's Case* (2). There is no doubt that, within its proper range, this rule of interpretation is still valid. LORD LINDLEY, M.R., said, in *Re Mayfair Property Co.* (3), at p. 35 : G

In order properly to interpret any statute it is as necessary now as it was when LORD COKE reported *Heydon's Case* (2) to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief. H

But this maxim has a valuable application only when the language of the statute which is being construed needs to have this additional light thrown upon it. The words we are considering do not in my opinion leave any doubt as to what they say and mean. Moreover, in order to make a useful application of the maxim it is first necessary to be certain what the previous mischief was. So far as I know, previous cases which may have been thought to call for this

statutory alteration were all cases where there was a succession of deaths, but it was impossible to ascertain which was the survivor. This, therefore, was the so-called mischief and it is this situation with which the section clearly deals. I cannot agree with the submission of counsel for the appellants that the form of the section shows that Parliament recognised the proposition that proof of simultaneous deaths is impossible. This would be to attribute to the legislature conclusions as to a problem of considerable refinement in the realm of physics and philosophy which I hardly think the two Houses can be expected to have studied and inferentially pronounced upon. The circumstance that Parliament provides for what is to happen if one condition is fulfilled is no reason at all for saying that Parliament has impliedly expressed the view that another and different condition can never arise. A rule of racing which provided that, where the judge was uncertain which of two horses passed the winning post first, the younger horse should take the prize, would not prevent the sharing of the prize in a dead-heat.

In passing, I venture to suggest, though without any great degree of confidence, an interpretation of the obscure words in brackets which differs from any of those thrown out in previous judgments, so far as I have seen them. The section lays it down that the rule which it embodies is to apply "(subject to any order of the court)." No entirely satisfactory interpretation of these words has, I think, ever been put forward. May it be that they were intended to provide for a case where sufficient evidence as to the respective ages of the deceased persons was not forthcoming? There must be many instances where this information could not be ascertained with precision, and in such cases the order of the judge, directed to the probabilities of the case, might be contemplated. But, even if there is any merit in this explanation, the words used have not been happily chosen for the purpose.

However, the interpretation of the parenthesis is of no importance in the present appeal and, as I have already said, I regard the interpretation of the rest of the section as quite clear. There is no justification for reading into the section a second alternative condition which is not there to the effect that the conventional order of survivorship also applies "in circumstances where the proper inference is that they died at the same time." The view which I take of the limited application of the section is the view expressed not only by LORD GREENE M.R., and GODDARD, L.J., but also by LUXMOORE, L.J., who dissented in the ultimate conclusion.

There thus remain three questions which must be answered in determining this appeal. If any one of them should be answered in the negative, the appeal must succeed. These three questions are (i) *Can* two or more persons die at the same time? (ii) *Can it be proved* in a court of law that two or more persons died at the same time? (iii) In the present case, is the proper conclusion on the evidence that the two testators and their beneficiaries in the shelter died at the same time?

(i) The view has been advanced in the course of the argument that simultaneous deaths are impossible, and this is said to be in some way related to the infinite divisibility of time. The mathematical theory of infinitesimals is a difficult topic which I feel ill qualified to expound. Modern science does not, I believe, dispute that time is infinitely divisible and I am prepared, with due humility, to assume it—but without dogmatism, bearing in mind that my distinguished predecessor, LORD CAMPBELL, L.C., eighty-five years ago, in *Wing v. Angrave* (4), at p. 199, rashly assumed that matter is infinitely divisible—a proposition which, so far as I know, modern physicists would not affirm. But even so, I do not think that either the scientific view or the legal view would insist that in the nature of things no two deaths can ever occur at the same time. Death, I suppose, may be a process rather than an instantaneous event, and although modern mathematical science, as I understand, teaches that if two events are to be absolutely simultaneous, they must occur not only at exactly the same instant but in exactly the same place, I am not disposed to introduce these refinements into the practical conclusions of a law court and should not be prepared, for the present purpose, to proceed on the basis that no two deaths can ever coincide in time. Previous judicial pronouncements on such a point may not be of great value as precedents, but I may point out that the view that it is possible that two persons perished at the same moment is that enter-

tained by LORD THURLOW in *Bradshaw v. Toulmin* (5); by SIR WILLIAM GRANT, M.R., in *Mason v. Mason* (6), at p. 313; by LORD WENSLEYDALE in *Wing v. Angrave* (4), at p. 213; and as "a highly improbable state of facts" by LORD CHELMSFORD in the same case at pp. 221 and 222: LORD CRANWORTH left the possibility in doubt at p. 209, but in the earlier case of *Underwood v. Wing* (7), at p. 661, said it was "hardly within the range of imagination." These are mere *dicta*, but there seems to me to be no ground for assuming that the law does not recognise the possibility of simultaneous deaths.

(ii) Next comes the question whether it can be *proved* in a court of law that two persons died at the same time, so that neither survived the other? Here a sharp distinction must be drawn between reaching a correct conclusion in a court of law, and establishing an absolute scientific truth. A court of law, whether it takes the form of a judge sitting alone, or sitting with the help of a jury, is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it. In most cases, there is a contest, and the court merely has to decide between the parties. And in reaching its conclusion, the court is greatly helped by considering upon which party rests the burden of establishing its contention. The conclusion, therefore, that the party upon which the burden rests has not proved an essential proposition, leads to the result that for the purposes of that litigation the proposition is to be rejected—a course of reasoning which could never establish a positive truth of science. Some observations made during the hearing of this appeal seemed to imply that the standard of proof to establish simultaneous deaths is something of an entirely different order from the standard of proof required in other cases. But I do not see why. On any view, the cases where two persons perish at exactly the same moment must be very unusual, though methods of wholesale instantaneous destruction have been much developed in the last five and a half years. But if the evidence is enough to justify the inference, the conclusion follows. Far-fetched hypotheses, unsupported by any semblance of evidence, *e.g.*, that one of the victims may conceivably have started to leave the shelter, or may have died from natural causes, just before the bomb fell, do not seem to me to advance the matter. The use of the word "uncertain" in sect. 184 is nothing to the point, for we are not engaged in applying the section, and in any case the uncertainty there referred to is uncertainty which is not removed by evidence leading to a defined and warranted conclusion. If nothing is to be held to be proved in a court of law when it is conceivable that another incident of which there is no evidence might reverse the conclusion, then decisions of fact based on circumstantial evidence—such as are frequently reached in criminal cases, or in the Divorce Court—would often have to be regarded as inadequately established. In my view, the right conclusion depends on the evidence, and on nothing else.

(iii) It is this last question, *viz.*, whether the proper conclusion from the evidence is that the deaths occurred at the same time, which to my mind creates the main difficulty in the case. LORD GREENE, M.R., and GODDARD, L.J., considered that the proper conclusion from the evidence (which was all on affidavit) was that the deaths were simultaneous. I agree with them. GODDARD, L.J., rightly points out, at p. 89, that:

... it is undoubted law that in civil proceedings a finding can and may be rested on the probabilities of the case,

And the citations which he makes from WILLES, J., and DYER, C.J., to support this are extremely relevant. If the issue came before a jury on these materials, I think that a properly-instructed jury would reach the same conclusion as the majority of the Court of Appeal. COHEN, J., took the other view, largely because he felt constrained to follow BENNETT, J., in *Re Lindop* (8), where the last-named judge quoted and relied upon the *dictum* of LORD CRANWORTH, L.C., in *Underwood v. Wing* (7) as laying down that it was practically impossible for a court to hold that two persons died at the same moment of time. I have already given my reasons for thinking that this does not sufficiently recognise the function of a tribunal in dealing with the weight of evidence before it.

I conclude, therefore, that for the purpose of reaching a decision of fact in a legal tribunal, it ought not to be held to be impossible for two people to die at the same time. I recoil from the proposition that two soldiers standing shoulder

to shoulder in the same trench when a high explosive shell drops between them and blows them both to smithereens, cannot rightly be held by a court of law to be proved to die at exactly the same moment. Where that conclusion is reached, it is not arrived at by ignoring small fractional differences in time, but by drawing the correct inference from the proved facts. I do not consider that the House should reverse the Court of Appeal unless it would set aside the verdict of a jury on the same evidence to the effect that the deaths were simultaneous. And this I should not be prepared to do. I would therefore dismiss the appeal.

LORD MACMILLAN: My Lords, in this appeal your Lordships are called upon for the first time to consider the interpretation and application of an enactment which has introduced an entire novelty into the law of England. It first appeared in the Law of Property Act, 1922, s. 107 (3), and is now in identical terms embodied in the Law of Property Act, 1925, s. 184. It reads as follows:

In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

The problem with which the legislature has thus dealt has long been familiar to lawyers. Rights of succession, alike testate and intestate, depend on the survivance of one person by another. The living succeed to the dead. In the ordinary case there is no difficulty in ascertaining which of two persons died first. But in the vicissitudes of human life there occur instances in which owing to the absence of any positive evidence, it is not possible to arrive at a conclusion and the matter is left in uncertainty. The most familiar case is where two or more persons meet their death in a common calamity, the case of *commorientes*, as lawyers designate it. Two or more persons perish together and there is no evidence to show which survived the other or others. Yet rights of high importance may depend thereon.

The Roman law provided a solution for the dilemma in certain cases by means of presumptions founded on what I may call biological considerations. Thus a grown-up son is presumed to have survived his parent. *Cum explorari non possit uter prior extinctus sit, humanius est credere filium diutius vixisse* (Dig. Lib. xxxiv, Tit. V., Reg. I, *De Rebus Dubiis*). The presumption takes the place of proof. The topic has been discussed with much learning by continental jurists and is specifically dealt with in the Code Napoleon by means of detailed presumptions. For the continental law I may refer to BURGE'S COMMENTARIES ON COLONIAL AND FOREIGN LAW, IV, 11-29. But CHANCELLOR KENT in his COMMENTARIES ON AMERICAN LAW, 12th Edn., Vol. 2, at p. 436 says:

The English law has hitherto waived the question, and, perhaps prudently, abandoned as delusive all those ingenious and refined distinctions which have been raised on this vexed subject by the civilians.

In the absence of any presumptions the English courts had to find some way of extricating the difficulty. What they did was to fall back on the principle that the plaintiff must prove his case—*actori incumbit onus probandi*. If a plaintiff's claim depended on showing that A survived B then the plaintiff must establish the fact affirmatively by evidence; if sufficient evidence was not forthcoming the claim failed. (*Re Phene's Trusts* (9).) This impotent conclusion was not a solution of the problem but rather an admission of its insolubility. Where the deceased persons had mutual claims to succeed the one to the other and there was no evidence that one survived the other, the fiction was adopted of holding that they died together at one and the same time (*In the Goods of Beynon* (10)). This expedient of assuming the deaths to have occurred simultaneously did not proceed on any proof of the fact or on any presumption, but was merely a method of solving an otherwise insoluble problem which had to be solved somehow. Such a state of the law was far from satisfactory. The results which may follow from the absence of any aid from presumptions are well illustrated in a recent case in Scotland, where the common law remains as it was in England (*Drummond's Judicial Factor v. H.M. Advocate* (1)). In that case the whole savings of one of the victims of a calamity almost

identical in its circumstances with that which this House has now under consideration were carried off by the Crown.

It was to remedy this imperfection of the law that the legislature came to the aid of the courts by enacting a statutory presumption in the terms which I have quoted. Unfortunately the wording of the section is such as to have given rise to controversy. Two views have been advanced as to its meaning and effect. According to one view, which is the view of LORD GREENE, M.R., and GODDARD, L.J., the statutory presumption is strictly limited in its application to cases in which :

... the court is satisfied as to two things, one, that the proper inference from the circumstances is that the deaths took place consecutively, and the other, that the circumstances leave the court in uncertainty as to which death took place first.

That is to say, all that the statute does is to fix artificially the order of sequence among consecutive deaths, where that order cannot in fact be ascertained. If the circumstances are such as to justify an inference that all the parties concerned died simultaneously then the circumstances are not such as to render it uncertain which of them survived the other or others, for it is certain that none survived the other or others. This, according to GODDARD, L.J., is the literal construction of the plain words of the enactment.

The other view is that when the circumstances are such that it cannot be ascertained that one of the deceased survived the other then the uncertainty which the section postulates exists and the statutory presumption applies. One reason why it cannot be ascertained that one survived the other may well be that the deaths occurred so closely in time that there is a high probability that they were practically simultaneous. I say "practically" for reasons which will appear later.

Having carefully weighed the arguments in support of each of these rival constructions I pronounce unhesitatingly in favour of the latter. It would be indeed unfortunate if the former were to prevail. For one thing it would mean that the legislature had signally failed to provide any remedy for an admitted defect in the law in a large and unhappily increasing number of cases in which evidence that the victims died consecutively is not available. Having set out, as I think may be reasonably assumed, to remedy the law as to *commorientes*, or persons dying together, the legislature is ironically found not to have made any provision for the case of *commorientes* who die together but to have dealt only with persons proved to have died consecutively. In the next place I would observe that where two persons perish in a common calamity and there is no evidence as to which died first it is necessarily left uncertain whether they died consecutively or simultaneously, although the circumstances may point with high probability to their not having both died at the same moment. The operation of the statutory presumption is, in the view of LORD GREENE, M.R., made dependent on the ascertainment of a fact, namely that the deaths were consecutive, which is itself necessarily conjectural in the absence of any positive evidence. The only case in which it can be demonstrated that the deaths were consecutive is where one of the persons concerned is proved to have been alive after the other is proved to have died : but in such a case there is no need for any presumption of survivorship. Nevertheless it is said that unless the court is satisfied that one of two victims of a common calamity survived the other the circumstances are not such as to render it uncertain which victim survived the other. I prefer to read the enactment as meaning that where the circumstances are such that it is not possible to say with certainty that one of the victims survived the other there is then uncertainty as to which survived the other. Clearly you cannot say with certainty that one of the victims survived the other if your belief is that both died at the same time, if that be possible. The decision of the Court of Appeal, if it were affirmed, would almost inevitably lead to every case having to come into court for determination of the obviously contentious and often really insoluble question whether the deaths were consecutive or simultaneous.

The view of LORD GREENE, M.R., involves two things, one, that it is possible by legal proof to demonstrate that two persons died at precisely the same moment of time and, second, that intentionally or inadvertently the legislature omitted to deal with this case. I gravely doubt whether the legislature envisaged as a practical consideration the existence of the possibility of simultaneous deaths.

The draftsman in addressing himself to the formulation of this remedial enactment may be assumed to have read at least the leading case of *Underwood v. Wing* (7). There he would find, at p. 661, this pronouncement by LORD CRANWORTH, L.C.:

A It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination and to adjudicate on such a principle would, I think, be proceeding on false data, but the real ground to proceed on is that it cannot be proved which died first.

B It is easy to involve oneself in logical and metaphysical subtleties, and perhaps fallacies, in handling such a topic as this. It is, of course, true that time is infinitely divisible and also that it is theoretically possible that the deaths of two persons may be absolutely coincident in time. As LORD PRESIDENT ROBERTSON said in *Edinburgh Street Tramways Co. v. Magistrates of Edinburgh* (11), at p. 704:

This is . . . a profound and impressive truth . . . but there are times and places for everything, and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching business men metaphysics unawares . . .

C I prefer, therefore, to judge the language of the present enactment by a more commonplace standard. I think that it poses a practical question—Can you say for certain which of these two dead persons died first? If you cannot say for certain, then you must presume the older to have died first. It is immaterial that the reason for your inability to say for certain which died first is either because you think they both died simultaneously or because you think they died consecutively but you do not know in what sequence. I note with interest that at p. 145 ([1944] 1 All E.R. 85) LORD GREENE, M.R., himself in the course of the argument in the Court of Appeal “suggested that the section upon its true construction might cover the case of simultaneous deaths.” The reasons D which he gives for rejecting his suggestion do not, with all respect, convince me, despite their verbal logical cogency.

E I would only add a few words regarding the term “uncertain” which occurs in the enactment and which was so much canvassed in the course of the argument. The basis of belief may range from mere conjecture through all degrees of probability to absolute demonstration—possibility, probability, certainty. In seeking to arrive at a conclusion in fact in ordinary human affairs the law rejects mere possibility as an insufficient basis of proof but on the other hand it does not exact absolute or mathematical proof. It is content to proceed upon probability if it is sufficient and the test of sufficient probability is that the direct evidence with all legitimate inferences is such as ought to satisfy the mind of a person of reasonable intelligence. But the result of a decision on a question of fact F by a judge or a jury is not certainty. It is finality, not certainty. Your Lordships in considering a verdict of a jury on a question of fact have often declared that it is not to be disturbed because there was evidence on which a reasonable person could so find but that it is not to be taken that your Lordships would have reached the same conclusion. Can it be said that in such circumstances the fact found by the jury has been ascertained with certainty? It has been determined with finality in law but not with certainty in fact.

G In my opinion the legislature in employing the word “uncertain” in the section which the House has to construe was not thinking of the kind of certainty with which the law has to be content but was using the word in its ordinary acceptation as denoting a reasonable element of doubt.

H So, coming at last to the facts of the present case so far as known I put the question thus: Can it be said for certain of any of the five persons involved in this tragic occurrence that one did or did not survive the other? All that is certain is that a high explosive bomb fell on a small house, No. 5, Upper Cheyne Row, Chelsea, on Sept. 14, 1940, about 6.30 o'clock, that it exploded within the house and reduced it to a heap of ruins, that five dead bodies severely mutilated were subsequently recovered from the debris, and that there was a shelter in the basement of the house to which the deceased were in the habit of resorting when there was an air raid. No technical evidence was led on the action of blast from high explosives or its effect on the human body.

I do not for the purposes of my argument need to say that if a judge or jury had to try the issue whether in these circumstances all the victims of the calamity

perished at precisely the same instant and were to find as a matter of fact that this was so that the finding would on appeal be set aside on the ground that there was no evidence on which a reasonable man could reach that conclusion—*pace* LORD CRANWORTH, L.C., who thought that the simultaneous death of two human beings was insusceptible of proof. Two most eminent and most reasonable judges have so found in this case. But, with all respect, that is not an issue which the statute requires to be determined in order to bring it into operation or exclude its operation. All that is necessary in order to invoke the statutory presumption is the presence in the circumstances of an element of uncertainty as to which of the deceased survived the other or others. I can imagine a jurymen saying: "I really cannot answer this question. It may be that they died one after the other or it may be that they all died at the same moment, but in any case I cannot say for certain which, if any, was the survivor."

That is also my state of mind on the facts of the present case. Without resorting to fantastic or far-fetched conjectures it is perfectly possible that the blast of the explosion did not annihilate the whole of these five victims at the same instant. Thus, one of them may quite well have been out of the shelter in another part of the house at the moment of the impact of the bomb and the blast though by an infinitesimal interval may have struck him sooner or later than the others. I simply do not know. Nobody can know. Where everything depends, as LORD CRANWORTH, L.C., said, on "survivorship for a second" I cannot accept the view that in the circumstances of this case there was no element of uncertainty, legal or other, on the cardinal issue.

My opinion accordingly is that the statutory presumption applies and that the appeal should be allowed.

LORD WRIGHT [read by LORD PORTER]: My Lords, In my opinion the decision in this appeal depends on a finding of fact. The question is whether the four persons who met their death when the enemy bomb exploded in the basement of the Chelsea house in which they were sheltering, died at the same moment. This fact, in my judgment, is to be ascertained by the verdict of a jury or the decision of a judge of fact in the same way and by the same rules as to proof as any other disputed issue of fact. Arguments to the contrary that some special rule applies have been advanced on behalf of the appellants. I shall deal with them when I have explained why I agree with the findings of fact stated by LORD GREENE, M.R., and GODDARD, L.J., with whose judgments I am in complete accord.

The issue of fact was one which might well have been tried in a common law court by a jury or a judge of fact. But as it involved the administration of the two wills of R. M. Grosvenor and E. M. Grosvenor respectively and also the rights of Elizabeth S. Parke and Mrs. Price Jones as legatees under one or other of the wills, the proceeding was by way of originating summons, and the only evidence was contained in affidavits. Indeed, precise and detailed evidence was not possible. The four persons, with one other lady, were sheltering during an air raid in the basement of the house, which was a small Chelsea residence; it received a direct hit from a German bomb, which penetrated through to the basement so that the whole premises were completely demolished and reduced to a heap of debris. When the bodies were dug out of the wreckage they were badly mutilated and the faces were wholly unrecognisable. Two, however, could be identified as male and three as female. It was only possible to say who the two males had been from articles found upon them. It was proved that the five persons were in or about the house on Sept. 14, 1940, when warning of the raid was given, and that it was their regular or invariable practice whenever that happened to go down into the basement shelter, which had been specially strengthened. The warning had sounded about 6 p.m., and the house was hit about three-quarters of an hour afterwards. I adopt and agree with the words of LORD GODDARD, "that all five persons were then actually in the shelter room is so highly probable that to my mind it amounts to a certainty that they were." The exact area of the shelter room is not given, but most jurymen and judges would have a rough, but sufficiently accurate, idea what it was. A few feet more or less would not matter. The affidavits show that the five persons were all in the building at the fatal moment. That seems to have been taken almost for granted in the courts below. Before this House

remote and fanciful possibilities were suggested why one or more might have left the shelter. I proceed on the footing that all five were in fact in the shelter. When the high explosive bomb fell straight into the basement, "that all five persons were killed at the same time seems to me to be a matter of certainty," if I may once more adopt the words of LORD GODDARD. LUXMOORE, L.J., who dissented on this issue of fact, laid stress on the absence of the evidence of an expert who could speak with authority of the effect of bomb blast on human beings. If there is such an expert, his evidence might perhaps have helped the court and relieved this House of the necessity of deciding an appeal on a mere issue of fact. But no expert was called on either side. The judge of fact was left to exercise his knowledge and experience of the ordinary affairs of life, as a jury would have been. It may seem strange to future generations that such an event (or "incident," as such happenings are nowadays commonly called) should be described as ordinary, but so it is to those who have for five years lived in or near London, and I do not see what real help the hypothetical expert could have given to the court. In any case, no such help was given. The court was left to decide. The court, then, is entitled to decide the question by applying such common sense and untechnical standards of the measurement of time as a plain man would adopt. Suppose the hypothetical plain man were cross-examined as to what he meant when he said that the five persons died at the same time, and were asked whether he meant within the same minute or the same second, or what? It may be he would reply that he was applying the smallest measurement of time of which he could take cognisance. This may not be very exact, but it is as exact as expressions like "the same moment," or "the twinkling of an eye" or "instantaneous" or "simultaneous" are in ordinary thought. Different language would be necessary to specify differences in measurement imperceptible to ordinary sense which might be recorded by scientific instruments of almost incredible delicacy. The hypothetical plain man would say that he knew nothing of such things. In the same way, it has been said that in legal proceedings cause and causation generally mean the "common sense" cause, or what it would mean to the ordinary man. Thus the plain man might say that, if two persons were beheaded by a guillotine cutting both heads off by the same stroke, they both died at the same moment. Or this might be said if two persons were electrocuted in the same chair by the effect of the same current. It was not contended in this House that it was impossible that two deaths should be simultaneous. What was said was that it was so unlikely that only the strictest and most minutely conclusive evidence could justify such a finding of fact. But I cannot see why any special and peculiar rule of evidence should be demanded in these cases or why the ordinary requirement of evidence reasonably sufficient to satisfy a jury should not be applicable. I note that LORD CAMPBELL, L.C., in *Wing v. Angrave* (4), at p. 199, seems to treat the test as being whether there was a clear preponderance of evidence to support the inference that the husband had survived, which was the issue in that case. He described the issue as a pure question of fact, to be decided by what is the true inference on a clear preponderance. He desiderated no higher standard of certainty. It may be that cases in which this question arises are rare. LORD GREENE, M.R., well observes at p. 146 ([1944] 1 All E.R. 85):

It is true that simultaneous deaths can only occur in special circumstances, but if the weight of evidence points to the conclusion that the deaths were simultaneous, I do not see why it should be said that the court ought not to draw that conclusion because of the existence of a remote possibility that it would be incorrect. In the present case, the only possibility suggested is that one or other of the persons concerned may have been struck and killed by the falling bomb a fraction of a second before it exploded. Anything is possible, but it is to be said that a scintilla of a possibility of this sort is to prevent the court from drawing the obvious inference as to what in fact happened? I do not think so.

This admirably expresses my own thought. The enquiry here is simply what is the proper inference from the facts. Five people are crowded in a small shelter. The high explosive bomb falls among them and explodes in that confined space. Can it be reasonably held to be uncertain that the effect on them all is not only fatal but instantaneous? To my mind that is the only proper inference. It cannot be forgotten how small a proportion of decisions of fact, either in the ordinary dealings of mankind or in the law courts, depend on factual or aural or visual observation. Most cases depend on circumstantial evidence, that is

on the correct inference to be drawn from all the known facts. So I think it is in this case.

Before your Lordships there was a great deal of discussion which centred round the Law of Property Act, 1925, s. 184, and on certain decisions. On the facts as I find them, the section has no application here because in my opinion the only condition in which the section applies is if:

... two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court) for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder. A

I may note that in my opinion the bracketed words "(subject to any order of the court)," whatever they may mean, cannot displace or affect or contradict the plain meaning of the section, namely that in the event specified the presumption is to have effect; I may also note in passing that if the section applied at all on the facts of this case it would in my opinion have affected the title to property, because if it applied it would affect the various dispositions of property under the wills. But I think that the section is not applicable unless there is uncertainty as to survivorship and in this case I am of opinion that there is no uncertainty because the proper finding of fact is that the persons died at the same moment. The possible contingencies are that the persons all died contemporaneously or that of the four persons one or other died before the other or others and that it cannot be ascertained what was the precise order of the deaths. In the latter event the section would have come into operation and the statutory presumption would have become applicable. The presumption had involved a change in the previous law. This House had held in *Wing's* case (4) that there was no presumption of law where two or more persons have perished in the same causality either that they all died at the same time or that the order of their deaths was to be taken to have been according to considerations of age, sex or the like. Such presumptions had been and still are established by some foreign codes; for instance as LORD CAMPBELL, L.C., pointed out in *Wing's* case (4) by the Code Napoleon. But he went on to say, at p. 197: B C D

... according to our jurisprudence, where the question arises, which of two individuals, who perished by the same calamity, survived, there is no inference of law from age or sex, and the question is to be decided upon the circumstances proved in each particular case. E

LORD CAMPBELL, L.C., had only in that case to consider which of the two, husband or wife, survived the other, or rather whether the husband was the survivor, so that the property had vested in him under the wife's appointment. LORD WENSLEYDALE, at p. 213, deals with the possibility that they both died at the same moment and points out that the language of the will would not be satisfied in that event. The precise event there postulated was survivorship. The possibility of simultaneous death was a different uncertainty but one which would have been equally fatal to a claim based on showing the husband's survivorship. Similarly, LORD CHELMSFORD, at p. 221, refers to: F

... a highly improbable state of facts ... either of their [*i.e.*, the husband and the wife] both perishing together, or of its being impossible to ascertain which was the survivor ... G

I have referred to these passages because of the appellants' contention that the section must be construed as covering something other than an uncertainty as to the order of survivorship. I cannot find any justification for this departure from the plain words of the section. It specifies precisely what is the uncertainty contemplated; it is uncertainty "which of them survived the other." If the true inference of fact is that neither survived the other, then the section according to its language as I construe it does not apply. The earlier cases and in particular *Wing's* case (4) had debated whether there was any presumption at all as to survivorship. This House held there was not; it was a question of fact. It had been held in the ecclesiastical courts that where husband and wife perish by the same accident and there is nothing to show that the husband survived the wife, they must be presumed to have died at the same time: as instance of cases in which this question was considered, I may refer to *Satterthwaite v. Powell* (12), in the Prerogative Court, where the doctrine of the ecclesiastical courts was applied, and *Wing's* case (4). *Wing's* case (4) showed H

there was no such presumption in English law. Sect. 184 thus introduced a new and very arbitrary presumption to operate in case of the specific uncertainty defined in the section. But as I agree with the Court of Appeal that there is here no uncertainty, the persons having all died at the same time, the section is irrelevant.

A *Wing's case* (4) was the case of a shipwreck : husband, wife and two young boys were swept away from the doomed vessel, apparently on her beam ends, by a wave and were never seen again. A third child, the daughter, was proved to have survived the others, because she had been tied to a spar and was seen alive after the others had disappeared in the sea. LORD GREENE, M.R., has pointed out how different such a casualty is from the calamity here in question where a high explosive bomb has burst in the confined space in which all the five persons were. The same distinction is also apparent in the earlier cases, which were mainly cases of shipwreck. In all such cases the element of instantaneous catastrophic death is absent. This is well explained by LORD GREENE, M.R., in his judgment under appeal.

B I have not overlooked that the judge found that the deaths were not proved in this case to have been simultaneous. It was said that the Court of Appeal were not justified in reversing his judgment of fact. It is indeed true that an appellate court will not generally reverse a decision of fact of the trial judge, where he has seen and heard the witnesses and come to his conclusion on the impression formed on him by them. But that is not the case here. This case falls within the class to which I referred in *Powell v. Streatam Manor Nursing Home* (13), at p. 267, where I said :

Many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents : in all such cases the appellate court is in as good a position to decide as the trial judge.

D Nor am I clear that the trial judge was not (perhaps unconsciously) influenced by the fact that in a similar but not identical case of a bomb explosion, in *Re Lindop* (8), BENNETT, J., had held that the presumption under sect. 184 applied. As I have explained, I do not think it applied in the present case, and that makes it easier to reconsider his finding of fact. But in any event a decision on a question of fact does not constitute a precedent in law for a decision on analogous facts. Each question of fact must be decided on the evidence in the particular case in accordance with the appropriate principles of law, as was pointed out by the Court of Appeal in *Tidy v. Battman* (14). It may be that COHEN, J., was to some extent influenced by a somewhat obscure *dictum* of LORD CRANWORTH, L.C., in *Underwood v. Wing* (7), at p. 661 :

It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time.

F In *Wing's case* (4) this *dictum* was not repeated or referred to in any of the opinions in this House. As I have shown above, the House of Lords in *Wing's case* (4) treated the particular issue as one of fact in which there might be a preponderance of evidence one way or the other. I need not, however, examine this *dictum* further because it has been very properly admitted in this House that simultaneous death is possible in fact. No ground has been indicated to support the opposite view. It is certainly not a proposition of law, any more than the suggestion cautiously referred to by LORD CAMPBELL, L.C., in *Wing's case* (4), at p. 199 : "time . . . is said to be infinitely divisible." If there be any truth in this suggestion, a judge of fact cannot get any help from it in a case like this.

I would dismiss the appeal.

H LORD PORTER : My Lords, if in this case the question at issue had been mooted before the passing of sect. 184 of the Law of Property Act, 1925, there is no doubt that the appellants must have failed. At that time anyone whose title depended upon the survivorship of the person in respect of whom the claim was made could not have succeeded unless it were shown that that person in fact survived to inherit the property, the right to which was in dispute. The onus of establishing this fact was on the claimant and that onus was not discharged if it was doubtful whether the person concerned died before or simultaneously with some other person who might be entitled or through whom his own title attached. There was one uncertainty and one only, *viz.* : did the person through whom a right to property was said to be derived survive or did he not

survive to inherit the property. For this proposition it is sufficient to quote *Wing v. Angrave* (4), but there are a large number of authorities to the like effect.

If there were cross-claims, *i.e.*, if A was entitled to B's property in case he survived B and on the other hand B was entitled to A's property in case he was the survivor and it could not be established which survived the other, whether because it was uncertain or because both died simultaneously, then the same result followed either in the ecclesiastical court or elsewhere. No finding was necessary save that neither had been shown to survive the other, and the direction given by the court was not that the two or more persons concerned died simultaneously, but that the estate must be distributed as if they had done so. The court was not concerned with any question other than the question whether it could or could not be shown that one survived the other. The law still remains in this form in Scotland and its results can be seen in *Drummond's Judicial Factor v. H.M.'s Advocate* (1).

In English law in order to establish a claim it had always been necessary to show as a matter of fact that the person whom the claimants represented had survived the other. In Roman law and in some foreign codes in cases of uncertainty presumptions of law were adopted by way of solving what would otherwise be insoluble.

The Roman law is to be found in JUSTINIAN'S PANDECTS II, Book 34, Tit. V, Reg. IV—a section of the work which is entitled "DE REBUS DUBIIS" and contains as part of its heading the statement :

Superest ea tantum dubii species quae ex incerto ordine morientium aut nascentium proficiscitur : de qua re paucas regulas proponemus.

The 4th rule is headed :

Quum nulla ratio occurrit dignoscendi aut praesumendi utra ex duabus personis praemortua sit : adversus eum cui una, ex illis personis praemortua petitio competeret, pro possessore reponetur.

And gives a number of examples—recognising that it might be possible to prove that one died before the other, but in all cases putting as the alternative that they died at the same time, *e.g.* :

Ex. 1. "*quod si simul.*"

2. "*quod de pariter mortuis tractamus.*"

3. "*Simul cum marito perierit.*"

4. "*Si maritus et uxor simul perierent.*"

5. "*Si dominus cum servis simul vita functus sit.*"

Read in conjunction with the heading these provisions of the Roman law would seem to deal with things which are doubtful and that, in the passages quoted, the words *simul*, *pariter*, etc., mean not that there was exact simultaneity of death, but that the deaths occurred in some common calamity and their sequence was doubtful.

Similarly the Code Napoleon, in art. 720, says :

Si plusieurs personnes respectivement appelées à la succession l'une de l'autre, périssent dans un même événement, sans qu'on puisse reconnaître laquelle est décédée première, la présomption de survie est déterminée par les circonstances du fait, et, à leur défaut par la force de l'âge et du sexe.

And in the following arts. 721 and 722 it speaks in terms similar to those used in the Roman law, *e.g.*, "*Si ceux qui ont péri ensemble.*" Here "*ensemble*" appears to mean "in the same disaster" and not at the exact same moment of time. In each case the presumptions were adopted not to deal with the case where it could be shown that there was simultaneous death but to resolve those cases where it had to be determined which of two persons survived the other and the answer was uncertain.

In English law uncertainty meant failure of the claim and equally the claim would fail if the persons whose deaths were involved had died at the same moment of time. It was, therefore, unnecessary to consider which of those two theoretical contingencies had in fact occurred or indeed whether the second was practically possible or, at least, whether it could ever be proved.

As to its possibility different judges seem by the expressions they used to have shown some difference of outlook. As long ago as 1784 LORD THURLOW, C., in *Bradshaw v. Toulmin* (5), said, at p. 633 :

If two persons . . . perish by one blow, the estate will remain in joint tenancy, in their respective heirs.

And in *Taylor v. Diplock* (15) SIR JOHN NICHOLL, in a case where husband and wife perished in the same shipwreck, said, at p. 280 :

I am not satisfied that proof is adduced that the wife survived : taking it to be, that both died together, the administration is due to the representatives of the husband. I assume that they both perished at the same moment.

A Again SIR WILLIAM GRANT, M.R., in *Mason v. Mason* (6) said, at p. 313 :

There were three contingencies ; either the daughter survived the father, or the father the daughter, or both perished at the same instant.

In none of these cases, however, was the mind of the judicial authority directed towards the question now in issue : all that was being considered was whether it could be determined that one survived the other and, if so, which ? Indeed it is common ground that there is no case in the books in which the present point came in issue. How little any distinction was drawn between simultaneity of death and inability to prove the sequence is to be seen in *Re Beynon* (10), where the headnote of the case says that GORELL BARNES, J. :

B . . . gave leave to vary the usual form of oath to lead the grants [of administration] by allowing the administrator and administratrix to swear that the husband and wife perished at the same time (named), and that, after due inquiries, there was no reason to believe that either survived the other.

C Whereas, in fact, the judge said nothing about their perishing at the same time.

The whole question of survivorship was discussed with reference to the law as it then stood in *Underwood v. Wing* (7), and in *Wing v. Angrave* (4). The former was an appeal from a judgment of SIR JOHN ROMILLY, M.R., in which LORD CRANWORTH, L.C., took the advice of WIGHTMAN, J., and MARTIN, B. According to their opinion, at pp. 657, 658 :

E The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as any other fact. If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide independent of age or sex ; and if there be no evidence, the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and of consequence no judgment can be formed. Upon this point we concur with the Master of the Rolls ; we think there is no evidence to show whether the husband or wife was the survivor . . . The Master of the Rolls is represented in the report of his judgment to have said, " There is, therefore, no evidence to show who was the survivor, and the conclusion of law is, that both died at the same moment." According to our view this is not correct ; we think there is no conclusion of law upon the subject ; in point of fact we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor.

F Following this advice LORD CRANWORTH, L.C., says, at p. 660 :

G In the report of the case before the Master of the Rolls, His Honour is represented in one passage to have said that he must assume that Mr. and Mrs. Underwood both died together. From personal communication with His Honour, I know that he is not aware that he ever used such an expression, and all he ever meant to say was that the property must be distributed just as it would have been if they had both died at the same moment. It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination, and to adjudicate on such a principle would, I think be proceeding on false data, but the real ground to proceed on is that it cannot be proved which died first. They both probably died within a few seconds of each other, but which died first it is impossible to say.

H The claim in *Wing v. Angrave* (4) arose out of the same facts and by the time it was heard LORD CAMPBELL had taken the place of LORD CRANWORTH as Lord Chancellor. LORD CAMPBELL after stating that it was a pure question of fact and that he did not think the House could obtain any assistance from the numerous cases where judges had held evidence sufficient or insufficient to satisfy them that one of two individuals who perished from the same calamity was the survivor, later continued, at p. 199 :

I need hardly say, that I think there is no foundation for the doctrine, erroneously imputed to the Master of the Rolls . . . where it is left doubtful which of two indivi-

duals died first, there is a presumption of law (*juris et de jure*) that they died at the same point of time. I will not say that this is impossible, although *time*, like *matter*, is said to be infinitely divisible, but such a presumption is not warranted by decision, by *dictum*, or by analogy.

LORD CRANWORTH, at p. 209, says :

... the rule of construction relied on by the appellant might have been contended to be applicable if the fact had been, and had been ascertained to be, that Mr. and Mrs. Underwood both died at the same instant of time, if that could be possible. A

LORD WENSLEYDALE said, at p. 213 :

The evidence leaves it in total uncertainty whether the husband died before or after the wife, or whether both died at the same instant. Whoever has to maintain any one of these propositions, must certainly fail.

And finally at p. 221, LORD CHELMSFORD says :

Had it occurred to her mind that a highly improbable state of facts might arise, either of their both perishing together, or of its being impossible to ascertain which was the survivor, no doubt she would have used apt words to embrace such an extraordinary contingency. B

My Lords, I have examined the phraseology used in these two cases somewhat at length because they exhibit, as I think, very forcibly, the attitude of mind adopted by judicial authorities prior to the passing of the 1925 Act. They show in some cases an acceptance at least in theory of the possibility of simultaneous death, but only in cases where the same result would follow whether the two or more deaths occurred at the same time or whether it could not be shown which preceded which, coupled with a recognition of at least the extreme improbability of two deaths being exactly contemporaneous and indeed with some hint of its impossibility. The uncertainty to which the tribunal's mind was directed was between an inability to ascertain who survived the other as opposed to a proved survivorship in the case of one. A problematical and somewhat fanciful case of simultaneous death is mentioned, but its incidence if it were possible could make no difference. C

In these circumstances sect. 184 of the Law of Property Act was passed. Your Lordships must forgive me if I repeat its terms. They are : D

In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder. E

Two arguments were presented to the courts below which were not maintained before your Lordships. It was not contended in your Lordship's House that the matter in issue did not affect the title to property nor was it submitted that the words "subject to any order of the court" gave the judge hearing the case an unfettered discretion as to the order he should make. I, therefore, leave both expressions for future discussion, should such discussion become necessary. The vital words for your Lordships' consideration I take to be "In all cases where . . . two or more persons have died in circumstances rendering it uncertain which of them survived the other or others . . ."F

For the appellants it was contended firstly that though simultaneity of death was theoretically possible and perhaps even possible in fact yet its existence could never be proved and, therefore, in all cases where it could not be shown that one survived the other there was always such uncertainty as the section requires. Secondly, that in the present case it was in fact uncertain which of the four persons concerned survived. There were, it was said, only two alternatives; either it could be shown who was the survivor or it could not, and if it could not the sequence of death was uncertain. On the part of the respondents it was maintained that the facts established instantaneous and contemporaneous death in the case of each of the four persons, and therefore there was no uncertainty : they all died together. G

Speaking for myself, I should be inclined to read the section, even without the previous history, as presenting only two alternatives, *viz.* : (i) an ability to show the order of death, or (ii) uncertainty. Like LORD CRANWORTH, L.C., I am not sure that the occurrence of two deaths at exactly the same point of time is possible, and still less am I inclined to accept the allegation that it can ever be proved. H

But quite apart from theoretical questions of this kind, I think the section itself is so framed as to exclude the possibility of simultaneous death from ever being recognised as a certainty and to include it amongst the uncertainties. It does not speak of uncertainty as to whether the persons concerned died at the same time, but seeks to determine which survived the other. It seems to be concerned with survivorship or no survivorship, and not to be concerned with some *tertium quid* which is neither the one nor the other.

- A When the previous history is taken into consideration I am confirmed in this opinion. There were previously two possibilities, not three: one uncertainty, not two. The section was presumably passed to get rid of practical difficulties which had occurred in the administration of estates. Those difficulties, so far from being resolved, seem to me to be increased if the construction urged by the respondents is adopted. To prove or to fail to prove that one person survived another is a simple issue of fact. To bring into question whether it is not shown that there was simultaneity of death presents, in my view, difficulties of the gravest kind. A question of fact is primarily a question for a jury. If the case were being so tried, what direction should be given them to enable them to determine whether two deaths occurred at the same moment of time?

- C "Substantially the same time!" "What a reasonable man would call the same time!" "What in the ordinary parlance of mankind is considered the same time!" All seem to me hopelessly vague. The difficulty is to direct a jury what division of time is sufficient to constitute survivorship and what insufficient, or indeed for a judge alone to make such a decision.

- D Counsel for the respondents came, I think, nearest it when he said there would be simultaneity of death in a case where there was a common calamity causing instantaneous death in which it could not be shown that any lapse of time had occurred between one death and another; but this seems to me to establish an inability to show that the deaths did not occur at the same time rather than an ability to show that they did.

- E The construction of the section, then, in my opinion, supports the appellants' contention, but in any case it is at least doubtful, and its wording, combined with a recognition of the mischief to be cured and the history of the difficulties previously met with, points, as I think, to uncertainty as being recognised to exist unless positive proof of survivorship can be given.

- F If, however, the possibility of proving simultaneous death was contemplated by the section or was practicable, I should be inclined to say that the facts in the present case go as far, or nearly as far, as they could to show simultaneous death. It is true that there is no positive proof that all four were in the shelter at the time when the bomb fell, and that the bodies were brought up at two separate times, but they were all mutilated to a more or less degree, all unrecognisable, and all buried in the ruins of the one house. Their separate exhumation is easily explainable as the result of some portion of the shelter being dealt with before the rest, and the balance of probability is that they all died at approximately the same time from the blast of one bomb whilst taking refuge in the shelter. This inference, however, as I have suggested to your Lordships, is not enough.

- G Before leaving the case I should desire to say something as to the amount of uncertainty required in order to establish that, in a case such as this, sect. 184 applies. It is undoubted law that in civil cases absolute proof of the fact to be determined is not required: it is enough if from facts admitted or proved a reasonable inference can be drawn. *Lancaster v. Blackwell Collieries* (16) was quoted as establishing this principle, and in the case of a matter so well recognised it is, perhaps, authority enough.

- H Moreover in a case where no oral evidence was given, but an inference has to be drawn from what appears in affidavits, an appellate court is in just as good a position to draw a correct inference as is a court of first instance, and one appellate court in just as good a position as another. If authority is needed, the latest case quoted to your Lordships, *viz.*, *Powell v. Streatham Manor Nursing Home* (13) may be cited. If, then, the fact which had to be proved was the sequence, if any, in which the persons interested died or that all died at the same instant, it would be enough that the balance of probability pointed one way; it would not be necessary to show absolute certainty. But in the present case,

under the section, what has to be proved is not whether there was simultaneous death or not, but the certainty of simultaneous death or rather uncertainty as to who survived whom. I can imagine a court, whether judge or jury, being asked on a balance of probabilities: "Do you draw the inference that A and B died at the same moment of time?" and replying, "Yes!"; but on the enquirer putting the further question: "But are you certain?" I can imagine the answer being "No!" That a court may have to come to a decision one way or other upon inconclusive evidence is illustrated by an excerpt from BEST ON EVIDENCE, 12th Edn., at p. 82, where he quotes the words of DYER, C.J., in *Newis v. Lark* (17), at p. 412:

... if the matter is doubtful, they [the jury] may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence.

The italics are mine, and the wording seems to suggest that, though in law there may be sufficient proof of the fact, yet there is still some uncertainty.

My Lords, on my view of the case it is unnecessary to determine which of these two replies would determine the case, and I prefer to express no opinion until it is imperative to give one. I merely deal with the point because I understand some of your Lordships take the view that an inference reasonably drawn on a balance of probabilities is sufficient. I am not sure whether it is or not, and would leave the point open. For the reasons I have given, however, I would allow the appeal and say that it was uncertain which of the four persons survived the others.

My Lords, I would add that I am conscious that the matter at issue is one likely to give rise to a considerable divergence of view. Opinion below is equally divided, and I am aware that there is likewise a difference amongst your Lordships. It is said, and I think said truly that where possible the law should avoid too great subtlety in interpretation and should follow the common sense view, and it is added that in the present case, in the judgment of mankind, the deaths were simultaneous, whatever infinitesimal difference in time could be imagined between them. As I have said, the difficulty I find in accepting this view is that it leaves too great a latitude to those who have to decide the question. If courts in the past had shown any sign of following the adage "*de minimis non curat lex*" in matters of survivorship I should have felt less difficulty, but where seconds are, or indeed any measurable interval is, recognised as constituting a sufficient difference of time, I cannot think that fractions of a second should be neglected. Moreover, the construction, which I suggest to be correct, at least gives a clear principle on which the courts can act and does away with nice questions of the little more or the little less, and is in accordance, I think, with scientific principles.

If at some future date the scientist devises an instrument which can ascertain exactly when death takes place, and so accurate as to indicate that the deaths of two persons were coincident, it may be necessary to give effect to their discovery. For the moment they have not done so. High explosives have no doubt made a lasting difference in the probable length of the interval of time between one death and another, but they have not abolished it. At any rate, I do not think sect. 184 recognises that they have. I would allow the appeal.

LORD SIMONDS: My Lords, on Jan. 1, 1926, there came into force sect. 184 of the Law of Property Act, 1925. That section is as follows:

In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

This enactment remedied a defect in English law. Previously, if A and B died in a common calamity, it was necessary for the representatives of that one of them who claimed to be interested in the estate of the other under his will or as upon his intestacy, to prove that he was the survivor. If they did not prove it, the claim failed. In the not uncommon case when each of them was interested under the will or as upon the intestacy of the other, neither of them could take any interest unless his survivorship was proved. It followed that in such a case the estate of A had to be administered upon the footing that B

did not survive him and the estate of B upon the footing that A did not survive him and the estate of B upon the footing that A did not survive him, a result which could be stated in a compendious form by saying that the estates of A and B were to be administered as if they had died at the same time. Survivorship was a fact to be proved like any other fact. There was no presumption of it founded on age or sex or any other factor. So also there was no presumption of death at the same time. This was the sum of law on this question and, though in the comparatively few cases in the books, in which the subject has been discussed, there will be found on the one hand observations by judges which appear to contemplate the possibility of two persons dying at the same time, and on the other hand observations by other judges, which suggest that such an event is beyond the reach of imagination, it is clear that, before this case or its predecessor, *Re Lindop* (8) (which was heard by BENNETT, J.), no court in this country had been called on to determine whether two persons can die at the same time or how such a fact can be proved or what in such a context is the meaning of the words "at the same time." These questions were all irrelevant when the only issue was whether A survived B; if that fact was not proved, it mattered not whether B survived A or whether they died "at the same time." I hope that I am not wanting in respect to the very eminent judges to whose observations I have referred if I say that I get little help from them in the construction of the section which now has to be considered.

At this stage of my opinion only a bare outline of the facts is necessary. On Sept. 14, 1940, a high explosive bomb fell on No. 5, Upper Cheyne Row, Chelsea, where there were taking shelter five persons, of whom four were Randolph Lea Grosvenor, aged 73, his brother Edward Moberley Grosvenor, aged 66, their housekeeper, Elizabeth Sarah Parke, aged 70, and the occupier of the house, Mabel Edith Price Jones, aged 52. All these persons were killed, and I do not prejudice any issue when I add that they might well be popularly said to have been killed at the same time. Under the will of the elder brother Randolph, the younger brother Edward and the housekeeper were beneficiaries: under the will of Edward his brother Randolph, the housekeeper and Mrs. Price Jones were all beneficiaries. The circumstances were such that it was clearly impossible for the representatives of any of them to prove that he or she survived the others. The question, therefore, arose whether this was a case to which the Law of Property Act, 1925, s. 184, applied, *i.e.*, had these four persons died in circumstances rendering it uncertain which of them survived the other or others? This question has been answered in the affirmative by COHEN, J., but in the negative by the Court of Appeal, LUXMOORE, L.J., dissenting.

My Lords, the grounds of the decision of the Court of Appeal may, I think, be fairly stated in a very few words. They are that the proper inference from the facts of this case is that the deaths in question were simultaneous—a variant expression of "took place at the same time"—and that where this is the proper inference the operation of the section is excluded. Put in a slightly different way, the argument is that the section only operates where the proper inference from the facts is that the persons in question died not simultaneously but consecutively. In this House the argument was somewhat expanded by saying that it is the proper inference that deaths are simultaneous or consecutive as the case may be, when the balance or preponderance of probability favours that inference.

To me, my Lords, this argument appears to ignore realities. It cannot, I suppose, be questioned that the section was designed to meet the case of common calamity for which some other systems of law, notably the Roman law and the Code Napoleon, make provision. It is significant that in these systems it is implicit that it is either proved which of two persons dies first or the order of death remains uncertain and, where it is uncertain, presumption is given the place of proof. No provision is made for simultaneous deaths as distinguished from deaths in uncertain order. but deaths, where the order is uncertain, are described in terms of simultaneity. For example, the Roman Law (see Lib. xxxiv, Tit. V. *De rebus dubiis*), dealing with that "*dubii species quae ex incerto ordine morientium proficiscitur*," gives examples in which such phrases as these occur: "*cum pubere filio mater naufragio perit*," "*cum bello pater cum filio perisset*," "*uxor simul cum marito decesserit*," "*si maritus et uxor simul perierent*."

So, too, in the Code Napoleon the repeated phrase is "ceux qui ont péri ensemble." Yet, if the decision under appeal is correct, the section, designed to fill a gap and remedy a mischief, fails in part at least to do so and introduces a conception which, if hinted at in the observations to which I have referred, has had no place in the English or, so far as I am aware, any other system of law, and which, as I shall endeavour to show to your Lordships, is incapable of legal definition.

It is said that the section has no operation where the proper inference of fact is that the deaths in question are simultaneous. I do not understand it to be contended that there must first be an enquiry whether two or more deaths are simultaneous, and then, and only if that enquiry is answered in the negative, a further enquiry whether the circumstances render the order of death uncertain. Indeed, I understand it to be conceded by counsel for the respondents that there could be but one enquiry, but that it would allow an answer either (i) that A survived B or *vice versa*, or (ii) that it was uncertain which of them survived the other, or (iii) that neither survived the other because they died at the same time. If the first answer was given, there would be proof of survivorship; if the second, presumption of it; if the third, there would be neither proof nor presumption, but the law would stand as it stood before the Law of Property Act, 1925, came into operation. If, therefore, the case was one in which both A and B were interested to prove survivorship and the third answer was given, their estates would have to be administered upon the footing that they died at the same time, neither taking any interest in the estate of the other, so that just that unsatisfactory result would be reached which in the case of uncertainty it was the purpose of the section to avoid. That it was the intention of the legislature to achieve this result no one can suppose. It cannot have been deliberately intended to supply a remedy by way of presumption where the estates of A and B had to be administered as if they had died at the same time because the order of their deaths was uncertain, but to supply no remedy where the same estates had to be administered upon that footing because they, in fact, died at the same time. It may, nevertheless, be that the case is a *casus omissus*, and that the language of the section is so plain that no other conclusion can fairly be reached.

I turn again to the section, and assuming, as the respondents contended, that its operation is precluded if there is simultaneity of death, ask two questions which are complementary to each other: (i) in measurement of time, what is meant by survivorship? (ii) what is meant by such expressions as "simultaneity" of death or "dying at the same time"? I say that the two questions are complementary, because it is clear that the same standard of measurement must be applied. It cannot be said that two persons, dying the one a second after the other, die at the same time, unless it can also be said that one person surviving the other by a second does not survive him. Conversely, it cannot be said that A surviving B by a second, does not survive him, if in such circumstances A and B are not said to die at the same time.

I examine the second question first. I do not know the answer to it. In vain I tried to elicit from counsel what the answer to it was. It helps me not at all to hear that the expression "at the same time" must be understood according to the common understanding of mankind. It is at least an expression of which the meaning must vary according to the context and subject-matter. In one context seconds, even minutes, even parts of a day may be disregarded; in another the difference of a small fraction of a second may be all-important. The standard must be set before the maxim can be applied "*de apparentibus et existentibus eadem est ratio*." What is the standard in this context? A judge, with the limited power of discernment that nature has bestowed on him may decide that two horses have passed the post at the same time: A high-speed camera will show that he was wrong and that one horse passed it in front of the other. And if that camera appeared to show that they passed at the same time, yet a finer instrument would show that that too was wrong. It is the same with spatial and with temporal measurement: the example that I have given might be used to illustrate either of them. Suppose the question to be whether two bars of metal are the same length; the answer may be correctly given Yes, though there is a difference between them of one eighth of an inch, if that difference is in the context immaterial: but where an instrument

of the greatest precision is required it might be false to say that they were of the same length, though the difference between them was only one thousandth part of an inch. But what if the context is such that an answer must be given to the question, which of the two bars is the longer? Then it is as false to say they are of equal length if the difference is an eighth as if it is a thousandth or a ten thousandth part of an inch. And if the finest instrument can detect no difference, the answer is not that they are the same length, but that until a finer instrument has been made it remains uncertain which is the longer.

A So here the context of the question whether A and B died at the same time (if indeed it is necessary to ask it) is the complementary question, which of them survived the other. And so here, as the circumstances make it more and more difficult to determine which of them died first, the uncertainty increases. Human perception, aided by human understanding, fails to discern which of two persons dies first. For my part, therefore, I would in such a case say in all humility that it is uncertain which of them survived the other and shrink from the assertion that they died at the same time, a thing that I do not know and cannot prove. I decline to find simultaneity of death upon a balance or preponderance of probability unless that expression is first defined. The attempt at definition leads irresistibly to the conclusion that, where there is no proof of survivorship, the answer is not simultaneity but uncertainty.

B To this conclusion, too, the nature of the subject-matter points. It is possible, I suppose, to measure the happening of some events to a very small fraction, the thousandth part or less, of a second: but even in the quietude of a bedroom, with all the aid that science could give, it would be difficult to ascribe to any minute fraction of time an event so mysterious, so impalpable, so difficult to define as that, before the happening of which a man is said to be alive and after it to be dead.

C I conclude, then, that the true construction of sect. 184 is that it proceeds upon the footing that the proof of simultaneous death is impossible, or in other words upon the footing that, if survivorship is not proved, the only alternative is uncertainty. If it is thus read, there is no *casus omissus* and the section can be so construed as to cover every case in which it cannot be proved that one of two persons dying together survived the other. In coming to such a conclusion I would reject the suggestion that it is that of a metaphysician rather than of a lawyer, unless indeed metaphysics here include logic. It is a conclusion which has regard to our pre-existing law, to the way in which other systems of law have dealt with the same problem, and to the physical realities of the situation, and without putting any strain upon its language gives to the section a consistent and sensible meaning.

E If the construction that I would put upon the section is accepted, that is an end of the matter. But if the alternative view prevails and the operation of the section is excluded where upon a preponderance of probability the proper inference is that the deaths in question are simultaneous, it becomes necessary to look more closely into the facts of the present case. I find myself hampered in my researches by not seeing the goal clearly, for I do not yet understand what is the meaning of that which is to be inferred. It appears, however, that the inference is based, first, upon the effect of a high explosive bomb exploding, as I will assume, in the basement of the house, secondly, upon the condition of the bodies, all of which were recovered from the ruins of the house, and, thirdly, upon the probability that, since all the persons concerned used the basement shelter for safety, they were all together in that shelter at the time of the explosion of the bomb. It would, I think, have been contended by counsel for the respondents that the same inference of simultaneous death should be drawn, even if it could not properly be inferred that all the victims were in the same basement shelter: it would have been enough if they were in any part of the basement, or indeed in any part of the house.

H I dissent from every one of these propositions. If the inference of simultaneous deaths rests on proving according to the ordinary standards of proof that all the victims were in the shelter when the bomb fell, I hold that that fact is not proved. There is no evidence that any one of them reached the shelter before the bomb fell or that he or she remained throughout the period of alarm within the sheltered part of the basement. There is no evidence that the bombing had been severe or that more than one bomb fell in the neighbourhood

on that occasion. It appears to me to run counter to all experience to say that in such circumstances the proper inference is that all the victims remained all the time in the shelter, not even straying into the other part of the basement.

If it is not established that the victims were all in the shelter together at the time of the explosion, I see no ground for inferring upon any standard of measurement of time that may reasonably be adopted that all died at the same time.

I conclude, therefore, by saying that if contrary to my view simultaneity of death can in any case be inferred this is not such a case. I would only add that I have tried in vain to give any reasonable meaning and effect to the parenthetical words "subject to any order of the court." I would allow this appeal and restore the order of COHEN, J.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.* (for the appellants); *W. R. J. Hickman & Randall* (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

TRUSTEES OF SIR HOWELL JONES WILLIAMS TRUSTS v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott, Lawrence and Morton, L.J.J.). May 14, 15, 16, June 13, 1945.]

Income Tax—Exemption—Charity—Trust to maintain Institute in London to give social, educational and other amenities to Welsh people or people connected with Wales—Trust property comprising houses—Direction to trustees to apply rents and profits from settled properties to carrying on Institute and maintaining properties—Rents and profits so applied—Whether trust for charitable purposes—Whether moneys applied for charitable purposes only—Income Tax Act, 1918 (c. 40), s. 37 (1) (a), Sched. A.

Under a trust deed, executed on Oct. 12, 1937, certain freehold hereditaments, situated in London, were held by the appellant trustees "for the purpose of establishing and maintaining an Institute and meeting place in London . . . for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history, literature, music and art." By cl. 1 of the deed, the expression "Welsh people" meant and included persons of Welsh nationality by birth or descent, born or educated or at any time domiciled in the principality of Wales or the county of Monmouth. The deed further set out certain purposes for which any part of the settled properties used for the Institute could be used, cl. 5 referring to such purposes as being of an educational, social and recreational character and also any of the purposes of the Young Wales Association (London), Ltd., a company limited by guarantee, whose objects were in fact similar. Part of the properties comprised in and subject to the trusts of the deed were occupied and managed by the Young Wales Association which later changed its name to "The London Welsh Association" as an Institute for the purposes envisaged by the deed; the remainder of the properties, situated in Doughty Street, were let by the trustees to tenants. By cl. 9 of the deed the trustees were directed to apply the rents and profits arising from the settled properties to carrying on the Institute and otherwise for the maintenance of the properties. The trustees applied under the Finance Act, 1925, s. 19, to the Inland Revenue Commissioners for exemption from income tax under Sched. A in respect of the Doughty Street houses, on the ground that the houses were vested in them for charitable purposes only within the meaning of the Income Tax Act, 1918, s. 37 (1). This claim was rejected by the Special Commissioners, whose decision was upheld by the judge. On appeal, the questions for the determination of the court were: (i) whether the Doughty Street houses were vested in the appellant trustees at the relevant time for "charitable purposes" only within the meaning of the Income Tax Act, 1918, s. 37 (1) (a); (ii) if so, whether

the sums in question were "applied to charitable purposes only" within the meaning of the same subsection:—

Held: (i) there being no common quality which united the potential beneficiaries into a class except a vague connection with Wales, either through local residence or education, or by descent, it was impossible to hold that a trust for such beneficiaries was a good charitable trust.

Since by the terms of the deed the trustees were empowered to apply the rents and profits for the maintenance of the Institute, one of the functions of which was that of an ordinary social club, such function would be sufficient to prevent the trust being a "public charity" or for the "benefit of a defined community." The properties in question were, accordingly, not vested in the trustees for charitable purposes only.

(ii) it followed that the Special Commissioners were justified in holding that the sums which the appellants sought to free from Sched. A tax were not in fact applied to charitable purposes only.

[EDITORIAL NOTE.] To constitute a charity it is essential that there should be a public trust for the benefit of a definite community and not a fluctuating body of private individuals. If the gift is to a class it must be defined with sufficient certainty. The trust here was for the benefit of Welsh people or people educated or domiciled in Wales and it is held that, as in the class gift to Jews in *Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Comrs.* (5), the definition is too vague to be the object of a charitable trust.

AS TO GIFTS FOR PUBLIC PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, 136, 137, paras. 161-168, 177; and FOR CASES, see DIGEST, Vol. 8, pp. 259 260, Nos. 209-217, DIGEST Supp., Charities, 199b-217c.

AS TO MEANING OF CHARITY FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-317, paras. 617-624; and FOR CASES, see DIGEST, Vol. 28, pp. 10, 11, 82-84, Nos. 51-54, 469-483.]

D Cases referred to:

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 8 Digest 241, 1; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53.
- (2) *Verge v. Somerville*, [1924] A.C. 496; Digest Supp.; 131 L.T. 107; *sub nom. Verge v. Somerville, A.-G. for Australia v. Somerville*, 93 L.J.P.C. 173.
- (3) *Re Smith, Public Trustee v. Smith*, [1932] 1 Ch. 153; Digest Supp.; 100 L.J.Ch. 409; 146 L.T. 145.
- (4) *Re Compton, Powell v. Compton*, [1945] 1 Ch. 123; [1945] 1 All E.R. 198; 172 L.T. 158.
- (5) *Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Comrs.*, [1932] A.C. 650; Digest Supp.; 101 L.J.K.B. 459; 147 L.T. 161; 17 Tax Cas. 27.
- (6) *Re Drummond, Ashworth v. Drummond*, [1914] 2 Ch. 90; 8 Digest 244, 28; 83 L.J.Ch. 817; 111 L.T. 156.
- (7) *Wernher's Charitable Trust v. Inland Revenue Comrs.*, [1937] 2 All E.R. 488; Digest Supp.; 21 Tax Cas. 137.

F **APPEAL** by the trustees from a decision of MACNAGHTEN, J., dated May 10, 1944, dismissing an appeal from the Special Commissioners, who had affirmed a decision of the General Commissioners, disallowing a claim for exemption made by the trustees from Sched. A Tax in respect of certain houses in Doughty Street, London, on the ground (i) that the trust under which the houses fell was for charitable purposes, and (ii) that the moneys in question were applied for charitable purposes only within the meaning of the Income Tax Act, 1918, s. 37 (1) (a). The years to which the claim related were 1940-1941 and 1941-1942. The following facts were found by the Special Commissioners who had stated a case under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice:

On Oct. 12, 1937, Sir Howell Jones Williams (hereinafter called "the settlor") entered into a trust deed . . .

H Under this trust deed Howell J. Williams, Ltd., were appointed trustees, but on Oct. 13, 1937, this company resigned their trusteeship, and by deed of appointment of that date seven individuals (including the settlor who has however since died) were together appointed as new trustees. The present appeal was brought by the remaining trustees . . .

The trust deed of Oct. 12, 1937, . . . recites *inter alia* that certain properties specified in the schedule to the trust deed were at an earlier date transferred to the trustees, and that these properties were purchased by the trustees out of moneys provided by the settlor, to hold the same on trust.

The said trust properties have always been maintained as two blocks. The first

block (hereinafter referred to as "the Institute block") consists of property in Gray's Inn Road and Mecklenburgh Square which was adapted for use as an Institute in accordance with the trusts hereinafter cited.

The second block, consisting of 29, 30 and 31, Doughty Street, was let out to tenants. The first block only . . . was until May, 1941, occupied by the Young Wales Association (London), Ltd., which later changed its name to The London Welsh Association, Ltd., and which is hereinafter referred to as "the Association."

The trustees were not on this claim contending that this association was established for charitable purposes only. The claim . . . was . . . that the trustees were so established; that in applying . . . rents of 29, 30 and 31, Doughty Street to the purposes of the before mentioned association they had applied the same to charitable purposes only; and that, consequently, they were entitled to exemption from income tax, Sched. A, in respect of the rents of the said properties.

Cl. 4 of the trust deed is in the following terms: "the settled properties" referred to meaning all the before mentioned trust properties, and the "Endowment Fund" meaning any moneys vested in the trustees . . . as capital:—

(4) The trustees shall hold the settled properties in the endowment fund for the purpose of establishing and maintaining an Institute and meeting place in London to be known as "The London Welsh Association" (hereinafter called "the Institute") for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history, literature, music and art.

Cl. 5 of the trust deed related to the "Institute block" and is as follows:

(5) Without prejudice to the generality of the foregoing provision the trustees may use or permit such part of the settled property as is required to be used as the Institute for all or any of the following purposes:

(A) For providing a meeting place for Welsh people in London and their friends where they can obtain facilities for social intercourse, study, reading, rest, recreation and refreshment.

(B) For meetings, concerts, lectures, and other forms of instruction, discussion or entertainment especially in relation to subjects connected with the Welsh language and Welsh history, music, literature and art.

(C) For any educational purposes connected with the Welsh language or Welsh subjects or likely to be of value or interest to Welsh people.

(D) For establishing and maintaining a library of periodical historical and other literature in the Welsh language or relating to Wales or which is likely to be of use to Welsh people.

(E) As a hostel for the accommodation of Welsh people.

(F) For any of the purposes of the association or of any similar association which may be formed for the benefit of Welsh people in London and which purposes may be within the general scope of the trusts declared in cl. 4 hereof.

(G) Generally for such other purposes being charitable and for the benefit of Welsh people as the trustees may from time to time think fit provided always that the trustees shall not permit any alcoholic liquor to be sold or consumed on any part of the settled properties for the time being occupied or used for the purposes of the Institute.

Cl. 9 and 10 are as follows:

(9) The trustees shall apply the income arising from the endowment fund and any rents and profits arising from the settled properties and any other profits income or contributions which may be received by the trustees in carrying on the Institute and otherwise for the maintenance repair and insurance of the settled properties and in payment of the rates and other outgoings and towards the cost of maintaining, equipping and using the settled properties for the purposes of the institute and generally for carrying into effect all or any of the trusts of this deed provided always that the trustees may set aside and invest in authorised investments such sums out of the said income or the said rents and profits as they may from time to time consider necessary or desirable as a reserve fund to meet any extra expenses in connection with the settled properties or in carrying out the trusts hereof provided that the income of such reserve fund shall be applicable as income hereunder and the trustees may at any time apply the capital of such reserve fund or any part thereof as income.

(10) The Institute shall not at any time be used for meetings of any political party or for the purposes of any such party and no part of the property capital or income for the time being subject to the trusts hereof shall at any time be used or applied for any such purposes or for any other purposes not being charitable provided that this prohibition shall not prevent any application of money or property from purposes necessarily incidental to carrying out the charitable trusts of this deed.

. . . the objects to which the donations were intended to be devoted were [the following] activities: . . .

(a) Public lectures and debates, a music club, and library and educational classes . . .

(d) The maintenance of headquarters premises . . . comprising lounge and writing room, library . . .

(e) Badminton and table tennis clubs . . .

(g) Dances, whist and bridge drives, and annually a dinner and a garden party.

(h) A weekly social and dance . . .

A prominent part of the activities of the Institute consisted of lectures, debates, music club and literary and educational classes . . .

. . . cl. 13 provides that the trustees may delegate their powers to carry on the Institute by appointing managers, while cl. 14 empowers the trustees (in exercise of that power of delegation) to appoint the association . . . to act as managers of the Institute, . . . and may also permit the association to occupy the settled properties . . . subject to the use of the same for the purposes of the trusts.

. . . Under the said powers the trustees did in fact allow the association to act as managers of the Institute. The association so acted until May, 1941, and before this date the trustees made two donations to the association for the purposes of the Institute.

The association had been unable to continue their occupation of the premises after May, 1941, the Institute having since that date been let to the Welsh Services Club and no further donations have been made.

The decision of the commissioners was as follows [para. 13 of the stated case] :

Under the terms of the trust deed the purposes of the Institute, to which the rents of the properties in question held by the trustees have been applied, are wide and inclusive. While certain of its features conform to the idea of a charity, we have come to the conclusion that these features are not so dominating nor is the general character of the Institute such as effectively to distinguish it from an ordinary social club. We are unable to say that it is established for charitable purposes only . . .

Cyril King, K.C., and F. N. Bucher for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp, Reginald P. Hills and Anthony L. Gordon for the respondents.

SCOTT, L.J. : In this case the subject appeals from a judgment of MACNAGHTEN, J., dismissing an appeal from the Special Commissioners, who had affirmed a decision of the General Commissioners, disallowing a claim for exemption made by certain trustees from Sched. A tax in respect of certain houses in Doughty Street, St. Pancras, on the ground (1) that the trust under which they fell was for charitable purposes, and (2) that the moneys in question were applied for charitable purposes only within the Income Tax Act, 1918, s. 37 (1) (a). MACNAGHTEN, J., upheld the decisions below that the Crown was entitled to tax. I agree with him ; but, in deference to the arguments of counsel for the appellants, will state my reasons.

They contended, and logically it was their first point, that there is no finding in the special case on the second issue. I do not take that view. The material paragraph is No. 13. It might have been stated more clearly ; indeed, it may be open to criticism for ambiguity ; but, in the light of the recitals from the deed and the previous findings of fact in the special case, that paragraph can, and I think should, be read as containing two quite separate findings, (a) of law, interpreting the trust deed, and (b) of fact, as to how the income was applied. So read the two findings may, exegetically, be re-stated thus : (a) Under cl. 4 of the deed the purpose of the trust was to establish and maintain an Institute to be called "The London Welsh Association," (the name of the company limited by guarantee, which in the relevant years managed the Institute). The function so entrusted to the Institute pursuant to the deed was (1) generally, to create and run a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people resident in or visiting London ; "Welsh people" being defined as including not only persons of Welsh birth and descent, but anybody "educated or at any time domiciled in Wales" ; and (2), particularly, to prosecute all or any of a long list of purposes lettered (A) to (G). Those purposes include many which are not charitable, and the dominant purpose of the trust is that the Institute should be maintained and used as an ordinary social club. (b) Although some purposes of the trust were charitable, it is not the fact that the income from the houses in question was applied *only* to its charitable purposes, as required by sect. 37 (1) (a) of the Income Tax Act, 1918 ; on the contrary it was applied mainly for the purpose of running the Institute as a social club. Assuming that my exegesis of para. 13 of the Special Case is a fair interpretation of it, it follows, first, that there is no error of law, for the commissioners have construed the trust deed correctly ; and, secondly, that there is a plain finding of fact that the income in question was not applied to charitable purposes only ; and as there was evidence before the Special Commissioners

upon which they could properly so find, the ambiguity of para. 13 is not such as to afford ground for either allowing the appeal or sending the case back.

The main argument for the appellants was that the trust fell within the fourth of LORD MACNAGHTEN's categories in *Pemsel's* case (1), viz. :

... for purposes beneficial to the community, not falling under the heads of the relief of poverty, the advancement of education, or the advancement of religion.

Their submission was that it was "a public trust for the benefit of a definite community," viz., the Welsh community. They relied on *Verge v. Somerville* (2), as showing that poverty was not an essential attribute of such a community ; and that a particular class of persons, like soldiers returning to New South Wales after the last war, may constitute such a community. But there are two fallacies in this argument. To constitute such a charity there must be a purely public trust for the benefit of the definite community to be benefited and not a trust for the benefit of individuals ; and it must be of such a general kind as will permit of the court making a scheme for its administration, that being the only way in which the community can enjoy such a public charity : see *Re Smith, Public Trustee v. Smith* (3), at pp. 171-2, per LAWRENCE, L.J., and pp. 174-5, per ROMER, L.J., and the full examination there made of the decided cases : *Re Compton, Powell v. Compton* (4), per LORD GREENE, M.R.

In the present case it is, in my view, impossible to say that there was any definite community such as could confer a public quality on the purposes of the trust. The definition of Welsh people in cl. 1 of the trust deed includes persons of any nationality who have ever been "educated," or at any time "domiciled" in Wales ; and cl. 4 directs the application of the trust moneys to the establishment and maintenance of the Institute as a meeting place in London for anybody and everybody falling within that very wide definition, who might happen to be "resident in or visiting London" with a view to creating a centre for (*inter alia*) their social welfare. Cl. 5 carries this special aspect of the Institute still further away from a public charity by several of its specific directions as to the use of the Institute, in particular para. (A) :

For providing a meeting place for Welsh people in London and their friends where they can obtain facilities for social intercourse, study, reading, rest, recreation and refreshment,
and para. (E) :

As a hostel for the accommodation of Welsh people in London.

These specific provisions suffice of themselves to justify the conclusion of the commissioners that an ordinary social club was, to say the least, a main object of the Institute. They thought it the Institute's dominant function ; but, even if it was only one function, it is enough to prevent the trust being, in the eye of the law, a "public charity," or for the "benefit of a defined community." There is no way in which a court of equity could prevent the Welsh Association, Ltd., in their capacity of managers of the Institute, from using the trust moneys to carry out the non-charitable functions of the Institute.

Lastly, the specific condition laid down in sect. 37 (1) must be truly satisfied if exemption from tax is to be claimed, viz., that the rents and profits of the trust houses must be applied only to charitable purposes. On that issue the commissioners were entitled to draw their own inferences from the evidence they heard in the light of the provisions of the trust to which I have referred. It is plainly impossible to say that there was no evidence to support their finding that that condition was not satisfied.

Since writing this judgment, I have had the advantage of reading those of my brethren. If, as MORTON, L.J., thinks, para. 13 of the special case ought to be read as containing no finding on that issue, I should subscribe to his conclusion. In other respects, I agree with both their judgments.

The appeal must be dismissed with costs.

LAWRENCE, L.J. : I am of the same opinion.

It is clear from the authorities cited by LORD GREENE, M.R., in *Re Compton, Powell v. Compton* (4), and from the speeches in the House of Lords in *Keren v. Inland Revenue Comrs.* (5), that the law recognises no purpose as charitable, unless it is of a public character, that is to say, for the benefit of the community or an appreciably important section of the community, and not merely for the benefit of private individuals, or a fluctuating body of private individuals,

and unless the section of the community is sufficiently defined and identifiable by some common quality of a public nature. These principles apply not only to the fourth class in LORD MACNAGHTEN's statement in *Pemsel's* case (1), but to all charitable gifts.

A The first question in this case is whether the beneficiaries designated in the trust deed of Oct. 12, 1937, constitute a sufficiently defined class of the community or are a fluctuating body of private individuals. There is perhaps an ambiguity in the phrase, a fluctuating body of private individuals, for, in one sense, the freeman of Saltash, or the inhabitants of Falkirk, or the native inhabitants of Dacca, or the schoolchildren of Turton, might have been said to be a fluctuating body of private individuals. But in each case they possessed the common quality of living in or being freemen of a specified place, and were, therefore, an easily identifiable section of the public as opposed to the classes of private individuals concerned in *Compton's* case (4), in *Re Drummond* (6), and in *Wernher's Charitable Trust* (7).

B In the present case there is, in my opinion, no such common quality in the class sought to be benefited, nor is the class easily identifiable. The speech of LORD TOMLIN in the House of Lords in *Keren v. Inland Revenue Comrs.* (5), p. 652, in which the other noble Lords concurred, makes it clear that the class must be sufficiently defined and that, if its definition is vague, it cannot be the object of a charitable trust. There the class was Jews, who were to be settled from Palestine, Syria and Turkey, and it was pointed out that Jews might come from any part of the world, and, although the matter was not specifically referred to, might carry little or much Jewish blood. So, in the present case, the class to be benefited includes anyone of Welsh descent who visits London, and anyone who has been educated in Wales. Welsh descent may, it appears to me, mean a person who had a Welsh great-grandmother, and obviously anyone may have been educated in Wales. There is really no common quality which unites the potential beneficiaries into a class except a vague connection with Wales, either through local residence or education, or through an unspecified proportion of Welsh blood. It is scarcely possible to imagine a class more vague and ill-defined, and, in my opinion it is impossible to hold that a trust for such beneficiaries is a good charitable trust.

D For these reasons, I think the appeal should be dismissed.

E MORTON, L.J.: In spite of the ingenious argument of counsel for the appellants, I think that the decision of MACNAGHTEN, J., affirming the Special Commissioners, was clearly right. I need not re-state the facts, which are fully set out in the special case, and are summarised in the judgment of MACNAGHTEN, J.

F Two questions are before us for decision: (1) Were Nos. 29, 30, and 31, Doughty Street vested in the appellants at the relevant time for "charitable purposes" within the meaning of sect. 37 (1) (a) of the Income Tax Act, 1918? Counsel for the appellants conceded that, in view of certain authorities, these words must be read as meaning "for charitable purposes only." (2) If so, were the sums now in question "applied to charitable purposes only" within the meaning of the same subsection? In my view, the former question must be answered in the negative. The purpose for which those properties were held by the appellants is stated as follows in cl. 4 of the deed of Oct. 12, 1937, which established the trust:

G For the purpose of establishing and maintaining an Institute and meeting place in London to be known as "The London Welsh Association" (hereinafter called the Institute) for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history, literature, music and art.

H The expression "Welsh people" is defined as follows in the deed:

The expression "Welsh people" shall mean and include persons of Welsh nationality by birth or descent or born or educated or at any time domiciled in the principality of Wales or the county of Monmouth.

In this definition I do not think that the word "domiciled" should be given its strict legal meaning; I think it refers merely to residence. It is plain that persons who have no Welsh blood in their veins, and who may live in any part

of the world, would come within the class of persons to be benefited. Thus, a native of Africa who had been educated in Wales, and was spending a few days in or near London, would be within the class. So, I think, would be a South Sea Islander, who had lived for a year or so in Wales, and examples of a less extreme nature might be multiplied. The members of this class have no common place of residence, and have not even a common nationality.

Turning again to cl. 4, I think it falls into two parts. The first part defines the purpose for which the settled properties are to be held; the second part, beginning with the words "with a view" states the end which the settlor hoped to achieve by establishing and maintaining the Institute. In order to ascertain whether the purpose of establishing and maintaining the Institute is a charitable purpose, I turn to cl. 5 of the deed to see how the Institute may be used. That clause begins:

Without prejudice to the generality of the foregoing provisions the trustees may use or permit such part of the settled properties as is required to be used as the Institute for all or any of the following purposes.

There is set out a number of purposes, which include the following:

(A) For providing a meeting place for Welsh people in London and their friends where they can obtain facilities for social intercourse, study, reading, rest, recreation and refreshment. (B) For meetings, concerts, lectures, and other forms of instruction, discussion or entertainment, especially in relation to subjects connected with the Welsh language and Welsh history, literature, music and art. (E) As a hostel for the accommodation of Welsh people in London.

From the passages quoted it is, I think, quite apparent that the whole of the rents and profits of Nos. 29, 30 and 31, Doughty Street might be applied for the maintenance of an institute which was to be used simply as a social club for the benefit of persons resident in or near London, or visiting London, who came within the class of "Welsh people" as defined in the deed. It is true that there are other purposes specified in cl. 5 of the deed, which are of an educational character, but the words "all or any" in the passage already quoted make it plain that neither the trustees nor the managers of the Institute would be bound to apply the funds for such purposes, or to arrange for the Institute to be used for such purposes. The result is that, even if I assume in favour of the appellants that there is no finding of fact by the Special Commissioners which is fatal to their case, the property in question is not vested in them as trustees for charitable purposes only. The running of a social club for the benefit of such a class of persons as is described in the deed is far removed from any purpose which has been held to be charitable in any decided case. I do not think it is necessary to examine in detail the cases which were cited to us. If the construction which I place upon the deed is the right construction, it is plain that the whole of the rents and profits of the Doughty Street properties might be applied for purposes which were not charitable, without travelling outside the limits of the purposes set out in the deed of Oct. 12, 1937.

Having regard to the view which I have formed on question (1), question (2) does not arise; but I think that it is abundantly clear that the sums which the appellants seek to free from Sched. A tax were not in fact applied to charitable purposes only. This appears from para. 11 of the Special Case, which I need not reproduce in this judgment. In para. 13 the Special Commissioners state their conclusion that the general character of the Institute was not such as effectively to distinguish it from an ordinary social club. Assuming, in favour of the appellants, that this conclusion is open to review by this court, I am not at all inclined to dissent from it. I agree that the appeal fails and must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: T. D. Jones & Co. (for the appellants); Solicitor of Inland Revenue (for the respondents).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

IN THE MATTER OF THE LOCAL GOVERNMENT
SUPERANNUATION ACTS, 1937 AND 1939,
ALGAR v. MIDDLESEX COUNTY COUNCIL.

[KING'S BENCH DIVISION (Humphreys and Cassels, JJ.), June 12, 13, 1945.]

Local Government—Superannuation—"Interim registrar" of births and deaths—

Originally contributory employee as Poor Law Officer—Request for assurance that superannuation rights protected on change of appointment—No reply to request—Estoppel—Contributory employee since commencement of appointment as "interim registrar"—Births and Deaths Registration Act, 1874 (c. 88), ss. 24, 25—Local Government Act, 1929 (c. 17), ss. 21, 22, 119—Local Government Superannuation Act, 1937 (c. 68), ss. 3 (2) (d), 27 (1), 35.

The applicant was an assistant collector to the Willesden Board of Guardians and, by the Local Government Act, 1929, s. 119, he was transferred to and became an officer of the respondents, the Middlesex County Council, as from Apr. 1, 1930. He exercised the option given to him by sect. 124 of the 1929 Act of remaining subject to the provisions of the Poor Law Officers' Superannuation Act, 1896, for superannuation purposes. From the time he was transferred to the service of the respondents the applicant continued as an assistant collector in the finance department of the respondents, and also held the office of deputy registrar of births and deaths for the Harlesden registration sub-district, to which he had been appointed on Jan. 10, 1914, by the registrar of births and deaths, who was also a vaccination officer. On Sept. 30, 1938, the registrar resigned his office and, in accordance with the Births and Deaths Registration Act, 1874, s. 25, the applicant became "interim registrar" of births and deaths. On Sept. 12, 1938, the respondents wrote to the applicant in reference to his continuing to act as interim registrar until the respondents' scheme for the revision of registration districts came into operation; and by letter dated Sept. 16, 1938, the applicant agreed to this proposal on the understanding that he would be granted leave of absence from his office as assistant collector during the period of his duties as "interim registrar" and at the same time he asked for an assurance that his superannuation rights would be protected. There was no reply to the applicant's letter. On Sept. 28, 1938, the Registrar-General wrote to the applicant notifying him that as from Oct. 1, 1938, he was to carry out all the duties of an interim registrar until further notice. The applicant also became temporary vaccination officer as from Oct. 1, 1938, and, only as such, he was in the employment of the respondents and pensionable as a contributory employee under the Local Government Superannuation Act, 1937, as applicable to a transferred Poor Law employee, and the period of service in this capacity from Oct. 1, 1938, to Apr. 1, 1939, was to be reckoned for superannuation purposes. By notice dated Apr. 28, 1939, served upon the applicant by the respondents and purporting to be given pursuant to regulations made by the Minister of Health under the Local Government Superannuation Act, 1937, the applicant was informed that on Apr. 1, 1939, the 1937 Act became applicable to him and that he would be a contributory employee for the purposes of that Act. A letter dated Nov. 23, 1940, was written by the Middlesex County accountant to the applicant stating that, until a ruling had been obtained from the Minister of Health regarding the application of the 1937 Act to the applicant's appointment as interim registrar, contributions to the superannuation fund could not be accepted, and that contributions paid by the applicant since his appointment were being returned to him. This question was referred to the Minister and subsequently the respondents decided that as interim registrar the applicant was not superannuable under the 1937 Act as a contributory employee. The questions for the determination of the court were (i) whether the applicant in respect of his office as interim registrar of births and deaths was a contributory employee within the meaning of the Local Government Act, 1937, s. 3 (2) (d); (ii) whether as between the applicant and the respondents, the respondents were not estopped by their conduct, in relation to the terms upon which the applicant accepted his appointment

as interim registrar and to the circumstances in which he continued in such appointment after Apr. 1, 1939, from relying on such facts (if any) as tend to establish that the applicant was not entitled to the benefits of the respondents' superannuation fund :—

HELD : (i) the word "interim" as part of the description of an appointment, did not qualify the position of an appointee but limited the time for which he was appointed. From the date when the applicant became "interim registrar" he was performing all the functions attaching to the office of registrar of births and deaths; and, although he had remained so ever since, he was a contributory employee with a right to participate in the benefits of the appropriate superannuation fund under Part 1 of the Local Government Superannuation Act, 1937.

(ii) by their conduct the respondents had allowed the applicant to alter his position on the assumption that his superannuation rights were assured. The respondents, therefore, were estopped from relying on any facts which would tend to establish that the applicant was not entitled to the benefits of their superannuation fund.

De Tchihatchef v. Salerni Coupling, Ltd. (1) applied.

[EDITORIAL NOTE.] The Births and Deaths Registration Act, 1874, provides that if any registrar dies, resigns, or otherwise ceases to hold his office, his deputy shall be interim registrar. The question here is whether such interim registrar is entitled to superannuation under the Local Government Superannuation Act, 1937. This depends upon whether he is a registration officer, and it is held that he is, being in fact the registrar. The word "interim" means only "for the time" and qualifies the position of the appointee only in respect of the time for which he is appointed. In general, the word contemplates a short period, but the fact that the interim appointment has lasted for several years does not affect the nature of the employment.

It is further held that the local authority, by failing to answer the applicant's letter relating to his superannuation rights, were estopped from relying on any facts which would establish that he was not entitled to benefit.

AS TO SUPERANNUATION OF OFFICERS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 71-88, paras 123-154; and FOR CASES, see DIGEST, Vol. 37, pp. 214-215, Nos. 100-105.]

Cases referred to :

* (1) *De Tchihatchef v. Salerni Coupling, Ltd.*, [1932] 1 Ch. 330; Digest Supp.; 101 L.J.Ch. 209; 146 L.T. 505.

* (2) *British Mutual Bank Co., Ltd. v. Charnwood Forest Ry. Co.* (1887), 18 Q.B.D. 714; 1 Digest 591, 2267; 56 L.J.Q.B. 449; 57 L.T. 833.

CASE STATED by the Minister of Health under the Local Government Superannuation Act, 1937, s. 35, at the request of the applicant, Leonard Algar, an interim registrar of births and deaths for the sub-district of Harlesden of the registration district of Willesden, Middlesex. The facts are fully set out in the judgments of HUMPHREYS and CASSELS, JJ.

W. A. L. Raeburn for the applicant.

Harold B. Williams for the respondents.

CASSELS, J. : HUMPHREYS, J., has asked me to give my judgment first. This is a case stated by the Minister of Health under the Local Government Superannuation Act, 1937, s. 35, and concerns the superannuation rights of the applicant, Leonard Algar. The respondents, the Middlesex County Council, have decided that as interim registrar of births and deaths for the sub-district of Harlesden of the registration district of Willesden the applicant is not superannuable as a contributory employee under the provisions of the 1937 Act. The applicant, being dissatisfied with that decision, requested the Minister to state a case for the opinion of this court.

Two questions have been submitted for the opinion of the court. The first is whether the applicant, in respect of his office as interim registrar of births and deaths, is a contributory employee within the meaning of the 1937 Act. The second, which was added at the request of the applicant through his solicitors, is whether, as between the applicant and the council, the council is not estopped by its conduct in relation to the terms upon which the applicant accepted his appointment as interim registrar, and to the circumstances in which he continued in such appointment after Apr. 1, 1939, from relying upon such facts (if any) which tend to establish that the applicant is not entitled to the benefits of the council's superannuation fund.

The 1937 Act made further and better provisions with respect to the payment of superannuation allowances by local authorities, and it is the Act which covers the position in this case. That Act came into operation on the appointed day, Apr. 1, 1939. By sect. 3 (1), (2) (d), the persons entitled to participate in the benefits of the superannuation fund, and thereby to become contributory employees included—I now quote from (d)—

A . . . every registration officer acting in or for a district in relation to which registration functions are discharged by a local authority who are not a local Act authority. The respondents are such a local authority. The question is, is the applicant a registration officer. Sect. 40 of the Act defines “registration officer” in the following terms :

“Registration officer” means a superintendent registrar or registrar of births and deaths, and includes a registrar of births and deaths exercising any of the functions of a registrar of marriages and a person appointed by a local authority to act as a deputy superintendent registrar or deputy registrar of births and deaths.

B Thus we get these plain governing words in that definition section that “registration officer” means a registrar of births and deaths. By sect. 27 (1) it is provided :

Every registration officer shall be deemed, for the purposes of this Act and of any local Act scheme, to be an officer in the employment of the local authority discharging registration functions in relation to the district in or for which the officer acts . . .

C There is a proviso which reserves the power of the Registrar-General to remove a registration officer from office, and provision is made in Part IV of the Second Sched. of the Act with respect to such registration officers as are therein mentioned, and that makes provision for the reckoning of the service of registration officers.

D Those being the relevant sections of the 1937 Act, it becomes of importance to see who the applicant is, and what he has been. For the purpose of this case, the applicant started his career as an assistant collector to the Willesden Board of Guardians, and by the provisions of the Local Government Act, 1929, s. 119, he was transferred to and became an officer of the respondents as from Apr. 1, 1930, continuing as assistant collector in the finance department. He also continued to hold the office of deputy registrar of births and deaths to which the registrar of births and deaths, one James, had appointed him in 1914.

E James was also vaccination officer. On Sept. 30, 1938, James resigned his office as registrar—he had been ill for some time—and about the same time he retired from the position of vaccination officer. During his illness, and until his retirement, the applicant had been doing James’s work in both offices, and at the same time he retained his position as a collector in the respondents’ finance department.

F What happens when a registrar dies or resigns, or in some way ceases to perform his duties ? As to that, we start with this, that the appointment of a deputy registrar is in the hands of the registrar, and the Births and Deaths Registration Act, 1874, ss. 24, 25, deal with that position. Those two sections read as follows :

G Sect. 24 : Every superintendent registrar shall from time to time, by writing under his hand, appoint, with the approval of the Registrar-General, a fit person to act as his deputy in case of his illness or unavoidable absence, or in any prescribed case ; and every such deputy while so acting shall have all the powers and fulfil all the duties and be subject to all the obligations by the Births and Deaths Registration Acts, 1836 to 1874, or any of them, giving to or imposed on the superintendent registrar whose deputy he is.

Such deputy shall hold his office during the pleasure of the superintendent registrar by whom he is appointed, but shall be removable from his office by the Registrar-General.

H Every superintendent registrar shall be civilly responsible for the acts or omissions of his deputy.

The provisions of this section shall apply to registrars in like manner as if it were enacted with the word registrar substituted for superintendent registrar.

Sect. 25 : If any superintendent registrar dies, resigns, or otherwise ceases to hold his office, his deputy shall be interim superintendent registrar.

Every interim superintendent registrar shall act as superintendent registrar and have all the powers and perform all the duties and be subject to all the obligations of a superintendent registrar until another is duly appointed.

The provisions of this section shall apply to a registrar in like manner as if it were enacted with the substitution of the word registrar for superintendent registrar.

If a registrar for any sub-district dies, resigns, or otherwise ceases to hold his office, and there is no interim registrar, then the superintendent registrar shall, when so required by the Registrar-General, appoint an interim registrar for such sub-district. There, for the first time in any statute relating to the registration of births and deaths, comes into existence by reference the words "interim registrar" or "interim superintendent registrar."

What does the word "interim" mean? Counsel for the applicant has said that it is only a classical way of saying "temporary." That may be true. I suppose it is another way of saying "for the time being." I think it relates to time, and not particularly to the appointment; and, if the words had been "registrar for the time being" instead of "interim registrar," it may very well be that this trouble would not have arisen, or, if it had arisen, it would not have arisen in this form. At any rate, it was by reason of the operation of sect. 25 of the 1874 Act, when James ceased to perform the functions of registrar, that the applicant became "interim registrar"—or, to put it the other way round, became "registrar interim"—and received a letter from the Registrar-General dated Sept. 28, 1938, stating that he was to carry out all the duties in the capacity of interim registrar of births and deaths until further notice, together with this not perhaps very encouraging addition: "on the understanding that by so doing you will acquire no vested interest in the office"; and in the letter were enclosed several forms, including incidentally a reminder or a reference to the fact that the applicant had upon him the responsibility of appointing a deputy. After all, it is important to ensure that the office of registrar of births and deaths should continue, because otherwise births may occur and deaths may occur without being registered; it is one of those services which must go on, and provision must be made by statute for the continued discharge of the functions of the office when death or illness or retirement removes the present holder.

The applicant also became temporary vaccination officer; as such (and only as such) he is in the employment of the council, and no question arises as to his being superannuable as a contributory employee.

One broad fact stands out, and that is that when he became interim registrar, or registrar for the time being, he ceased to be employed in the finance department of the respondents. The remuneration of a registration officer is by fees, and out of these the applicant paid his contribution for superannuation purposes to the respondents in respect of his office as interim registrar.

On Apr. 28, 1939, soon after the 1937 Act came into force, a letter was addressed to him by the respondents setting out his rate of contribution and the amount of previous service which the applicant was entitled to reckon for superannuation purposes, namely, from the time that he was first employed by the Willesden Board of Guardians, and informing him that he was a contributory employee for the purposes of the Act. But a reconsideration of the position took place, and on Nov. 23, 1940, the county accountant wrote a letter to the applicant in which he said that until a rule had been obtained from the Minister of Health regarding the application of the 1937 Act to the applicant's appointment as interim registrar, contributions to the superannuation fund could not be accepted, and enclosing the respondents' cheque for the amount of the applicant's contributions paid by him in respect of fees received from the public. On Dec. 20, 1940, this question was submitted to the Minister.

The first question is as to whether, as an interim registrar, the applicant is a contributory employee, and that depends upon whether the applicant is a registration officer within the meaning of the 1937 Act. Between 1836 and 1896, registrars were not in the service of the Boards of Guardians, and it was only by the Poor Law Officers' Superannuation Act, 1896, s. 19, that they were deemed to be in the service of the Guardians of the Unions in which their districts were situated for the purposes of that Act; and it was pointed out to us in the course of the argument by counsel for the respondents that you do not find in that Act any reference to an interim registrar.

The Local Government Act, 1929, transferred all the functions of the Guardians to the county councils, and sect. 122 of that Act made provision for a registration officer to be deemed to be an officer transferred to the service of the council. Sect. 134 provided that registration officer means any superintendent registrar; sect. 22 converted registration officers into salaried officers instead of officers

receiving fees ; and sect. 24 provided for the re-arrangement of registration districts ; but no scheme for either of these last-mentioned purposes was ever brought into being, and it was pointed out that the 1929 Act contained no reference to an interim registrar..

- A Sect. 40; therefore, of the 1937 Act, has to be read particularly in order to ascertain what is really meant, for the purposes of superannuation, by the term "registration officer." That section I have already read ; and, when one looks at the position which was occupied by this applicant, it is very difficult to see why he should not be regarded as a registration officer, seeing that he was a registrar. What was he doing ? If he was doing his duty (and there is no suggestion in this case that he was not) he was performing all the functions and discharging all the duties and obligations attaching to the office of registrar which he was called upon by statute to discharge. If he had not been in the position which had just recently been vacated by the registrar, there would have been no registrar. If anyone had asked in respect of this district who was the registrar, the answer could only have been that it was the applicant. He was the registrar.

Is he a contributory employee within the meaning of sect. 3 (2) (d) ? If my reasoning is right, he was a registrar. A registrar is a registration officer. Sect. 3 (2) (d) says :

- C . . . every registration officer acting in or for a district in relation to which registration functions are discharged by a local authority who are not a local Act authority. And that, it is conceded, includes the respondents in this case. The facts as disclosed in this matter indicate that the word "interim", or the words "for the time being," if that is what "interim" means, have meant, so far as the applicant is concerned, the period of between six and seven years that he became, by operation of the 1874 Act, registrar for the interim or for the time being on Sept. 30, 1938, and, we are told, he still is.

My view, therefore, certainly is that the answer to the first question which has been submitted to this court—whether the applicant, in respect of his office as interim registrar of births and deaths, is a contributory employee within the meaning of the 1937 Act—is in the affirmative.

- E I think it is necessary in the circumstances of this case, should it go further, to deal with the matter which is raised in the second question, namely, the question of estoppel. A feature of this case, which does not appear in every case, is the sympathy which is felt by the respondents for the applicant. The respondents feel that if he is not a registrar—if he does not come within the application of the Superannuation Act, 1937—he has had a very bitter experience, for he was told by the respondents that he did ; he was led to believe that he did ; he paid up his contributions as if he did, and they accepted his money as if he did. I need not read again the letters which have already been read ; but there is the letter which he wrote on Sept. 16, 1938, very early in the history of the matter, indeed before he actually took up the question, in which he said, referring to leave of absence—that meant from his position as collector :

It is understood that leave of absence is to be granted during the period that I shall be interim registrar. I shall be glad, however, to have the county council's assurance that my superannuation rights will be protected.

- G Now that raised a matter of some considerable importance to the applicant. To that letter he received no immediate reply ; but some seven months later, namely, on Apr. 28, 1939, he received a letter from the respondents of that date referring to the Local Government Superannuation Act, 1937, and setting out some most interesting particulars from the point of view of the applicant. Therein his category was described as a transferred officer ; the description of his employment was that of interim registrar ; his rate of contribution to the superannuation fund was 3½ per cent. ; and he was going to be able to reckon for superannuation purposes his services as far back as 1914 when he first went into the offices of the Willesden Board of Guardians.

It is contended by the applicant that the respondents are now estopped by their conduct from relying on any facts which would tend to establish that the applicant is not entitled to the benefits of the council's superannuation fund. The question arises : is that fact, is it law, or is it a mixture of both ? Counsel for the respondents said quite frankly that no public authority, having allowed these things

to happen, could wish to take advantage of them; but, in the discharge of his duty to the court, he urged that this letter would not be sufficient to establish the position for which the applicant was contending, because he suggested that the applicant had not altered his position. In this connection he cited *de Tchihatchef v. The Salerni Coupling, Ltd.* (1), the headnote of which is all, I think, that I need read, and then only the first two paragraphs:

If a person authorises or permits another to make a representation intended to be acted upon and it is acted upon, that person cannot afterwards be heard to say that the representation is not true. A

This applies when the representation is as to the legal effect of a document if there is no qualification in the representation suggesting that the document and not its effect as represented is to govern the relations of the parties.

Certainly the first of those two paragraphs seem to fit in with the facts in this case.

Counsel for the respondents also referred to *The British Mutual Banking Co., Ltd. v. The Charnwood Forest Railway Co.* (2), and he cited a passage in which BOWEN, L.J., said, at p. 718: B

... no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so? C

That was not the main decision in that case; it was a secondary point in the matter; and, speaking for myself, whilst accepting it as the law, I do not see that it is particularly applicable to the facts in this case. The applicant here was concerned about his superannuation rights when he wrote the letter of Sept. 16, 1938. By not answering that letter, it may be said that the respondents allowed him to think that he had their assurance that his superannuation rights would be protected. When the letter of Apr. 28, 1939, reached him, he was assured of the position; the applicant altered his position by giving up his appointment in the finance department of the respondents and becoming and remaining an interim registrar, and thus losing, if the contentions of the respondents on the first point in this case had prevailed, his rights to superannuation. If he had not been allowed to think that his superannuation rights would be protected, if he had not received the letter of Apr. 28, 1939, he might have given up, or declined to continue in, the position of interim registrar, and returned to his position in the finance department, or have asked that steps should be taken to have his interim appointment made permanent. D

Taking this view, in my judgment the answer to the second question is that as between the applicant and the respondents, the respondents are estopped by their conduct from relying on any facts which would tend to establish that the applicant is not entitled to the benefits of the council's superannuation fund. E

Those being the two answers to these two questions, that concludes the investigation which has followed their submission to this court. F

HUMPHREYS, J.: I agree with the view upon this matter expressed by CASSELS, J. I have been very doubtful in the course of the argument as to what our decision ought to be upon the first point, namely, the question whether the applicant in this case is entitled to be considered a contributory employee by virtue of his office as interim registrar of births and deaths within the meaning of the 1937 Act. G

There are, however, two things in this case which are very clear. The first is that the point is one which is extremely unlikely to arise, and was extremely unlikely to arise in 1937. The appointment of an interim officer, if a public authority does its duty (and public authorities are assumed to do their duty) is likely to be an extremely temporary matter. When an office which is never allowed to be vacant is filled on the terms that the appointing authority must have a little time to consider who is the person to appoint (and that is the meaning of appointing an interim officer), it is obvious that the statute is contemplating a very, very short period of time during which he will be that temporary officer or interim officer. H

In the normal way there is no doubt at all in my mind that as from Sept. 30,

1938, when the applicant became, by virtue of an Act of Parliament, interim registrar, he having been deputy registrar of births and deaths, it was contemplated by everybody that in a very short period—which could only be a matter of weeks—the position would be filled, and that someone would be appointed registrar by the Registrar-General, who has the duty of making that appointment. It is owing to the muddle into which the Middlesex County Council got in regard to their superannuation schemes—perhaps also owing to the war—that the matter dragged on in this particular case for years and years, and nothing has been done.

It is also to be observed that the expression “interim” as applied to an officer is, so far as I am aware, not mentioned in any Superannuation Act at all, either in the Local Government Superannuation Act, 1937, or the Act which was passed in 1896, or in any other Act of Parliament dealing with superannuation. The only statute to which our attention has been called in which the word is to be found is an Act which has nothing to do with superannuation at all, the Births and Deaths Registration Act, 1874; and it is that Act, dealing, no doubt, with quite different matters, which provided that if a person who was registrar of births and deaths died or resigned, or became incapable of carrying out the duties of his appointment, the deputy whom he was required to have appointed by sect. 24 of the Act automatically became registrar for the time being; and that is what happened to this gentleman on Sept. 30, or Oct. 1, 1938. So I think that the question which is asked of us in this case is one which is extremely unlikely to be of any general importance. There may, of course, be other cases which have arisen as the result of the same unusual difficulties which arise in this case, but it is not likely that the question will arise, any ordinary case in ordinary times. I think it is almost inconceivable that anyone ever contemplated or ever would contemplate the idea that a temporary officer called interim registrar would continue as interim registrar for six years, as this applicant has done.

The next thing which I think is quite clear is that if the court is plunged, as we were plunged yesterday, into a sea of statutes, we come up perhaps gasping, but no wiser than we were when we went underneath—for I cannot find any provision in any of the numerous statutes and sections to which our attention was directed which helps the applicant in the smallest degree. I think it is quite clear that unless he is a registrar of births and deaths, he has no right whatever to become a contributory employee; he is not a contributory employee and he has no right to ask, as he did ask, that he should be treated as a person who had, of course, the duty of contributing, but also the right of receiving later on the results of his contribution to a superannuation fund.

Sect. 3 of the 1937 Act states in the plainest possible terms who are the persons entitled to become contributory employees; and it is common ground that sub-sect. (2) (d) of that section is the provision, if any, which applies to this applicant, and that reads as follows:

... every registration officer acting in or for a district ... [which includes this district, and states, in regard to such a person, that on or after the appointed day all such persons as are mentioned in, amongst others, that provision] shall be entitled to participate in the benefits of the appropriate superannuation fund.

Is the applicant a registration officer? That depends upon the definition of registration officer which is to be found in sect. 40, which says that “registration officer” means and includes a registrar of births and deaths. It is quite clear, incidentally, that it does not include a deputy registrar as such, because it makes mention of a particular class of deputy registrars who are to be included, and therefore any other deputy registrar, according to the ordinary canon of construction, would be outside the Act.

The question then arises, is this gentleman a registrar of births and deaths. During the very interesting argument to which we listened yesterday, I confess it seemed to me throughout that that was going to be (and I now think it is) the one and only real question at issue in this case as far as this point is concerned namely, is the applicant a registrar of births and deaths. If he is, he appears to me to come within the express terms of the Act of Parliament.

It is worthy of note that the word “employee” is also defined in that same section. 40, and means:

... an employee whether permanent or temporary, but does not include a person whose employment is of a casual nature.

In this case nobody will insult the applicant by suggesting that his employment as registrar or interim registrar was casual employment.

Upon this point, I ask myself, what is the meaning of "interim registrar." What is an interim registrar? I turn to the Act, and the only Act, which deals with that question, the Births and Deaths Registration Act, 1874, s. 25, of which—I leave out the word "superintendent," because the section is afterwards said to apply to registrars as well as to superintendent registrars—reads as follows:

If any registrar dies, resigns, or otherwise ceases to hold his office, his deputy shall be interim registrar. Every interim registrar shall act as registrar and have all the powers and perform all the duties and be subject to all the obligations of a registrar until another is duly appointed.

That was the position of the applicant, who was, at the time, deputy registrar, which office he ceased to hold on Sept. 30, 1938.

In my view, the word "interim" means nothing more than "for the time," "in the meantime"; that is all it means. I asked the question in the course of the argument: Is the dividend which is declared to be an interim dividend any the less a dividend? It cannot be recalled afterwards. A very much better illustration was at once afforded by counsel for the applicant, who said: Can an injunction which is granted by the court be said to be not an injunction because it is only an interim injunction? The answer surely must be that it is an injunction, and just as much an injunction as a permanent injunction, with this qualification, that it is to last only for a certain time, but otherwise it is just as effective as is, in truth and in fact and in law, an injunction. I think the word "interim", as part of the description of an appointment, does not qualify the position of the appointee in any way whatever except as regards the limit of time for which he is appointed.

For these reasons, in my opinion—though I am not saying I am not conscious that this is a matter upon which it would be possible to take differing views—on the whole I think that as from the date when, by virtue of the statute, this applicant became interim registrar, he was registrar of births and deaths, and has remained so, so far as I know, ever since; and as such, in my opinion, he became and has been a contributory employee under the provisions of the 1937 Act. Those are the reasons which induce me to express my view in my own words, to agree with the judgment on that point delivered by CASSELS, J.

I think it necessary to say just a few words as to the other point, the point of estoppel; it does not arise directly since our judgment is in favour of the applicant on the main question. What is said here is this. It is argued that the action of the Middlesex County Council brings them within the law of estoppel, which I take as being satisfactorily stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 13, para. 452, in these words, at p. 400:

Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that other has acted on such representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

On the facts of this case, what happened was that on Sept. 16, 1938, having been offered this position of interim registrar, the applicant wrote to the clerk of the council and said:

Since July 21 last, when Mr. James [who was the retiring registrar] by reason of ill-health became incapable of discharging his duties as registrar, I have been carrying out all the requirements of the office in addition to my usual work in the finance department at the local county offices. As interim registrar, on Oct. 1 next I shall be happy to continue upon the existing fee basis of remuneration until the county council's scheme for the revision of registration districts comes into operation.

I am not sure whether I am correct, but I believe I am right in saying that it never has come into operation.

It is understood that leave of absence is to be granted during the period that I shall be interim registrar.

I pause there to observe that the applicant is there laying down the terms upon which, if one were trying an action on contract, and upon which alone he is prepared to enter into this contract.

I shall be glad, however, to have the county council's assurance that my superannuation rights will be protected.

A To that letter there was no reply; and no reply from a public body is, I think, rightly interpreted in the old saying that silence gives consent—and it is quite clear that it was so intended by the county council, because later on the county council said in effect in a letter to the applicant: "Your superannuation rights are protected," because they said: "You will come under the superannuation scheme; you will pay so much; so much will be deducted from your wages as contribution to the superannuation fund," and so on and so forth. But I prefer to deal (and I think it is more satisfactory to deal) with B Sept. 16, 1938, as the date when that letter was written by the applicant, and not answered by the respondents. In my view, the failure to answer that letter did amount to a representation by the Middlesex County Council that the statements in it were accepted as true, including the statement that the applicant's superannuation rights will be protected—the representation, that is to say, being that they will not be affected.

C Was that true? It was not. According to the argument which is now put forward, it was incorrect. The applicant, there is no doubt whatever, has certain superannuation rights. Those superannuation rights could have been protected, to use his words, in more than one way, but they were not. He had rights, I think, in his capacity as an assistant collector at that time. He had a right and was a member, if I may use that expression, of the superannuation fund, which I think was a private fund. He had superannuation rights. He D lost those in fact by taking up the position which he then did on the faith of his statement being accepted by the council. He lost those rights because he ceased to be the holder of the office which entitled him to be a member of the superannuation fund.

Looked at in that way, therefore, it seems to me that this case comes precisely within the language of the law as laid down (and, as I think, rightly laid down) in the late LORD HALSBURY's great work, if I may so describe it.

E One realises, of course, that in dealing with the doctrine of estoppel, one must always be careful to see that the court is not saying that a man is estopped from stating what is the law. No man can ever be estopped from that. If all that happened was that a certain view of the law was taken by the Middlesex County Council, and they made a mistake in what, after all, on the part of anybody, even a judge, can only be an expression of opinion as to what is the law—if all that happened was that someone said: "Well, in my view of the law, F this, that and the other result follows," no law of estoppel can prevent him from asserting that that is the law. It is questions of fact which are dealt with. It seems to me that this is a question of fact which arises here. The applicant is saying: "Will my superannuation rights be protected?"; and in point of fact, as I have already said, I think the Middlesex County Council could have protected his superannuation rights by saying: "If you take this other G post, we point out that you lose your superannuation rights so far as that is concerned." But what they are saying in effect is this: "You may take it from us that in your position your superannuation rights will not be affected." In one sense that may be said to be a question of law, but to a very great extent, I think, it is question of fact; and, put in that way, I should feel no doubt that that is a matter as to which the Middlesex County Council are estopped, having regard to their representation, from setting up the contention that this man was never a registrar at all, but in point of fact was something H quite different, that is to say, an interim registrar.

Those are the reasons why I prefer to base my view of the estoppel point upon that letter. I think that that falls within the terms of the statement I have cited from HALSBURY'S LAWS OF ENGLAND, and that this is a genuine case where a man, acting upon a representation as to the position by another party, has been induced to do something which he has done—to use the precise words, "has acted on such representation and thereby altered his position to his prejudice."

For that reason I agree also that the answer to the second question which is asked of us by the Minister, if and in so far as it arises—which is whether, as between the applicant and the council, the council is not estopped—is, in my opinion, that it is estopped.

Appeal allowed with costs.

Solicitors: *Stutfield & Son* (for the applicant); *C. W. Radcliffe*, Clerk to the Middlesex County Council (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., *Barrister-at-Law.*] A

ATHEL LINE, LTD. v. THE LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LTD. B

[KING'S BENCH DIVISION (Atkinson, J.), May 17, 1945.]

Insurance—Marine insurance—War risks—Warlike operation—Ship stranded while anchored according to instructions from naval authorities before discharging cargo—Damage consequence of warlike operations.

A ship requisitioned by the Government under the conditions of the charterparty T99A was insured by the respondents against the consequences of hostilities by or against the King's enemies. On Oct. 19, 1940, she left Trinidad in the West Indies with a full cargo of fuel oil on a voyage towards the naval bases of Lochalsh and Scapa Flow for the purpose of there discharging her cargo in accordance with the time charterer's orders. On Nov. 26, 1940, the ship arrived off the base of Lochalsh and anchored according to instructions from the naval authorities. On Nov. 27, 1940, it was noticed that the ship was listing. It was also discovered by soundings that the ship had grounded and was fast on a rock. Subsequently the ship was floated; her oil cargo was emptied and she was ordered for repairs. It was admitted that the ship was engaged on a warlike operation, namely, the conveyance of oil for the Navy to Lochalsh, but that at the time of the stranding she was not in actual performance of her warlike operation. The arbitrator found that the damage caused was the direct consequence of the warlike operation on which the vessel was engaged. The question for the court was whether the arbitrator had come to a correct conclusion:—

HELD: on the facts of the case, the arbitrator came to the correct conclusion.

Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport, The Coxwold (2) applied.

[EDITORIAL NOTE. The stranding of a requisitioned tanker while at anchor, with her cargo undischarged, is held to be due to a warlike operation. A merchant ship engaged on a warlike operation is on the same footing as a war vessel and it makes no difference that the immediate cause of the loss is an ordinary sea peril, provided that the casualty can be traced to the definite action of those on board. Such action here consisted in navigating the tanker to the war-time anchorage, anchoring in pursuance of naval orders, and shortening cable, which led to stranding.]

AS TO WARLIKE OPERATION, see HALSBURY, Hailsham Edn., Vol. 18, pp. 316, 317, para. 441; and FOR CASES, see DIGEST, Vol. 29, pp. 229, 230, Nos. 1854-1861.] G

Cases referred to:

* (1) *Larrinaga Steamship Co., Ltd. v. R.*, [1945] 1 All E.R. 329; 114 L.J.K.B. 129; 172 L.T. 177; 78 Ll.L.Rep. 167.

* (2) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport, The Coxwold*, [1942] A.C. 691; [1942] 2 All E.R. 6; 111 L.J.K.B. 512; 167 L.T. 349.

(3) *Britain S.S. Co. v. R.*, *Green v. British India Steam Navigation Co.*, *British India Steam Navigation Co. v. Liverpool & London War Risks Insurance Assn.*, [1921] 1 A.C. 99; 29 Digest 230, 1860; 89 L.J.K.B. 881; 123 L.T. 721. H

SPECIAL CASE stated by an arbitrator in an arbitration between the owners of a ship and an insurance company. The facts are fully stated in the judgment of the court.

A. J. Hodgson for the claimants.

Sir Robert Aske, K.C., and *Patrick Devlin* for the respondents.

ATKINSON, J. : This is an award in the form of a special case dealing with a claim by the Athel Line, Ltd., against the Liverpool and London War Risks Insurance Association, Ltd., that they are entitled to be indemnified against certain damage sustained by one of their motor vessels, the Atheltemplar, under a policy insuring them against the consequences of hostilities by or against the King's enemies.

A The arbitrator was assisted by an agreed statement of facts, and the submission authorised him to draw such inferences of fact as he thought necessary. The question was whether the admitted damage was a consequence of warlike operations. He has found, subject to the opinion of the court, that, in so far as it is a question of fact, it was the consequence of a warlike operation, and in so far as it is a question of law he takes the same view.

B It is necessary to summarise the relevant facts, which I take from the agreed statement. I have mentioned the policy. The Atheltemplar, the statement says, is a steel motor tank vessel, twin-strewn, of 8,939 tons gross and 5,248 tons nett. She carried a dead weight of about 13,000 tons. She was 475ft. overall and 63ft. beam. Her loaded draft is 28ft. 4ins. mean. Since the start of the present war the tanker has been under requisition successively to the Board of Trade, the Ministry of Shipping and the Ministry of War Transport under the T99A (Tankers) form of charterparty. In the course of this service she left Trinidad in the West Indies on Oct. 19, 1940, with a full cargo of fuel oil of about C 12,000 tons on a voyage towards the naval bases of Lochalsh and Scapa Flow for the purpose of there discharging and delivering her cargo in accordance with the time charterers' orders. About 5 o'clock on Nov. 26 she arrived off the base at Lochalsh.

D Lochalsh is a naval harbour consisting of a sound between The Isle of Skye and the mainland of Scotland. It is known by the Admiralty as Port ZA, and was under the control of a King's Harbour Master, and the base is used solely for naval purposes. As the vessel approached her anchorage there were no lights exhibited nor was land visible and it was dark, with heavy rain. No pilot was available or employed to bring the vessel to her anchorage, but the ship was met outside the harbour by a naval tug or trawler carrying her anchorage instructions from the naval authorities. The Atheltemplar duly followed the tug, and close to the harbour entrance she was met by a second naval tug E detailed to act as her guide to the anchorage appointed where she was to await daylight and begin discharging. The second naval tug passed a rope to the ship, which followed the tug until she blew three blasts and went astern. Then the engines of the Atheltemplar were put astern to take her away off and were then stopped. The master of the tug hailed the Atheltemplar and ordered her to let go her anchor, and the port anchor was let go in about 18 fathoms. The F anchor failed to hold and the ship immediately started to drag towards the east side of the sound. The anchor was then hove up and she moved back under her own power into more or less her former position. The master hailed the master of the tug, saying that he intended to let go his anchor, and the master of the tug replied "All right." Thereupon the port anchor was again let go in 13 fathoms of water, and it held with about 6 shackles out at a point about half a mile from the Isle of Skye. It was then about 6.30. Then the G statement says that during the night there was a good deal of sheering and swinging, and soundings were taken regularly, always indicating plenty of water, and that at 2 a.m. the cable was hove up to 3 shackles to prevent the ship sheering as much as possible and swinging towards the beach. The vessel appeared to be all right, even at 7.30 in the morning, and when daylight came at about 8.45 in the morning of Nov. 27 it was seen that the ship was listing. On sounding again, a minimum depth of about 7 fathoms was found. An H unsuccessful attempt was made to heave up the anchor, and assistance was rendered. At 10 o'clock it was noticed that oil was leaking from the port side of Nos. 7 and 8 main tanks, and it was then discovered by soundings that the ship had grounded and was fast on a rock just under No. 8 tank. Then comes this very important fact : There was still plenty of water all round, soundings from 7 fathoms forward to 9 fathoms aft. Low water was at 11 o'clock, and at about 3 o'clock the ship straightened up, and at 3.30 floated off, and, with the help of the tugs, she went alongside the naval depot vessel British Prudence and got rid of half her oil, and ultimately went on to Scapa Flow and

got rid of the rest of the oil and was then ordered to the Tyne for repairs.

The question is whether the damage so caused was the result of the warlike operation upon which admittedly she was engaged, carrying oil for the Navy to Lochalsh. It is conceded that that was a warlike operation.

I want to get the times and dates clear. When the ship first anchored, on Nov. 26, at 6.30 that evening, the tide was running out. It was low tide at 10.45. The wind was then S.S.W., so the ship at that time was six lengths, some 180 yards, from the anchor, and would, of course, be nearly north-east of the anchor. She survived that low tide without any trouble and without anything happening at all. At midnight the wind changed to north-west. That, of course, would bring the ship round to a position south-east of the anchor—I think that would be inevitable. At 2 o'clock the cable was shortened by three links, that is to say, the ship was brought some 90 yards nearer to the anchor; so that, as the tide was ebbing for the second time, the position of the ship was changed in two respects, firstly, that instead of being N.N.E. she must have been south-west, and she was 90 yards nearer to the anchor. There is this further inference which seems to me inevitable and perfectly clear, and that is that the rock which caused the damage must have had a very small surface. The ship was only damaged under the No. 8 tank, and even when aground there was deep and ample water all round. It seems to me to be a fair inference to draw, as I have no doubt it seemed to the arbitrator, that if the ship had been 90 yards further away from the anchor, this stranding would never have taken place, because it would have been in the deeper water which was proved there.

If this venture were not a warlike operation the loss might not be deemed to have been a consequence of the making of the voyage. Such a loss might be said to be merely a fortuitous result of the ship being at a particular place at a particular time. But even if that would have been the true view as to an ordinary voyage, it does not follow that that same view ought to prevail, or does prevail, with regard to a warlike operation.

The latest case to emphasise the distinction between the ordinary commercial voyage and a warlike operation is the *Ramon De Larrinaga* (1). There, the *Larrinaga*, a requisitioned ship, was ordered to take war stores to a war base at St. Nazaire during the war. She arrived safely and discharged her cargo, and she was then ordered to Cardiff for a joint survey with the idea, I think, of being released from further service. The charterparty provided that the master should be under the orders and directions of the charterers as regards employment, and then came this clause: "The charterers hereby agree to indemnify the owners for all consequences that may arise from the master complying with such orders." In addition to being ordered to Cardiff she was ordered to leave St. Nazaire the moment her cargo was discharged. It was dark, it was raining, it was blustery; the channel was unlighted. The master protested but he was ordered to leave, and in navigating the channel in the dark in that way the ship stranded and bumped along the sandbanks, and finally had to get back to St. Nazaire much damaged. The owners were seeking to make the charterers liable for that loss on one of three grounds: First, it was said that the warlike operation was still continuing; secondly, it was said that if that warlike operation was over, the stranding was a consequence of complying with the order to go to Cardiff; and thirdly, it was said, alternatively, if they could not succeed on that ground, that it was a consequence of complying with the orders to leave under the then prevailing conditions.

The case started in this court, and all three courts held that the warlike operation was completed. That, also, has its value for this case at the time I am dealing with, because everybody said it was completed when the cargo was discharged—at any rate, all the courts agreed that the warlike operation was over. I thought that the stranding could not be said to be a consequence of complying with the order to go to Cardiff. As to that, the Court of Appeal took the view that it was not an order relating to employment; that employment did not mean employment of the ship. The House of Lords took my view about that, that it did relate to employment, and they also agreed that it could not be regarded as a consequence of complying with the order to sail to Cardiff. They overruled my view that it was due to the specific orders. I found for the claimants on the ground that the accident was due to complying

with the orders to leave under the then prevailing conditions against the protest of the master. That was dealt with in this way. It was said that those particular instructions were not employment instructions, but were navigational instructions, and, therefore, even if the stranding could be considered the result of those orders, they were not orders regarding employment. VISCOUNT SIMON, L.C., thought that even if they had been, the stranding was too far removed to be the consequence. But the case is interesting in this way, that it establishes beyond all question that although a stranding might be held to be the result of an ordinary voyage, a voyage that was not a warlike operation, yet it may still be the result of that voyage if it amounts to a warlike operation, because there was never any argument anywhere but that if the warlike operation was continuing, in that case the stranding was the result of it. There are just a few lines I might refer to in LORD PORTER's opinion. On p. 336 he says :

A loss is not, under English law, caused by orders to make or by making a voyage because it occurs in the course of it. Such a loss is merely the fortuitous result of the ship being at a particular place at a particular time, and in no legal sense caused by the charterers' choice of port to which the ship is directed or their instructions to her master to proceed to it.

I say it is clear that cases concerning damage from sea peril while the ship is engaged on a warlike operation are on a different footing from cases involving not being so engaged, although the peril and damage are precisely the same.

The question in this case is : How far does the difference extend ? Counsel for the respondents contends that a careful examination of the *Yorkshire Dale* case (2) which is, of course, by far the most illuminating authority on this point, shows that it is only when the ship is actually proceeding through the water in performance of her warlike operation that collisions and strandings are deemed to be the consequence of the warlike operation. It is said here that the ship was anchored from 6.30 p.m. until a few minutes before 8.45 a.m. the following morning, when she was found on the rock stranded, and he argues, therefore, that because for 14 hours she had been lying there doing nothing, it is quite impossible to say that the warlike operation was proceeding at that moment, and that this case ought to be treated in the same way as it would have been treated if the voyage had not been a warlike operation but merely as a marine peril which has nothing to do with a warlike operation.

To decide this it is, to my mind, necessary to ascertain, if one can, from the *Yorkshire Dale* case (2), how the exceptional rule relating to warlike operations came about and what the basis of it is. I find that the most instructive opinion there is that of LORD WRIGHT, because he deals with the history and shows how it has come about. The ship stranded on a warlike operation on the north coast of Scotland, and the stranding was held to be a consequence of the operation. On p. 707, LORD WRIGHT says this :

The stranding in this case was undoubtedly a peril of the seas, but we must look behind the stranding to ascertain if the cause of the casualty was a peril which could be described as a consequence of warlike operations. It is necessary to examine more closely what these words cover in principle and on the authorities, at least so far as relevant for the matters in hand, in their application to the circumstances of a merchant, not a naval, vessel. [Then after dealing with the first branch of its history when the accident was caused by actual hostilities, he goes on] . . . But there is a different class more relevant to the present problem, where the casualty is due, not to hostile action, but to the acts of the national or allied armed forces. [Having dealt with that, he continues] But the authorities have given a further extension to the scope of these words. In certain circumstances a trading or merchant vessel has been held to be for purposes of the war risk clause engaged in a warlike operation. As illustrative of these circumstances, I may take those of a merchant ship carrying troops, ammunition, guns, tanks, or other military machines or equipment to a theatre of war or away from a theatre of war as in the evacuation of the British forces from Norway, Greece or Crete, or elsewhere. Such a vessel may be regarded *pro hac vice* as serving the belligerent purposes of the country and as taking her share in hostilities against the enemy. She is, therefore, it is said, to be deemed to be engaged on a warlike operation within the meaning of the war risk cover. So it has been laid down by this House under T99, the charterparty used in the last war. If that vessel is lost or damaged or damages other vessels by reason of the acts which she does in executing the warlike operation, the loss or damage is held to be the consequence of the warlike operation.

The idea there is that, whilst engaged on a warlike operation, the merchant ship is to be deemed to be in the position of a ship of war. On p. 710, he says :

The next development came through treating a merchant vessel as being on the same footing as a war vessel simply because of the cargo she was carrying and the character of the place of departure or destination. Once it was determined that she was to be treated as on this footing it did not matter [so it was held] that the sea peril collision or the like, was, apart from the special character attributed to her, merely an ordinary marine casualty, the occurrence of which was in no way influenced by the nature of her cargo, or, indeed, her ports of sailing or destination, except in the sense that she was being navigated on the particular voyage.

There one comes across the words again, "on the same footing as a war vessel." At p. 712 he says :

I have gone through these authorities to show why, in my opinion, it is fallacious to require a connection between the casualty—stranding, collision or the like—and the nature of the cargo being carried or the termini of the voyage. The nature of the cargo is, indeed, material at an earlier stage . . .

On p. 713 he continues :

The parallel between the warship and the merchant ship has up to now been limited to cases of collision, or cases resembling collision, such as stranding. I do not see why the principle should be extended any further or beyond the point to which the cases have carried it.

This was, of course, a stranding. There are just one or two short passages from LORD PORTER'S opinion. On p. 716 :

Having regard to the observations of VISCOUNT CAVE in *The Petersham* and *The Matiana* (3), when he quotes with approval the statement that almost any movement of a warship of a belligerent power by sea in time of war is a warlike operation . . .

At p. 717 :

The logical conclusion of these observations would seem to be that, in a case where the warlike operation consists in passing from one war base to another, any accident due to proceeding between the starting and finishing points is caused by the warlike operation . . .

At p. 718 :

Proof, then, is required that the damage claimed for was caused by the warlike operation. Stranding, it is true, is normally a marine risk just as a collision is, but it may, nevertheless, be effectively caused by a warlike operation where that operation is the proceeding from one war base to another and the stranding takes place as a result of so proceeding.

Then at p. 719 :

. . . I should be prepared to hold that almost any casualty befalling a vessel as a result of her own action is proceeding on a voyage, in a case where proceeding on that voyage was a warlike operation, was caused by a warlike operation . . .

Finally on p. 720 :

. . . in the circumstances the cause of the *Coxwold* (2) being at that place at that time in those conditions was her warlike operation, and the loss was, in my view, not only in the course of but caused by that operation.

There is another passage from LORD WRIGHT'S opinion dealing with the objection that MACKINNON, L.J., had made with regard to stranding being the result of the warlike operation. LORD WRIGHT dealt with that in this way, at p. 713 :

There are, however, I think, obviously some damage claims in the case of a requisitioned ship while engaged on a warlike operation which do not come within the war risk provision. Thus, a fire accidentally caused on board, or accidents within the Inchmaree clause, or leaks due to inherent defects in the hull, would not seem to me, as at present advised, to come within the war risk cover in any event. The basis of the decisions seems to be that the casualty can be traced to definite action on the part of those on board the warship or quasi-warship (if I may use that term) in directing the course of the vessel to carry out the warlike operation.

It is clear in this case, of course, that the warlike operation had not been completed when this accident happened. If the basis of the special rule as to causation applicable to a merchant ship engaged on warlike operations is that, while so engaged, she is on the same footing as a war vessel, and that it does not matter that the sea peril was an ordinary marine casualty, I cannot see how it can reasonably be said that this stranding was not a consequence of the

warlike operation. Could it be said, if this ship had been a vessel of war, that she was not engaged on a warlike operation? I do not think so. If, while just about to drop her anchor, she had hit a rock, there could be no question that she was directed to an anchorage so near to a latent danger that a change in the wind and a shortening of her cable caused the disaster, and caused the disaster at a time when her task had not yet been completed. That task was to discharge part of the oil carried into a naval vessel at Lochalsh, and even then she would not have discharged all her cargo and would not have finished her operation; she had to go to Scapa Flow where the rest of the oil was to be discharged. In my view, if she had been a war vessel doing precisely the same thing, it would have been impossible to say that she was not engaged in a warlike operation, and, if this vessel be treated on the same footing as a warlike vessel, it seems to me that the same results must follow.

A I want to test that conclusion by reference to one or two principles enunciated by LORD WRIGHT, at p. 704:

The warlike operation is, as it were, an umbrella which covers every active step taken to carry it out, including the navigation, the course and helm action intended to bring the vessel to the position required by the warlike operation . . .

What happened here? First you have the anchoring, which was an active step in pursuance of naval orders, at a spot very near to which lurked this hidden danger. You have the shortening of the cable which brought the ship 90 yards nearer. Without that I think the irresistible inference must be drawn that the accident would not have happened—but for that active step taken to prevent excessive swinging and sheering. It seems to me that there were two movements of the ship without which this accident could not have happened: anchoring in a particular place, and the shortening of the cable. Again, on p. 713, LORD WRIGHT illustrates the sort of accident which he would not regard as a consequence of the warlike operation, as far removed from this stranding as an accident could well be:

The basis of the decisions seems to be that the casualty can be traced to definite action on the part of those on board . . .

This can be traced to definite action on the part of those in control of the ship. This operation took the vessel to an unusual destination. Lochalsh is not a port, nor was this an approach to a port where normally I suppose every foot of the approach would be well charted and well known. This was an open loch which was being temporarily used as a naval base for warships, and where there might well be, and, of course, were, hidden and unknown rocks.

E Causation, as LORD WRIGHT said—and others have said it as well—is to be understood as the man in the street would understand it, “on a broad view.” Would not any ordinary man in the street, looking at this broadly, say that this accident was caused by it being directed to anchor in a place where there was a hidden danger, and that that stranding was the consequence of the warlike operation upon which she was so engaged: it was all part and parcel of it. The question of causation has been said to be a question of fact. Courts have not, as far as I can see, treated it as such; they have not been slow to differ from arbitrators’ conclusions if they did not agree with them. Maybe it would be nearer the truth to say that it is a question of the proper inference to be drawn from the facts found. This is how in *Yorkshire Dale Steamship Co. v. Minister of War Transport* (2), LORD MACMILLAN put it at p. 702:

The learned arbitrator has found that the casualty . . . was “the direct consequences . . .” Your Lordships have, therefore, only to decide whether that conclusion is justified on the facts which the arbitrator has found and set out in the case which he has stated. These facts have been narrated by the Lord Chancellor, and, in my opinion, they justify the arbitrator’s conclusion.

H I have come to the same view, that the facts here do justify the arbitrator’s conclusion. I think he drew the right conclusion, whether it is an inference of fact or whether it is a question of law, and I so decide.

Appeal dismissed with costs. Award upheld.

Solicitors: *Hill, Dickinson & Co.* (for the claimants); *Thomas Cooper & Co.* (for the respondents).

[Reported by P. J. JOHNSON, Esq., Barrister-at-Law.]

PHILLIPS v. BUTLER.

[CHANCERY DIVISION (Romer, J.), June 5, 1945.]

Auctioneers—Duration of authority—Deposit—Conditions of sale—Auctioneer authorising postponement of payment of deposit—Repudiation by vendor—Right of auctioneer to modify conditions of sale.

Sale of Land—Memorandum of sale—Incorporation of conditions of sale in memorandum—Memorandum containing receipt for deposit—Memorandum signed by auctioneer and purchaser before payment of deposit—Authority of auctioneer to sign memorandum irrevocable—Law of Property Act, 1925 (c. 20), s. 40. A

The defendant put up for sale by auction on July 27, 1944, certain freehold properties. The properties were offered for sale in two lots according to certain printed particulars and special conditions of sale which provided, *inter alia*, that the date for completion should be Sept. 29, 1944, and that a deposit of 10 per cent. of the purchase money should be paid to the auctioneers as stakeholders. Upon each print of the particulars and conditions of sale was endorsed a form of memorandum of contract of sale with blanks to be filled in. The plaintiff attended the auction and bid up to £1,100 for lot 2, a freehold cottage with garden, and the auctioneer knocked lot 2 down to the plaintiff at that sum. Two copies of the memorandum of sale were then filled in under which it was agreed that the plaintiff was declared purchaser of lot 2, at a price of £1,100 subject to the accompanying conditions of sale, the sum of £110 having been paid to the auctioneers as a deposit and in part payment of the purchase money. The two memoranda, bearing date July 27, 1944, were signed in duplicate, one by the plaintiff and the other by the auctioneer. The deposit was not paid that day, the plaintiff having left his cheque book at home, but the auctioneer agreed to the plaintiff paying by cheque on the following day. Since the memorandum not only contained evidence of the contract entered into but also purported to be a receipt for the deposit, the auctioneer retained in his possession the document which he himself had signed. On July 28, 1944, the plaintiff posted the cheque for the deposit to the auctioneer and the cheque was received by the auctioneer the same day. In the meantime the defendant informed the auctioneer that his authority to exchange the contract and accept the deposit was withdrawn. It was contended for the defendant, who relied on the Law of Property Act, 1925, s. 40, that it was an implied term of the contract of agency between her and the auctioneer that the latter should not sign a memorandum of contract or otherwise enter into a contract on behalf of the defendant for the sale of lot 2 unless the purchaser should have first paid to him the deposit specified in the conditions of sale; that as the deposit was not received until July 28, 1944, the document, though on the face of it signed on July 27, 1944, could not be treated as a document signed on that day by a duly authorised agent of the vendor :— B C D E F

HELD: the authority of the auctioneer to sign on behalf of the vendor arose directly the contract was concluded and that authority was irrevocable. The memorandum, executed on July 27, 1944, was, therefore, within the proper authority of the auctioneer to sign and its validity was not affected by the subsequent modification of a provision imposed by the conditions of sale. G

[EDITORIAL NOTE.] An auctioneer has authority to sign a memorandum of contract on behalf of his vendor immediately the contract is brought into being at the fall of the hammer. In this case it was a condition of sale that a deposit should be paid by the purchaser immediately after the sale and it is argued that on waiver of this condition until next day by the auctioneer he has no authority to sign the memorandum. This argument is rejected, since the only function of the memorandum is to provide evidence and to convert an otherwise unenforceable contract into one which is enforceable. H

As to AUTHORITY OF AUCTIONEER, see HALSBURY, Hailsham Edn., Vol. 1, pp. 696-701, paras. 1143-1151; and FOR CASES, see DIGEST, Vol. 3, pp. 5-11, Nos. 16-76. As to SUFFICIENCY OF MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 7, pp. 126-128, para. 180: and FOR CASES, see DIGEST, Vol. 12, pp. 137-142, Nos. 926-967.]

Case referred to :

(1) *Chaney v. Maclow*, [1929] 1 Ch. 461 ; Digest Supp. ; 98 L.J.Ch. 345 ; 140 L.T. 312.

ACTION by the plaintiff for specific performance of a contract, dated July 27, 1944. The facts and arguments are fully stated in the judgment.

E. M. Winterbotham for the plaintiff.

J. Pennyquick for the defendant.

A ROMER, J. : In this action Colonel Phillips sues Mrs. Butler for specific performance of a contract, dated July 27, 1944, under which he says that he became the purchaser of certain property in Sussex.

The preliminary facts are undisputed, and I will take them from the first few paragraphs of the statement of claim. The defendant, as the personal representative of Arthur Lennox Butler deceased, put up for sale by auction on July 27, 1944, at the Town Hall, Horsham, certain freehold properties forming part of the estate of the said Arthur Lennox Butler. Such properties were offered for sale in two lots and the auctioneers instructed by the defendant were the firm of Wm. Wood Son & Gardner, chartered surveyors of Crawley, and Mr. Gilbert Gardner, a partner in the said firm, acted as auctioneer. The said properties were offered for sale as aforesaid according to certain printed particulars and special conditions of sale. The said special conditions of sale provided that the sale was subject to such conditions and to the National Conditions of Sale (13th Edn.) so far as the latter were not inconsistent with the special conditions, and the special conditions provided that the date for completion should be Sept. 29, 1944, that the defendant sold as such personal representative as aforesaid, and that the deposit should be 10 per cent. of the purchase money and should be paid to the said auctioneers as stakeholders. Lot 2 at the said auction was described in the said particulars as a freehold cottage known as " Hillsborough " fronting on Springfield Lane, Colgate, in the county of Sussex, with a garden and having a frontage of 90ft. and a depth of 130ft., and it was stated that vacant possession would be given on completion. Upon each print of the said particulars and conditions of sale was endorsed a form of memorandum of contract of sale with blanks to be filled in. The plaintiff attended the said auction and after other biddings bid up to £1,100 for lot 2 and the auctioneer knocked such lot down to the plaintiff at that sum. Two copies of the said memorandum endorsed as aforesaid were then filled in under which it was agreed that the plaintiff was declared the purchaser of lot 2 described in the accompanying particulars of sale from the defendant at the price of £1,100 subject to the accompanying conditions of sale, the sum of £110 having been paid to the auctioneers as a deposit and in part payment of the purchase money. The plaintiff signed one such completed memorandum over a 6d. stamp and the auctioneer signed the other completed memorandum also over a 6d. stamp and both of these were left with the auctioneer.

The two memoranda were signed in duplicate, one by the plaintiff and the other by the auctioneer, who signed in the firm name of Wm. Wood Son & Gardner, and the memorandum is as follows :

G It is hereby agreed that Colonel C. J. Phillips of Springfield Farm, Colgate, Horsham, was declared the purchaser of lot 2 described in the accompanying particulars of sale from the vendor at the price of eleven hundred pounds (£1,100) subject to the accompanying conditions of sale, the sum of one hundred and ten pounds (£110) having been paid to Wm. Wood Son & Gardner as a deposit and in part payment of the purchase money. As witness our hands this 27th day of July, 1944. Purchase money, £1,100 ; deposit, £110 ; balance, £990.

That was the form of the memorandum, and it is described as a memorandum, which was signed by the auctioneers.

H There is very little dispute as to what took place at this auction sale which was held on July 27. The plaintiff told me that he was interested in lot 2 which was to be put up for sale at this auction, and that he attended the auction sale. He had met Mr. Gardner the auctioneer, who had had a number of transactions with him from time to time in the past. At the sale the auctioneer (Mr. Gardner) was on the platform, as was also a Colonel Mead, who is the defendant's solicitor, and the first lot was put up for sale but there was no bid. The auctioneer then put up lot 2, and there were two or three bidders besides the plaintiff, and the plaintiff eventually bid £1,100 and the lot was knocked down

to him. He was then called up to the rostrum by Mr. Gardner to sign the memoranda of sale, and he signed the memorandum which was handed to him for his signature, and Mr. Gardner signed the memorandum which I have read. The plaintiff then found that he had left his cheque book at home, so he told Mr. Gardner and asked Mr. Gardner whether he had a blank cheque which he could use in order to pay the deposit. Mr. Gardner said he had not got one. The plaintiff then said to Mr. Gardner, in effect, that he had his car outside, and suggested that he should go back to his home and fetch his cheque book ; but Mr. Gardner said (again, in effect) that it would do quite well if he sent the cheque on the following day. A

There has been some little doubt as to precisely what part Colonel Mead played in this discussion. The plaintiff thought that Mr. Gardner said to him, "Would that be all right," or "Did he agree?" or something of that sort, and that Colonel Mead nodded; but Colonel Mead himself said that when Mr. Gardner told Colonel Phillips that it would be all right for him to send the cheque the next day, Mr. Gardner then turned to him and asked him, "Is that all right?" and Colonel Mead said, "I am satisfied if you are." But it was not suggested, and in fact Colonel Mead expressly said that he had no authority from his vendor to interfere in the conduct of the sale or to give any authority to Mr. Gardner to depart from whatever might be his obligation towards the defendant in the conduct of the sale. B

It is to be observed that the memorandum which was signed by these parties was a memorandum not only of the fact that a contract had been entered into, but purported also to be a receipt for the deposit, and inasmuch as the deposit had not in fact been paid, Mr. Gardner very correctly retained in his possession the document which he himself had signed. C

The auction sale came to an end and Colonel Phillips went home, giving Colonel Mead (whom I gather he had also met once or twice previously) a lift, and on the way Colonel Mead congratulated the plaintiff on getting the property which was comprised in lot 2. On arriving home the plaintiff wrote out a cheque in favour of the auctioneer's firm for the amount of the deposit, and sent that off the following morning, namely July 28. It arrived at Mr. Gardner's place of business by the second post on July 28. But in the meantime Colonel Mead had been in touch, I suppose, with the vendor, and he communicated fairly early in the morning with Mr. Gardner, and told him that his authority to exchange the contract and accept the deposit was withdrawn. The reference to that in two letters in the correspondence makes it a little doubtful as to what precisely were the instructions given by Colonel Mead to Mr. Gardner, but Colonel Mead says, and I accept it from him, that that was in substance what he told Mr. Gardner, and, as I say, those instructions were received by Mr. Gardner before he received the cheque from the plaintiff. In point of fact Mr. Gardner was out most of the day; he got back in the evening and found waiting for him the message from Colonel Mead and also the cheque from the plaintiff; but it is not disputed that the message from Colonel Mead arrived first. To conclude the recital of the facts, eventually the cheque was cleared and passed through the bank in Sept., 1944, and Mr. Gardner is holding the money for whomsoever shall be entitled to give him a receipt for it. D

Now the defence to the action is in substance the Statute of Frauds. The defendant pleads that : E

It was a term of the contract of agency between the defendant and the auctioneer that he should not sign a memorandum of contract or otherwise enter into a contract on behalf of the defendant for the sale of lot 2 unless the purchaser should first have paid to him the deposit specified in No. 2 of the special conditions of sale and he had no authority to sign or enter into such a contract on behalf of the defendant until such deposit had been paid. Save in so far as it is therein alleged that the plaintiff did not pay any sum to the auctioneer at any time before delivery on July 29 of the letter therein mentioned containing a cheque for £110 the defendant makes no admission as to the allegations contained in para. 6 of the statement of claim. On the morning of July 28 the defendant withdrew her authority to the auctioneer to enter into a contract on her behalf for the sale of lot 2. F

There again, that was not, I think, intended to bear the meaning which it apparently bears, because a contract, for better or worse, had undoubtedly been entered into on July 27, but it was intended, I think, to mean that the G

defendant withdrew her authority to the auctioneer, in the terms that I have already described as used by Colonel Mead in explaining what he did in relation to Mr. Gardner on the morning of July 28.

A Save that the defendant claims to have been entitled to withdraw such authority and that there has never been any concluded contract between the plaintiff and the defendant and save that the auctioneer retains the memorandum signed by him and the plaintiff's cheque the defendant denies each and every allegation contained in para. 7 of the statement of claim. The defendant has instructed the auctioneer to return the said cheque to the plaintiff but he declines to do so.

And there is a reliance on the Law of Property Act, 1925, s. 40.

B Then the defendant was asked to give particulars of the term of the contract of agency relied upon in para. 1 of the defence, and particulars were given, from which it appears that no express term was relied upon, but the term of the contract of agency mentioned in the said paragraph was implied by law. In substance this matter comes down to the question whether sect. 40 has been satisfied. I have already read the memorandum which was signed by the auctioneers, and I will just refer to one passage from HALSBURY (2nd Edn.), Vol. 1, p. 699, para. 1150 :

C The auctioneer, in the absence of special circumstances, is, by virtue of his employment impliedly the agent of both the vendor and the purchaser to sign the contract or a note or memorandum thereof to satisfy the requirements of the Law of Property Act, 1925, in the case of land, and of the Sale of Goods Act, 1893, in the case of goods, both of which statutes apply to sales by auction. This implied authority cannot be revoked after the conclusion of the bidding either by the vendor or by the purchaser. It must, however, be exercised at the time of the sale or while the transaction of sale is still in being, and the auctioneer has no authority to sign on a subsequent day or on a sale otherwise than by auction.

D And the law is similarly stated in the other text-books to which I was referred—DART ON VENDOR AND PURCHASER and WILLIAMS ON VENDOR AND PURCHASER, and is undoubtedly the law.

E Having regard to the fact that there is a memorandum of sale signed by the auctioneer on behalf of the vendor, or purporting to have been signed by the auctioneer on behalf of the vendor and dated July 27, it would appear that *prima facie* the section has been satisfied, for there is a memorandum in writing evidencing a sale, containing sufficient particulars of the sale and signed by the auctioneer on behalf of the vendor. But it is said that, although that may be the *prima facie* result of this memorandum, nevertheless it is not the true result because the auctioneer had no authority from the vendor to sign the document unless and until he received the deposit, and that as the deposit was not received until July 28, this document, although on the face of it it bears date July 27, cannot be treated as being a document signed on that day by a duly authorised agent of the vendor.

F The sale was, as I have already mentioned, subject to both special conditions and the National Conditions of Sale, and cl. 1 of the National Conditions is the only one to which I need refer. Cl. 1, sub-cl. (1) is as follows :

G Subject to a right for the vendor by himself or his agent to consolidate all or any lots, to re-arrange and sub-divide lots, to divide the property into lots, to fix a reserve price for the property or for any lot, to bid up to such reserve price, and to withdraw the property or any lot (not actually sold at the auction) without declaring such price, the highest bidder shall, subject as hereinafter provided, be the purchaser. (2) Provided that no person shall at any bidding advance less than a sum to be stated by the auctioneer no bidding shall be retracted, but the auctioneer may refuse any bidding, and if any dispute arise respecting a bidding the auctioneer may determine such dispute or the property may, at the vendor's option, either be put up again at the last undisputed bidding or be withdrawn. (3) The purchaser shall, immediately after the sale, pay the deposit (if any) mentioned in the special conditions, and complete and sign the memorandum endorsed thereon.

H On this aspect of the matter the defendant's case is that Mr. Gardner had no authority to sign that memorandum until he had got the deposit—that he had authority to sign not only a receipt but also a memorandum of the contract, but not until he had got actual possession of the deposit, which might take the form either of cash or of a cheque. It has not been suggested that that was an authority which was expressly conferred upon the auctioneer ; it is said that

is the result of the authority with which the auctioneer is clothed by the law, and having regard to the provisions of the National Conditions of Sale. No authority was cited in support of that view. It was treated as a matter of implication. It is to be observed that a contract at an auction sale is brought into being at the moment the hammer falls. A contract, in the eye of the law, subsists from that moment onwards. But it is not a contract which can be enforced by either party against the other for the want of a statutory requirement. That statutory requirement is a memorandum or document in writing evidencing the terms of the sale and signed by the parties or by their duly authorised agent. The only function which the memorandum, as such, affords is to provide evidence, which has no effect upon the terms of the contract which has been already entered into, but converts an unenforceable contract into an enforceable contract; and provided that such a document or memorandum is found or comes into being, it does not matter for what purpose it has been brought into being provided it satisfies the statutory requirement and provided that it is signed either by one of the parties to be charged or by some agent duly authorised to sign the document by the party sought to be charged. A

On the fall of the hammer, when lot 2 was put up for sale, the plaintiff undoubtedly became the purchaser, and a contract then and there was called into being between him on the one hand and the vendor on the other; and it is beyond any question the law that the auctioneer has the authority of his vendor to bind him to a contract by signing on his behalf a memorandum which will satisfy the requirements of the Law of Property Act, 1925, s. 40. B C

I am unable, myself, to see any logical ground for suggesting that the authority of an auctioneer to sign a memorandum on behalf of his vendor does not arise immediately the contract has been brought into being, but is postponed and is contingent upon that contract becoming partly performed, namely, by the performance by the purchaser of the requirement imposed by the contract, that he shall pay a deposit which is to be treated as part payment of the purchase price. It seems to me, and I think it is the result of the authorities, that the authority of the auctioneer to sign on behalf of the vendor and on behalf if need be, of the purchaser, arises directly the contract is concluded and that authority is irrevocable. D

In the present case the memorandum which Mr. Gardner signed is not only a memorandum but a receipt, and as it purported to be a receipt for money which had not in fact been paid up to that time (at the time it was signed) Mr. Gardner very naturally and very properly retained it until the deposit was actually paid, which he anticipated would be done upon the following day and which was in fact done upon the following day; and in so far as the document is a receipt, it was a conditional receipt or a receipt in the nature of an escrow, but I am unable to see why the signature to the document should not result in a perfectly good memorandum of the contract itself upon being brought into being, and be put in evidence as a document which satisfies the requirements of sect. 40. The obligation, as I say, to pay the deposit was an obligation which arose under and by virtue of the contract itself, which was made subject to the National Conditions of Sale. The failure to pay the deposit might result in the vendor treating the contract as repudiated on the ground that a breach of it had been committed, but until that was done—and it was not in fact done—the contract in my view remained on foot and remained subsisting; and it seems to me that a distinction has to be borne in mind between the authority of the auctioneer to sign the memorandum of a contract on the one hand, and his authority to waive or modify any of the provisions imposed by the contract on the other. So far as the authority to sign a memorandum of the terms of the contract is concerned, that authority is conferred by the law, which has taken cognizance of the peculiar nature and difficulties of sales by auction, and it is an irrevocable authority. It was in pursuance of that authority that Mr. Gardner signed the memorandum, before any question of the deposit had arisen at all, but after the plaintiff had been declared the purchaser of the property in question, and I hold that that memorandum was within the proper authority of Mr. Gardner to sign, and it is, therefore, a sufficient answer to the defence upon which the defendant relies. E F G H

That being so, subsequent events, of course, are irrelevant, and in particular the fact that Colonel Mead purported to instruct Mr. Gardner the next day

not to exchange the contract or sign a memorandum is irrelevant, because a contract had already been brought into being and a memorandum of it had already been properly signed.

A A very interesting discussion has taken place on the hypothesis that Mr. Gardner's signature to this document on July 27 must be treated as having been appended to it on the following day on the footing—which I have held to be wrong—that the auctioneer had no authority from the vendor to sign a memorandum until the deposit was received. As I have found myself unable to accept that contention, it is not really necessary for me to deal with this alternative matter. It is, I think, a somewhat difficult question, because it involves, as I see it, the right of an auctioneer, to some extent at all events, to modify sub-cl. (1) of cl. 1 of the National Conditions of Sale, which says that the deposit is to be paid immediately after the sale. The question of the right of an auctioneer, or rather the question of the duration of the authority of an auctioneer to sign contracts on behalf of the vendor and the purchaser has been referred to in two or three cases to which I have been referred, the most notable of which is *Chaney v. Maclow* (1), which was a decision of MAUGHAM, J., as he then was, which was affirmed by the Court of Appeal. I think, having regard to that decision, it is plain that under certain circumstances, and in order to achieve certain purposes, the authority of an auctioneer has no specific duration but must be regarded and treated as lasting throughout the transaction of sale, and obviously it must be a matter of great difficulty at times to determine whether there has been a break such as to prevent it from being said that the signature by the auctioneer is made during the subsistence of the transaction of sale. From one point of view nobody could suggest that Mr. Gardner had done anything that was not in accordance with what might be expected of people who know each other well. The plaintiff was a man of standing and repute and Mr. Gardner not unnaturally did not want to put him to inconvenience, and indeed in a sense to the suggestion of a slur which might be involved if he had accepted the plaintiff's offer to go off in his car then and there at the time of the auction sale, and get his cheque book. But the question is as to whether in fact as between Mr. Gardner and the vendor he had the right to refuse that offer, and inasmuch as quite plainly there was no difficulty in the plaintiff going off at once and fetching his cheque book and signing a cheque and handing it over to Mr. Gardner without any further delay, I feel that if the matter had had to be decided on this point, it might have been difficult not to come to the conclusion that no power to postpone the payment of the deposit was permitted to the auctioneer other than was required by the exigencies of the situation. It was, I think, incumbent upon the plaintiff as the purchaser to pay his deposit at once in compliance with cl. 1 of the National Conditions of Sale, and assuming that by forgetfulness or for some other reason he was unable strictly to comply with that condition, then assuming that the auctioneer had authority to give time to the plaintiff to pay the deposit, I think that he could only, as between himself and the vendor, give such time as the circumstances really required. I need say no more about that part of the case, because I have come to the conclusion that there is in fact a perfectly good written memorandum signed by Mr. Gardner, and which must be treated as being executed by Mr. Gardner on the date which it bears upon its face, namely July 27, 1944.

G Declaration accordingly and order for specific performance. Inquiry as to damages. Costs of the inquiry to be reserved.

Solicitors: Herbert Smith & Co. (for the plaintiff); Mead, Sons & Bingham (for the defendant).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

Re ALLEN'S ESTATE, PRESCOTT *v.* ALLEN AND BEAUMONT.

[CHANCERY DIVISION (Cohen, J.), June 6, 1945.]

Conflict of Laws—Will—Construction—Election—Testator domiciled in South Africa and subject to South African law regarding community of property between husband and wife—Will made in England—Purported disposition of joint property—Indication on face of will that testator contemplated application of English law—Residuary bequest—Doctrine of election applicable. A

Equity—Election—Conflict of laws—Testator domiciled in South Africa and subject to South African law regarding community of property between husband and wife—Will made in England—Purported disposition of joint property—Indication on face of will that testator contemplated application of English law—Residuary bequest—Doctrine of election applicable.

The testator made his will on June 5, 1941, at Bournemouth, where he was then residing, and, after appointing his wife and an English solicitor executors and trustees thereof, he gave to his wife, free of duty, all his personal chattels as defined in the Administration of Estates Act, 1925, s. 55, a pecuniary legacy and all the real property in South Africa which he might have, or have power to dispose of, at his death. He further gave certain silver plate to his trustees on trust for the use of his wife during her life and after her death on trust for J.B. absolutely. The testator gave the residue of his property to his trustees upon trust for sale and conversion, with power to postpone sale indefinitely and so that any reversionary interest should not be sold prior to falling into possession unless the trustees should see special reason for earlier sale; and after giving directions for the payment of his funeral and testamentary expenses, etc., the testator gave the income of his residuary trust fund to his wife for life and, subject to the wife's life interest, the trustees were, in the event that happened, to hold the trust fund and future income thereof in trust for R.B. absolutely. The testator died on June 24, 1941, and probate of his will was granted in England to the executors named therein. The testator had married his wife in South Africa in 1936, and, at the date of the marriage and down to the date of his death, he was domiciled in South Africa and the property which ostensibly belonged to him at his death was subject to the law of South Africa relating to community of property between spouses. Under this law, the wife was entitled, on the testator's death, to half the joint property after payment of all debts due by the joint estate. The question for determination was whether the wife could take a half of the joint property to which she was entitled under the South African law and also retain the benefits given her by the will, or must elect between her rights under the South African law and the benefits given to her by the will. It was contended for the wife that, even if English law were applicable to the construction of the will, the question of election could not apply to a residuary bequest and that the gift of "the residue of my property" should be construed as referring only to the testator's share in the liquidation of the joint estate:—

HELD: (i) it was clearly indicated on the face of the will, in particular by the reference to the Administration of Estates Act, 1925, that the testator wrote the will with reference to English law. Therefore, the exception to the general rule that disposition of personal property follows the law of the domicile was established and English law was applicable to the construction of the will.

Re Price, Tomlin v. Latter (1) followed.

(ii) upon the true construction of the will, the expression "residue of my property" meant the residue of the testator's ostensible property, i.e., the residue of what would have been the testator's property under English law if he had been domiciled in England. The power to postpone sale and the direction that the reversionary interest should not be sold before falling into possession showed that the testator was not disposing merely of his share of the joint estate.

(iii) since, upon the true construction of the will, the testator was purporting to dispose of property which belonged to the wife under the South African law relating to community of property, the wife must elect between

her rights under the South African law and the benefits given to her by the will.

[**EDITORIAL NOTE.** The testator here died domiciled in South Africa, leaving property subject to Union law relating to community of property between spouses. It is held that the wording of the will shows an intention that it should be construed by English law and not by the law of the domicile. The question then arises whether a residuary bequest puts the widow to her election between her rights under the law of South Africa and the benefits given by the will. There is apparently no reported case in which a person has been put to election by a residuary bequest or devise, but as it is clear here on the construction of the will that the testator did not intend the residuary bequest to be limited to his share of the joint property, it is held to be a proper case for election by the widow.]

AS TO CONSTRUCTION OF WILLS OF MOVABLES, see HALSBURY, Hailsham Edn., Vol. 6, pp. 253, 254, para. 306; and FOR CASES, see DIGEST, Vol. 11, pp. 372, 373, Nos. 521-529.

AS TO ELECTION, see HALSBURY, Hailsham Edn., Vol. 13, pp. 147-155, paras. 132-137; and FOR CASES, see DIGEST, Vol. 20, pp. 403-409, Nos. 1411-1451.]

Cases referred to :

* (1) *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; 11 Digest 383, 615; 69 L.J.Ch. 225; 82 L.T. 79.

(2) *Re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502; 11 Digest 384, 619; 85 L.J.Ch. 329; 114 L.T. 835.

*(3) *Dummer v. Pitcher* (1833), 2 My. & K. 262; 20 Digest 415, 1481; *Coop. temp. Brough*, 257.

ADJOURNED SUMMONS to determine a question of construction arising under the testator's will. The facts are fully stated in the judgment.

Raymond Jennings for the plaintiff, an executor of the will.

R. F. Roxburgh, K.C., and *Wilfrid Hunt* for the first defendant, the widow.

H. Wynn-Parry, K.C., and *H. E. Salt* for the second defendant, the residuary legatee.

COHEN, J.: The testator was in 1941 residing at 14, Bartfield Court, Bournemouth. By his will dated June 15, 1941, and executed at Bournemouth, the testator appointed his widow, the first defendant, and the plaintiff, who is a solicitor, to be the executors and trustees of his will. Cls. 2 and 3 of the will are in the following terms :

2. I give all my silver plate and plated articles bearing the Beaumont crest free of duty to my trustees upon trust to permit my wife to have the use and enjoyment thereof during her life without being responsible for any loss or damage which may happen thereto and after the death of my wife my trustees shall stand possessed of the said silver upon trust for James Beaumont the son of Sir Henry Beaumont absolutely subject to his attaining the age of 21 years. 3. I give my wife free of duty all my personal chattels as defined by the Administration of Estates Act, 1925, s. 55.

By cl. 4 the testator gave a number of pecuniary legacies free of duty, including one to his widow of £500. By cl. 5 he devised all his real and immovable property situate being or arising in Potechefstroom, South Africa, or at any other place in South Africa, for all the estate and interest therein which the testator might have, or have power to dispose of, at his death to his said wife absolutely free of duty. By cl. 6 the testator gave the residue of his property to his trustees upon trust for sale and conversion with power to postpone such sale and calling in indefinitely and so that any reversionary interests should not be sold prior to falling into possession unless his trustees should see special reason for earlier sale and the testator gave directions as to the application of the income pending sale. By cl. 7 he directed his trustees to pay his funeral and testamentary expenses and debts and the legacies given by his will and the duty on any legacies given free of duty. By cl. 9 he gave the income of his residuary trust fund to his wife for life and directed by cl. 10 that subject to her life interest his trustees should in the event which happened stand possessed of the trust fund and the future income thereof in trust for the second defendant absolutely.

The testator died on June 24, 1941. Probate of his will was granted in England to the executors therein named on Aug. 29, 1941. A question arose as to whether the testator, who had been married to his wife in South Africa, was at the date of his marriage and death domiciled in England or South Africa and on Apr. 21, 1942, the summons in this matter was issued. The question as to domicile came before MORTON, J., as he then was, and on July 6, 1944, he made an order declaring that the testator at the date of his marriage on July 15,

1936, was, and down to the date of his death remained, domiciled in the Union of South Africa and that property which ostensibly belonged to the testator at his death was subject to the law of South Africa relating to community of property between spouses. Counsel for the widow and counsel for the second defendant agreed that the effect of such community of property is correctly stated in two passages in MAASDORP, INSTITUTES OF SOUTH AFRICAN LAW, Vol. 1, THE LAW OF PERSONS (6th Edn.). At p. 39, it is said :

At common law, marriage lawfully contracted and not preceded by an antenuptial contract between the intending spouses creates a universal partnership or community of property between the husband and wife, and every marriage is presumed to be in community of property until the contrary be proved. It is competent, however, for the parties before marriage to regulate their respective rights by express contract ; but, in the absence of such contract, they are understood to enter into a tacit agreement that the common law community of property shall prevail, and once community is introduced it cannot be varied.

No such express contract was made in this case. At p. 117 the author deals with what is to happen on the dissolution of marriage by death, and says :

The proper course, in case of the dissolution of marriage by death, is for the executor of the first-dying to liquidate the joint estate in so far as may be necessary for the purpose of paying all the debts due by the joint estate and of the proper division of the estate, and after the debts have been paid the net balance of the joint estate will have to be equally divided between the survivor and the heirs of the first-dying. The survivor thereupon receives possession of one half of the estate as his or her own property, whilst the other half goes to the heirs of the first-dying. Where the property can be divided *in specie*, this may be done, the share awarded to each being taken at a valuation; but where this cannot be done, or where the parties cannot agree as to the mode of division, the whole of the estate will have to be realised and division made.

The question which I have now to decide is whether, in these circumstances, the widow can take a half of the joint property to which she is entitled under the South African law relating to community of property and also retain the benefits given to her by the will of the testator, or must elect between her rights under the said law and the benefits given to her by the will. The first question is whether the doctrine of election applies to all. If the matter were governed solely by South African law, it is common ground that there can be no case of election : but it is said that there is an exception to the general rule that disposition of personal property follows the law of the domicile where it is clear from the will of the testator that the testator contemplated the application of some other law for the construction of his testamentary document. Counsel for the widow said that in this court he could not dispute that statement, since I am bound to hold that this exception is established by reason of the decision of STIRLING, J., in *Re Price* (1) followed in *Re Simpson* (2). A passage from the headnote in the earlier case is in these terms :

Although as a general rule a will is to be construed according to the law of the testator's domicile, this rule does not apply where there are indications on the face of the will that the testator wrote it with reference to the law of some other country.

That exception being established, I am, I think, bound to hold on the construction of the will with which I am now dealing that there is a clear indication on the face of the will, that the testator wrote it with reference to English law. I rely in particular on the provisions of cl. 3 where the testator directs that the expression "personal chattels" shall be construed as defined by the English Administration of Estates Act, 1925, s. 55. This view is, I think, fortified by the fact that the testator executed his will in England, appointed as one of his trustees an English solicitor, and that, according to the evidence of the plaintiff, his estate consisted almost entirely of property which was in England.

English law being applicable to the question of construction of the will before me, it being agreed that the question of election is one of construction, I have now to consider whether, upon the true construction of this will, the widow is put to her election. The general principle as to election is stated in JARMAN ON WILLS, 7th Edn., Vol. 1, at p. 510 :

"The doctrine of election," says Mr. Jarman, "may be thus stated : That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee

accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

Then at pp. 514, 515, the author adds:

- A "A question which has been much discussed is, whether the principle governing cases of election under a will is forfeiture or compensation; or, to speak more explicitly whether a person claiming against a will is bound to relinquish the benefit thereby given to him *in toto*, or only to the extent of indemnifying the persons disappointed by his election. The strong current of the authorities, particularly those of a recent date, is in favour of the principle of compensation . . ."

- B Applying that statement of the law to the facts of the present case, the first question to be decided is whether the testator has by his will purported to dispose of property of the widow. In my opinion the answer to the question must clearly be "Yes." By cl. 2 he gives: "all my silver and plated articles bearing the Beaumont crest." I have no doubt that in so doing he meant to dispose of the whole of such articles which fell within this description and were his ostensible property and not merely of such interest as he might have therein by reason of his interest in the joint estate. Similarly I have no doubt that by cl. 3 the testator was purporting to dispose of all his personal chattels as defined by the Administration of Estates Act, 1925, s. 55 (x), which reads as follows:

- C "Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornaments, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money.

- D It is to my mind clear that the testator was referring to such carriages, horses, etc., as were his ostensible property, and not to an aliquot proportion of the net proceeds of liquidation of the joint estate. But it will be of little assistance to the second defendant if the only property of the widow of which the testator purported to dispose was his interest in the plate and the personal chattels.
- E The aggregate value of the items comprised in cl. 2 and 3 is, according to the evidence, about £796. The widow would have little hesitation in insisting on her rights outside the will if she only had to compensate the second defendant to the extent of the amount he had suffered by her refusal to give effect to the provisions of these clauses. I should add that she is willing to allow the plate and plated articles to pass under cl. 2 of the will—she takes the other personal chattels under the will.

- F The vital question, therefore, is whether the gift in cl. 6 of the will of "the residue of my property" comprises property in which the widow had an interest *dehors* the will. Counsel for the widow says that there is no case in which a person has been held to be put to his election by a residuary bequest or devise, and he relies on the following passage in JARMAN ON WILLS, 7th Edn., p. 521:

- G A general devise of the testator's real estate has always been held to show an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the devise could operate.

- H Applying that passage to the facts of the present case he says that full effect can be given to cl. 6 of the testator's will by treating it as applying to what the testator will receive in the liquidation of the joint estate, and that accordingly, I ought not to read the clause as purporting to dispose of any property or interest of the widow. He also relies on another passage in JARMAN ON WILLS, at p. 521, where the author, after referring to *Dummer v. Pitcher* (3), says:

But if the will is so expressed as to show that the testator had in mind some specific property the case is different.

I readily accept that a mere general devise or bequest would not of itself raise a question of election, but I cannot regard this passage as concluding the matter. The question whether a beneficiary under a will is put to his election depends on whether the testator has purported to dispose of his or her property. This must depend on the construction of the will as a whole, and if I am satisfied

that upon the proper construction of the will as a whole the residuary gift included property of a beneficiary, it must follow that the beneficiary is put to his election. On the whole, I have come to the conclusion that upon the true construction of this will the expression "residue of my property" in cl. 6 means the residue of what was called in the order made by MORTON, J., the testator's ostensible property, *i.e.*, the residue of the property which, in the eyes of English law, would have been his property had he been domiciled in England at the date of his marriage and remained there domiciled down to the date of his death. I think there are a number of indications which show that in disposing of the residue of his property he was not intending to dispose of his share of the net balance of the joint estate. The disposition of the plate and plated articles in cl. 2, and of the personal chattels in cl. 3 are wholly inconsistent with the view that the testator was disposing of his share of the joint estate, for if he had had the joint estate in mind in any part of his will, he would have had in mind that under the relevant law of the Union of South Africa he had no plate or personal effects to dispose of. Under the provisions of South African law, in the absence of agreement between the parties as to mode of division, the whole joint property including the plate and personal chattels would have had to be sold. But the matter does not rest there; cl. 6 itself is inconsistent with the view that it can apply to the share of the joint estate, for it provides for the sale and calling in of the residue, and directs that any reversionary interest should not be sold prior to falling into possession unless the trustees should see special reason for earlier sale. If counsel for the widow were right, it would follow that the testator by cl. 6 could only have been disposing of the net proceeds of realisation of the joint estate, so there could have been no question of any further sale or calling in or of the postponement of sale.

In these circumstances I am bound to hold that the widow must elect between her rights under the South African law relating to community of property and the benefits given to her by the will. I think that it will be sufficient at this stage if I make a declaration to that effect and give liberty to apply. If she elects to rely on the will, no difficulty will arise, but if she insists, as she is entitled to do, on her rights under South African law, except as regards the plate and plated articles, her rights under the will will have to be impounded to make good the loss to the estate by reason of such election. The extent to which compensation would have to be made cannot be ascertained until the joint estate, which of course includes property of the wife as well as property of the husband, has been administered in accordance with the provisions stated in the passage which I have read from MAASDORP, INSTITUTES OF SOUTH AFRICAN LAW, Vol. 1, p. 117.

Declaration accordingly.

Solicitors: *Foyer, White & Prescott* (for the plaintiff); *Bircham & Co.* (for the first defendant); *Griffiths & Son* (for the second defendant).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

J. & F. STONE LIGHTING & RADIO LTD. v. LEVITT.

[COURT OF APPEAL (MacKinnon, du Parcq, L.JJ., and Stable, J.) **May 15, June 7, 1945.**]

Landlord and Tenant—Rent restriction—Tenancy "in consequence of employment"—Tenancy continued on termination of employment—Rent increased—Claim for possession—Counterclaim for overpayment of rent—Estoppel—Decision correct in law though reasoning erroneous—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), ss. 12 (1) (a), (7)—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3.

In 1937 the appellants engaged the respondent as manager of one of their shops and in consequence of this employment they let to him the flat over the shop at a rent of 10s. a week. In Mar. 1943, the respondent ceased to be employed by the appellants; he continued to occupy the flat but, as from Apr. 7, 1943, he paid, by agreement, a rent of £1 a week. Subsequently the flat was required for a new manager and the appellants served the respondent with a notice to quit on Oct. 21, 1944. The respondent did not leave the premises and the appellants brought an action in the county court to recover possession on the ground that the letting was made in

consequence of the respondent's employment. The respondent denied that the tenancy existed on those terms and alleged that, as "the proper and lawful rent" of the flat was 10s. a week, he was entitled to recover the amount which, on that footing, he had overpaid. In dismissing the action for possession the county court judge held that the tenancy at £1 a week started after the termination of the respondent's employment and gave judgment for the respondent on his counterclaim. The rateable value of the flat was £42 per annum and a rent of 10s. a week or £26 per annum was less than two-thirds of £42. At the time of the trial it was not brought to the attention of the judge that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7) provided that: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . ." The appellants, however, started fresh proceedings in the county court for possession on the sole ground that the rent payable by the respondent was less than two-thirds of the rateable value of the flat. Giving judgment for the respondent, the judge took the view that, though the appellants were entitled to raise the claim for possession again, the protection of the flat under the Rent Restrictions Acts was *res judicata* as between the parties. The appellants appealed from this decision:—

HELD: (i) the court could only revise a decision where there was an error in law but not where the decision arrived at was right though based on erroneous reasoning. The standard rent being, on the facts of the case, more than 10s. a week, the decision of the county court that the flat was protected by the Rent Restrictions Acts was correct in law.

(ii) that being so, the appellants could not rely on the doctrine of estoppel by judgment since the result would be to compel the court to give a judgment which it was by statute prohibited from giving, namely, that the appellants were entitled to possession.

Griffiths v. Davies (2) applied.

[EDITORIAL NOTE. This case is decided by the application of the words of LORD GREENE, M.R., in *Griffiths v. Davies* (2) when he says "a statutory prohibition or direction cannot be overridden or defeated by a previous judgment between the parties." The mandatory terms of sect. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, cannot be avoided when the facts indicate that premises are entitled to protection, by introducing the doctrine of estoppel by judgment to establish that they are not so protected.

AS TO ESTOPPEL AGAINST STATUTE, see HALSBURY, Hailsham Edn., Vol. 13, p. 402, para. 455; and FOR CASES, see DIGEST, Vol. 21, p. 139, Nos. *e-m*, Vol. 42, p. 762, No. 1877.]

Cases referred to:

* (1) *Veale v. Cabezas*, [1921] W.N. 311; 31 Digest 565, 7124.

* (2) *Griffiths v. Davies*, [1943] 1 K.B. 618; [1943] 2 All E.R. 209; 169 L.T. 201.

(3) *Bradshaw v. McMullan*, [1920] 2 I.R. 412; 21 Digest 139, *h*.

APPEAL by the plaintiffs from an order of His Honour JUDGE KONSTAM, K.C., made at Epsom County Court and dated Mar. 28, 1945. The facts are fully set out in the judgment of DU PARCQ, L.J.

C. L. Henderson, K.C., and *E. M. Gorst* for the appellants.

D. Weitzman for the respondent.

DU PARCQ, L.J. [delivering the judgment of the court]: In order to define the question which we have to decide it is necessary to set out the history of this unfortunate case. In 1937 the plaintiffs engaged the defendant as manager of one of their shops. They wished, or were willing, that he should occupy the flat over the shop, and this they let to him at a rent of 10s. per week. The flat was thus let to the defendant "in consequence of his employment" within the meaning of the Rent Act, 1933, Sched. I, para. (g). In Mar., 1943, the defendant ceased to be in the plaintiffs' employment. He continued to occupy the flat, but as from Apr., 1943, he paid, by agreement, an increased rent of £1 a week. In 1944 the plaintiffs wished to obtain possession of the flat in order to provide a home for a new manager whom they had appointed. On Oct. 21, 1944, they served notice to quit on the defendant. He did not leave the premises, and the plaintiffs brought an action against him in the Epsom County Court to recover possession. The particulars of claim, dated Nov. 17, 1944, show that the claim to possession was founded on para. (g) of the first schedule to the

1933 Act. The defence pleaded was a denial that the rent was £1 a week, and a further denial that the plaintiffs required the premises for the purpose alleged. Moreover, the defendant, alleging that "the proper and lawful rent" of the premises was 10s. a week, claimed to recover the amount which, on that footing, he had overpaid.

The action came before His Honour JUDGE KONSTAM on Jan. 10, 1945. The judge, after a full hearing, decided that the existing tenancy at £1 was not a letting in consequence of his employment, since the employment had terminated when the agreement by which the rent was fixed at £1 a week was entered into. It followed that he had no jurisdiction to make an order for possession. There was no appeal against the judge's decision and so far as the claim was concerned it seems to us to have been manifestly right.

The difficulty which has now arisen results from the decision on the counterclaim. Unfortunately, the counsel engaged in the case overlooked, and so omitted to bring to the attention of the judge, the provisions of sect. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In all the circumstances, we think that the error, though regrettable, was venial. The judge's notes show that counsel for the plaintiffs agreed that the standard rent was 10s., and on this admission there was judgment on the counterclaim for £35 10s. 0d., a sum representing the difference between payments made by the defendant at the rate of £1 a week and the supposed standard rent. In the course of the proceedings the secretary of the plaintiff company stated in evidence that the rateable value of the flat was £42 per annum, but the significance of this fact was not appreciated. A reference to the forgotten subsection at once shows its importance. A rent of 10s. a week, or £26 per annum is less than two-thirds of £42, that is to say, than £28. Therefore, as was said by a Divisional Court in *Veale v. Cabezas* (1), at p. 312, it :

... could not have been the standard rent . . . , and . . . by sect. 12 (7) of the Act, it was a rent, and the tenancy in respect of which it was paid was a tenancy, to which the Act had no application.

As we have said, there was no appeal against the judge's decision. Reflection, however, brought hope to the defeated plaintiffs. For if, as the judge had held and the defendant had admitted, 10s. was the rent which he ought to pay, might it not follow that he had gained a temporary triumph only at the cost of losing the protection of the Act altogether? By reason of sect. 12 (7) it might be contended that the Acts did not apply to his tenancy at all.

The possibility of such a satisfactory solution emboldened the plaintiffs to bring new proceedings in the county court in Feb., 1945. This time, having served another notice to quit, they claimed possession on the sole ground that the rent payable by the defendant was less than two-thirds of the net rateable value. The defence, as finally amended, stated the defendant's intention to rely on :

... the fact that in the proceedings brought between the parties and heard in the Epsom County Court on Jan. 1, 1945, it was admitted by the plaintiffs and/or held by the judge that the said premises were protected by the provisions of the Rent and Mortgage Interest Acts, 1920-1939, and that the standard rent of the said premises was 10s. a week.

This action, like the former, was heard by JUDGE KONSTAM. In opening the case, the plaintiffs' counsel said that there was no dispute that the standard rent was 10s. a week, and no dispute that the rateable value was £42 a year. The judge, after hearing argument, gave judgment for the defendant. His note of his judgment is as follows :

I hold it *res judicata* that protection of Rent Restriction Acts applies. Sect. 12 (7) would have afforded a complete defence to the counterclaim which could only succeed under sects. 1 and 14 of the Rent Restriction Act, 1920, and judgment was given between the parties on the counterclaim on the basis that these Acts apply. I assume the decision on the claim in the previous action does not amount to *res judicata*.

From this decision the plaintiffs now appeal. They wish to rely on the decision in the first action in order to free themselves from the restrictions of the Acts. It is now manifest that this decision was erroneous, and the plaintiffs can only keep the benefit of it by themselves praying in aid the doctrine of *res judicata*, which, however, they desire to abandon as soon as it has served their turn, since, if it be pressed further, it will support the decision of the judge. The defendant, on the other hand, when he delivered his defence, showed himself

no less desirous than the plaintiffs of having the best of both worlds. He wished then to profit by the manifestly erroneous decision that the standard rent was 10s., but at the same time to escape, by the aid of a supposed estoppel, the fatal effect which sect. 12 (7) must have on a tenancy at that rental.

A At the hearing before us counsel for the defendant submitted that, if the matter were *res integra* and no question of estoppel were involved, the rateable value would constitute the standard rent, by virtue of sect. 12 (1) (a) of the 1920 Act, and he said that the tenant was willing to continue as a tenant at a weekly rent on the basis of £42 per annum and to repay whatever overpayments had been made to him under the first order in the county court. Without expressing a final opinion as to the amount of the standard rent, we intimated our readiness to approve a compromise of the dispute on this basis. The parties were not, however, able to agree, and it only remains for us to deal with the appeal according to the strict rights of the parties.

B We are not now hearing an appeal from the first judgment in the county court. We did, indeed, suggest that if an application were made for an extension of the time for appealing from it, we should be disposed to grant it, but no such application was made. It is not now for us to fix the standard rent, or to deal with any question which it is unnecessary to determine in order to dispose of the appeal. If the judge made an error in point of law, it is the duty of this court to revise his decision. It must always be remembered, however, C that if the conclusion at which the county court judge arrived is shown to be right, his order will stand even though it appears to this court that the reasons which he gave for it were erroneous.

We agree with the contention of counsel for the plaintiffs that the judge was wrong in thinking that any supposed estoppel could override the provisions of sect. 12 (7). But the next stage of his argument is, we think, plainly inadmissible. It is only on the footing that the rent of the flat is 10s. per week D that the plaintiffs now seek to evict the defendant. As we have shown, the standard rent, whatever it may be, is certainly not 10s. a week, and no one suggests that 10s. a week is now an agreed rent. If this court is free to look at the facts with a fresh mind, untrammelled by the first decision in the county court, nobody suggests that this flat is outside the Acts or that their protection can be denied to the defendant. The terms of sect. 3 of the 1933 Act are mandatory. They impose a duty on the court—"no order shall be made." This E duty is not fulfilled if the court makes an order which the facts do not justify. It is well settled that, in the words of LORD GREENE, M.R., in *Griffiths v. Davies* (2)—a decision which is here directly in point—at p. 621:

... a statutory prohibition or direction cannot be overridden or defeated by a previous judgment between the parties.

F It was founded on no novel doctrine, but on a decision of the House of Lords in *Bradshaw v. McMullan* (3), which was cited by LORD GREENE, M.R., in his judgment. We are thus bound to decide the case according to the facts, and we are clearly of opinion that the only reason given by the plaintiffs for their claim to possession was a bad reason, based on a fundamental error of law, and that they have made out no claim to possession. It follows that the appeal must be dismissed with costs.

G *Appeal dismissed with costs. Leave to appeal to the House of Lords refused.*
Solicitors: Moreton Phillips & Son (for the appellants); Sidney Samson (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

H LEWIN v. AMERICAN & COLONIAL DISTRIBUTORS LTD.
[COURT OF APPEAL (Scott and Morton, L.JJ., and Cohen, J.), **March 12, 1945.**]

An appeal by the defendant company from the decision of VAISEY, J., dated Jan. 18, 1945, and reported in [1945] 1 All E.R. 592, was dismissed.

J. Neville Gray, K.C., and Geoffrey Lawrence for the appellants.

R. F. Roxburgh, K.C., and W. F. Waite for the respondent.

Solicitors: Oscar Mason & Co. (for the appellants); Preston, Lane-Claypon & O'Kelly, agents for Herbert & Gowers & Co., Oxford (for the respondent).

JOHNSON v. HILL.

[COURT OF APPEAL (Scott and du Parc, L.J.J., and Stable, J.), May 16, 1945.]

Negligence—Damages—Deductions from damages—Leading aircraftsman killed in motor accident—Probability of widow and children receiving pensions—Pensions to be taken into account in assessment of damages—Fatal Accidents Acts, 1846-1908—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41) A
—*Royal Warrant, Dec., 1943 (Cmd. 6489), art. 56 (1).*

The respondent was the widow of a leading aircraftsman in the Royal Air Force who was killed in a road accident caused by the negligence of a servant of the appellant. The respondent claimed damages in respect of the death of her husband for herself and for her four children under the Fatal Accidents Acts and, under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix of her husband's estate. The deceased was a man of 39 years of age and enjoyed good health. Until he joined the Royal Air Force he had been earning over £6 a week. The judge assessed the damages to which the respondent and her children were entitled under the Fatal Accidents Acts at £4,750. On appeal it was contended for the appellant that the sum awarded was excessive, the appellant relying particularly on the admitted fact that the respondent and her children had benefited, and were likely to continue to benefit, at least to some extent, by the grant of a pension from the Crown and that the probability of such pensions being paid should have been taken into account in assessing the damages :—

HELD : (i) apart from the prospect of a pension being paid, the award of £4,750 as damages was, in the circumstances, too high.

(ii) where dependants had a reasonable prospect of receiving a pension from the Crown by reason of the death on which their claim for damages was founded, that prospect like any other reasonable expectation of benefit must be taken into consideration in assessing the damages. D

Baker v. Dalgleish S.S. Co., Ltd. (2) followed.

(iii) the proper sum to be awarded under the Fatal Accidents Acts, after every deduction had been made, was £2,750.

[EDITORIAL NOTE. The question here considered is the assessment of damages under the Fatal Accidents Acts where there is a possibility of the plaintiff receiving a pension from the Crown. It was laid down in *Baker v. Dalgleish Shipping Co. (2)*, that a reasonable prospect of receiving a pension must be taken into consideration in assessing damages, and the onus of proof of this is upon the defendant. On the other hand, regard must be had to the probability of the pension being reduced in the event of an award of damages. In this case, as in *Baker's* case (2), the Minister concerned had power to reduce the pension in such circumstances, but evidence was given of a practice in the Ministry of Pensions to grant a proportion of the pension, whatever compensation may have been awarded. E

As regards widows' and orphans' pensions under the Widows', Orphans' and Old Age Contributory Pensions Acts, the matter is concluded by sect. 22 of the 1929 Act, which provides that these shall be excluded in computing damages, but otherwise the general rule is as laid down in *Baker's* case (2) and applied with reference to police pensions in *Lory v. Great Western* ([1942] 1 All E.R. 230).

AS TO DEDUCTIONS FROM DAMAGES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 698, 699, para. 986; and FOR CASES, see DIGEST, Vol. 36, pp. 139-141, Nos. 933-944.] G

Cases referred to:

* (1) *Davies v. Powell Duffryn Associated Collieries, Ltd.*, [1942] A.C. 601; [1942] 1 All E.R. 657; 111 L.J.K.B. 418; 167 L.T. 74.

* (2) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 36 Digest 140, 943; 91 L.J.K.B. 392. H

APPEAL by the defendant from a decision of LEWIS, J., sitting at Nottingham Assizes, dated Mar. 5, 1945. The facts are fully set out in the judgment of the court, delivered by DU PARCQ, L.J.

Cartwright Sharp, K.C., and *Douglas Lowe* for the appellant, defendant in the court below.

F. W. Beney, K.C., and *Norman Winning* for the respondent, plaintiff in the court below.

DU PARCQ, L.J. [delivering the judgment of the court]: This is an appeal by the defendant in an action brought by a widow under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. At the trial before LEWIS, J., it was admitted that the death of the plaintiff's husband was caused by the negligence of a servant or agent of the defendant. Under the Law Reform Act the judge awarded £50 damages, and, in addition, the sum of £16 2s. 0d. funeral expenses. No complaint is made as to the award of these sums, and no more need be said about them except that they will stand. The plaintiff sued under the Fatal Accidents Acts for the benefit of herself and of four children who were dependent on her husband. Under these Acts the judge awarded £4,750, which he duly apportioned to the widow and children. In the result judgment was entered for the total sum of £4,816 2s. 0d. The defendant appeals on the ground that the sum of £4,750 was excessive.

- A The deceased was at the time of his death a leading aircraftsman in the Royal
B Air Force, and the defendant relied in particular on the fact, which was admitted, that the plaintiff and her children had benefited, and were likely to continue to benefit, at least to some extent, by the grant of a pension from the Crown. Even if there had been no possibility of a pension being paid in this case, we should have thought that the award of £4,750 was, upon the plaintiff's case, too high. The evidence which the judge had to consider can be briefly summarised. The deceased was a man of 39. He was in good health, and fit for active service.
C Until he joined the Royal Air Force he had been earning something over £6 a week—there was no proof of the exact figure—as what is called a traveller-collector. He habitually gave his wife £4 a week with which to pay the rent of 17s. and feed the family. He made no further allowance to his wife, but he paid for coal, lighting, clothing and such holidays as the family had. The widow estimated that these latter payments amounted in all to “more than £1” a week, and said that it cost “about £1” a week to feed him. The deceased died intestate, leaving no money or property of any kind. Nothing more was proved, and with great respect to the judge we find it impossible to say that these facts justify the award which he made. The principles on which a jury, or a judge exercising the functions of a jury, must assess damages under these Acts are well known and we will not re-state them. A common method of arriving at a fair result is that to which LORD WRIGHT alluded in the following
D passage from his speech in *Davies v. Powell Duffryn Associated Collieries, Ltd.* (1), the most recent case of this nature in which the quantum of damages has been reviewed in the House of Lords. LORD WRIGHT said, at p. 617, ([1942] 1 All E.R., at p. 665):

The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own
E personal and living expenses. The balance will give a *datum* or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt.

- In the case then before the House their Lordships thought that the amount awarded by the judge was much too low. In the present case we are satisfied
G that, whatever legitimate method of assessing the damages be adopted, the figure of £4,750 is much too high. If no allowance fell to be made in respect of what may be paid as a pension, we are agreed that a sum of £3,250 would have been fair and reasonable.

- Where dependants have a reasonable prospect of receiving a pension from the Crown by reason of the death on which their claim for damages is founded,
H that prospect like any other reasonable expectation of benefit must be taken into consideration in assessing the damages. In *Baker v. Dalglish Shipping Co.* (2), where the principle which we have just stated was affirmed, the pension in question was granted on the terms that it might be reduced or cancelled if compensation was paid by a tortfeasor. This is true of the present case also. It is common ground that the Minister of Pensions must act in accordance with the Royal Warrant dated Dec. 4, 1943, of which art. 56 (1) is as follows:

Where the Minister is satisfied that compensation has been or will be paid to or in respect of a person to or in respect of whom a pension or gratuity is being or may be

paid or that any compensation which has been or will be paid will benefit such a person, the Minister may take the compensation into account against the pension or gratuity in such manner and to such extent as he may think fit and may withhold or reduce the pension or gratuity accordingly.

As was pointed out in *Baker's case* (2) it is reasonable to assume that if full compensation is recovered from the wrongdoer, the Minister will withhold, or at least drastically reduce, the pension. (See especially the judgment of SCRUTTON, L.J., at pp. 372, 373). *Prima facie*, therefore, little or no deduction should be made in respect of so shadowy an expectation of benefit, and in *Baker's case* (2) this court affirmed the decision of a judge who had made no deduction in respect of the pension payable. It is however plain from the judgments delivered in that case that if a practice prevailing in the Ministry of Pensions had been proved, under which it was reasonably probable that certain sums would be paid, the court would have thought it right that some allowance should be made in respect of those sums. In the present case the defendant called a senior clerk from the Ministry of Pensions who gave evidence of what was called a "practice" under which the Minister, whatever compensation may have been awarded, still grants at least £50 per annum, or 10 per cent. of the pension, whichever is the greater, and makes a deduction from the balance of the pension which varies with the amount of the compensation recovered. With regard to the children the witness said, "The Minister may disregard £150 in respect of each child." It was not stated that this practice was never departed from, and it can be no more than a convenient working rule. Moreover, letters from the Ministry were admitted as evidence which seem to show that in the view of the Minister compensation should be assessed without reference to the possibility of a pension being granted or continued, and thus indicate that he does not consider himself in any way bound to follow the practice in every case. It is, of course, plain that the practice may at any time be altered by the Minister for the time being.

While it would be wrong, in view of the terms of art. 56 of the Royal Warrant, to treat it as certain that the pensions which have in fact been granted to the plaintiff and her dependants will be continued, it is, we think, impossible not to make some allowance for them in the particular circumstances of the present case. In fact, the plaintiff has received from the date of her husband's death to the present day something over £200. Having regard to the evidence of the official to whom we have referred, we think that some further allowance ought to be made for the future. Here an obvious difficulty arises, and must always arise, since the tribunal which is assessing compensation finds itself obliged to make allowance for the payment of an amount which will itself vary according to the quantum of compensation awarded by that tribunal. Logically the problem seems to be insoluble. The practical way of resolving the difficulty is to make no allowance at all unless payments have already been made, or it can be affirmed on the evidence with reasonable certainty that they will be made. The burden of proving a reasonable expectation of benefits resulting from the death to the dependants is on the defendant. It must always be remembered that the value of evidence of a practice depends on the regularity and certainty of the application of the practice, and, further, that any estimate of future payments must, in the words of YOUNGER, L.J., in *Baker's case* (2), at p. 381, be "severely discounted" for the reasons which he there gave, or for any other like reasons which may exist. In cases where a very large sum can properly be awarded against the wrongdoer, it will usually be safe to assume, in the absence of clear evidence to the contrary, that the Minister will withhold the pension.

On the particular facts of the present case we are satisfied, as we have said, that some deduction should be made for future payments, and we think that the proper sum to be awarded under the Fatal Accident Acts, after every deduction has been made, is £2,750. Subject to any observations which counsel may have to make we should apportion that amount as follows: to the widow, £2,375; to Alan, £75; to Patricia, Peter and Paul, £100 each making £300 in all. The total amount of the sums awarded will thus be £2,816 2s. 0d., in lieu of £4,816 2s. 0d., and the judgment must be varied accordingly. The judge's order as to costs will stand, but the defendant is entitled to his costs of the appeal.

Appeal allowed. Judgment varied accordingly. Judge's order as to costs to

stand. Appellant entitled to his costs of appeal.

Solicitors : *Stanley & Co.* (for the appellant, defendant in the court below) ; *Gibson & Weldon*, agents for *Marchant & Co.*, Mansfield (for the respondent, plaintiff in the court below).

[*Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.*]

A **ALEXANDER AND ANOTHER v. TREDEGAR IRON & COAL CO., LTD.**

[HOUSE OF LORDS (Viscount Maugham, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Simonds), **April 16, 17, June 24, 1945.**]

B *Mines—Coal mine—"Obstruction" of haulage road—Fatal accident on underground haulage railway—Collision with damaged truck—Negligence of fellow workman—Defence of common employment—Coal Mines Act, 1911 (c. 50), ss. 47, 102 (8).*

Master and Servant—Common employment—Whether doctrine of common employment modified by Essential Work Order—Essential Work (Coalmining Industry) (No. 3), Order, 1941 (S.R. & O., 1941, No. 1594), para. 4.

C The respondents owned and managed a coal mine. A fireman, employed by them and in charge of the district, ordered two of their repairers to accompany him when he was taking a damaged tram, drawn by a horse, to the pit bottom for repair. In order to arrive at their destination they had to proceed, for part of the way, along the main haulage road, where there was a steep incline down which trams were lowered by gravity and pulled up again by a haulage engine. Owing to the negligence of the fireman, who failed either to telephone to the engine house at the pit bottom to ask that the road should be kept free for his party, or to signal that he and his party were coming, a collision occurred between his party and a journey of trams coming down the haulage road, resulting in the fireman and the two repairers being killed. In an action by the defendants of the two repairers it was contended that the deaths had been caused by a breach of statutory duty imposed on the respondents by the Coal Mines Act, 1911, s. 47, which requires that "every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions," or, alternatively, by the negligence of the defendants at common law. It was further contended that the defence of common employment did not apply to men whose employment came within the Essential Work Order :—

F HELD : (i) the damaged tram while being moved along the rails to the pit bottom for repair was not an "obstruction" within the meaning of the Coal Mines Act, 1911, s. 47.

(ii) as the workmen had been in the service of the respondents for many years before the Essential Work Order came into force, common employment was still a defence to the respondents.

Decision of the Court of Appeal (GODDARD and DU PARCQ, L.JJ., SCOTT, L.J., dissenting) ([1944] 1 All E.R. 451) *affirmed*.

G [EDITORIAL NOTE. The first question here decided, affirming the Court of Appeal, is whether the haulage by animal power of a broken tram up the main haulage road of a mine was a breach of the Coal Mines Act, 1911, s. 47, which requires that every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions. The accident was caused by collision with a train travelling in the opposite direction, about which no warning was given, and it is held that as sect. 47 is not a traffic regulation and "obstruction" refers to something stationary, the section is not here applicable.

H The second point is of wider application, being the question of whether the doctrine of common employment is excluded where the injured workman is unable to leave his employment by reason of an Essential Work Order. It is argued that the doctrine being in fact an application of the maxim *volenti non fit injuria*, it must be regarded as based upon the continuing freedom of the workman to leave his employment. It is held, however, that no such condition relating to common employment should be read into a contract of employment, and the doctrine remains applicable, notwithstanding the Essential Work Order.

It is important to notice that the contracts here in question had been in existence long before the Essential Work Order was made. The further question remains for decision, whether a workman directed to employment under the Order, and having

no freedom to contract, could successfully challenge the defence of common employment by his employer. This question the House refuse to decide until it arises, but it may be pointed out that in *Read v. Lyons* ([1944] 2 All E.R. 98), CASSELS, J., held that the doctrine of *volenti non fit injuria* was not applicable in the case of a person directed to employment against her will by the Ministry of Labour. The case was decided on appeal on another ground (see [1945] 1 All E.R. 106), but all the members of the Court of Appeal expressed agreement with CASSELS, J., on this point.

AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 207-210, Nos. 1697-1729.] A

Cases referred to :

- * (1) *Priestly v. Fowler* (1837), 3 M. & W. 1; 34 Digest 71, 479.
- (2) *Hutchinson v. York, Newcastle and Berwick Ry. Co.* (1850), 5 Exch. 343; 34 Digest 207, 1697.
- (3) *Bartonshill Coal Co. v. Reid* (1858), 3 Macq. 266; 34 Digest 126, 971; *sub nom. Bartonshill Coal Co. v. Clark*, 6 W.R. 664.
- * (4) *Bartonshill Coal Co. v. McGuire* (1858), 3 Macq. 300; 34 Digest 126, 972; *sub nom. Bartonshill Coal Co. v. Stewart*, 6 W.R. 697.
- (5) *Wilson v. Merry* (1868), L.R. 1 Sc. & Div. 326; 34 Digest 211, 1747; 19 L.T. 30.
- (6) *Fanton v. Denville*, [1932] 2 K.B. 309; Digest Supp.; 101 L.J.K.B. 641; 147 L.T. 243.
- * (7) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] A.C. 215; [1939] 1 All E.R. 637; Digest Supp.; 108 L.J.K.B. 320; 160 L.T. 420.
- (8) *Smith v. Steele* (1875), L.R. 10 Q.B. 125; 34 Digest 213, 1756; 44 L.J.Q.B. 60; 32 L.T. 195.
- * (9) *Morgan v. Vale of Neath Ry. Co.* (1864), 5 B. & S. 570; *affd.* (1865), L.R. 1 Q.B. 149; 34 Digest 212, 1750; 5 B. & S. 736; 35 L.J.Q.B. 23; 13 L.T. 564.

APPEAL by the plaintiffs from a decision of the Court of Appeal (GODDARD and DU PARCQ, L.J.J., SCOTT, L.J., dissenting), dated Mar. 17, 1944, and reported [1944] 1 All E.R. 451. The facts are fully set out in the opinion of VISCOUNT MAUGHAM.

Gilbert Paull, K.C., and *E. Ryder Richardson* for the appellants.

A. J. Long, K.C., and *A. A. Warren* for the respondents.

The House took time to consider its opinion.

VISCOUNT MAUGHAM: My Lords, this action was brought by the appellants to recover damages under the Fatal Accidents Act, 1846, and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the deaths of Henry Alexander and Ernest Williams Andrews by an accident in a coal mine owned and managed by the respondents. Each of the appellants sues as the administratrix for one of the deceased.

The facts are not now in dispute and may be stated as follows:—

The two men were miners, aged 63 and 62 years old, employed as repairers at the mine and had been continuously employed at the mine for some thirty years. In the mine there was a straight main haulage road called Badham's Drift running south-west from near the pit-bottom in a gradient of about 1 in 18 downhill for nearly a mile ending at the junction of Main Mead Vein and Badham's Level. Throughout this length there was a narrow haulage railway on which trucks or trams could be lowered by gravity down the incline, and pulled up again by a haulage engine near the pit-bottom. About 300 yards down the said incline there was a road which diverged to the east, known as No. 4 East Drift Road; and at the junction thereof with Badham's Drift there was a telephone and in addition the usual signalling wires. About 250 yards further down the said incline a level road called the Hydraulic Parting diverged to the west. The Hydraulic Parting and No. 4 East Drift were both haulage roads with rails.

On Sept. 5, 1942, at or about 5.30 in the morning, one Mantle, a fireman in the service of the respondents and in charge of the said district ordered one Addis to take a tram which had a bent axle with a horse to draw it from near the junction of Main Mead Vein and Badham's Level up Badham's Drift to the pit-bottom. This Addis began to do, and Mantle accompanied him. On the way Mantle ordered each of the two miners (now deceased) to accompany Addis, and this they did, walking behind the defective tram.

When Mantle, Addis and the deceased and the defective tram arrived near the Hydraulic Parting, Addis stopped the tram and went forward to see whether there was a rope on the ground. If there had been, this would have meant that there was a train of trams which was or shortly would be coming up on its way

to the pit-bottom. Addis told Mantle that there was no rope on the ground and Mantle then told him and the deceased to proceed up Badham's Drift.

In the meantime, a train of trucks or trams filled with rubbish had been pulled up No. 4 East Drift by the stationary haulage engine. The man in charge having adjusted the points, started the journey down the incline of Badham's Drift.

A At that hour main haulage was in operation and, as Mantle knew, trams were liable to be hauled up and down Badham's Drift and there was a system of telephones whereby Mantle could have warned the man in charge of the presence in Badham's Drift of Addis, the deceased and the defective tram. It was the duty of Mantle to give the warning, but this he failed to do.

B Badham's Drift was in darkness and the defective tram made considerable noise, so that neither Addis nor the deceased were aware that the train of trams was approaching them. In consequence the train collided with the defective tram and both the deceased were killed.

It is not now in dispute that Mantle was guilty of negligence and that the accident was thus occasioned. It was held by the trial judge (SINGLETON, J.) that at the time of the accident Mantle was a fellow servant with Alexander and Andrews under the respondents and in common employment with each of them; and this is not questioned on the appeal.

C Two points were raised upon the trial of the action and are raised upon this appeal. The first is the contention of the appellants that the deaths were caused by a breach by the respondents of the provisions of the Coal Mines Act, 1911, s. 47, which is in these terms:

Every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions.

D The second is raised by the defence of common employment set up by the respondents.

The appellants in answer to this defence rely upon an order made by the Minister of Labour under regs. 58A and 98 of the Defence (General) Regulations, 1939, which is entitled the Essential Work (Coalmining Industry) (No. 3) Order, 1941, (S.R. & O., 1941, No. 2096). Para. 4 of that Order has a marginal note:

Provisions as to employment in scheduled undertakings.

E It is agreed that this is a scheduled undertaking, and that both men who were killed were persons who were subject to this Order.

Para. 4 reads as follows:

F Subject as hereinafter provided, where a person carries on a scheduled undertaking the following provisions shall apply: (a) the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any person employed therein, or without terminating such employment cause him to give his services in some other undertaking (except in case of emergency for a period not exceeding fourteen days), except with the permission in writing of a national service officer; (b) a person employed in the undertaking shall not leave his employment except with such permission as aforesaid . . .

G That is to say a person employed as Alexander and Andrews were employed could not leave his employment except with the permission in writing of a national service officer.

The Order makes no reference to such a matter as the liability of the employer for accidents to workmen or to the rule as to common employment. It is a temporary war-time regulation intended to increase the production of the scheduled undertakings, and it will cease to have validity in due course.

H It is in reliance on this Order that the appellants contend that the defence of common employment is not open to the respondents in regard to the negligence of Mantle, because at the time of the said negligence the liberty of each of them, Alexander and Andrews, to leave his employment under the respondents was restricted by the provisions of the Order. It was conceded by the appellants that but for the effect of the Order the respondents were entitled to rely and succeed upon the defence of "common employment," in so far as the appellants' claims were based upon the negligence of Mantle and not based upon any breach of statutory duty by the respondents.

By his judgment SINGLETON, J., decided both these points in favour of the respondents, that is, that the respondents had not been guilty of a breach

of the provisions of the Coal Mines Act, 1911, s. 47, and that the defence of common employment was open to them notwithstanding the terms of the Order.

The appeal was heard by the Court of Appeal (SCOTT, GODDARD and DU PARCQ, L.J.J.) and was dismissed by a majority of the court on Mar. 17, 1944. All the Lords Justices held that the respondents were entitled to succeed upon the defence of "common employment" in so far as the appellants' claims were based upon the negligence of Mantle and not based upon any breach of statutory duty. GODDARD and DU PARCQ, L.J.J., also held that the respondents had not been guilty of any breach of the provisions of the Coal Mines Act, 1911, s. 47. SCOTT, L.J., however, held that the respondents had been guilty of a breach of the provisions of the Coal Mines Act, 1911, s. 47, and further were not relieved of liability by the provisions of subsect. (8) of sect. 102 of the said Act.

My Lords, I will deal first with the question arising under sect. 47 of the Coal Mines Act, 1911. The section is contained in Part II of the Act described as relating to "Provisions as to Safety." Those sections contain elaborate provisions as to ventilation, safety lamps, shafts and winding apparatus, and (sects. 42 to 48) travelling roads and haulage, and a number of other provisions designed as far as possible to secure the safe working of mines of coal and ironstone. The haulage roads dealt with in the Act might be worked by gravity or mechanical power or by horses or other animals. (See the terms of sects. 43, 44 and 45.) Vehicles using the road might, of course, be travelling in either direction although there might be (and is in this case) only one pair of rails; and under sect. 43 (1) it is agreed that miners and others might use a road of the width of Badham's Drift, their safety being secured by refuge holes (sect. 44). It is to be noted that there is a provision (sect. 48) requiring means of "communicating distinct and definite signals." between all regular stopping places and the ends of the road. Failure to comply with any of these provisions is an offence against the Act (sect. 75). Penalties are imposed by sect. 101.

My Lords, the sections, as I have mentioned, show clearly that haulage roads are intended to be used by vehicles and persons travelling in both directions. If a tub or a tram used for the normal purposes of the mine is "an obstruction" within sect. 47, it would seem to follow that "as far as possible" it should not be allowed on the road—which is absurd. The appellants' argument that the defective horse-drawn tram under the care of Addis was an obstruction would seem to require the section to be read as if some words were added by implication to show that vehicles would not be within the section unless there were other vehicles travelling in an opposite direction on the same line. This would not be a legitimate addition to a penal section. Pieces of coal or a baulk of timber would be obstructions at any time to all kinds of traffic along the road. The case of trams used to transport coal or stone or persons is entirely different, and danger from such traffic is more appropriately guarded against by provisions for proper signalling under sect. 45. The section in my opinion is not a traffic regulation at all. It is primarily directed to the state of the haulage way and the lines upon it, and is designed to secure that they shall continuously be kept clear for traffic in either direction. I, therefore, agree with the way the matter is stated in the Court of Appeal. I do not, however, think that the *ejusdem generis* rule is applicable here; for it is easy to think of obstructions which are not in any reasonable sense of the same *genus* as pieces of coal. I would prefer to say that upon the true construction of the section, the presence on the line of tubs or other vehicles for the purpose of working the mine is being contemplated as normal, and accordingly that vehicles so employed are not within the scope or meaning of the words "other obstructions" as used in that section. I have carefully considered the contrary view expressed by SCOTT, L.J., but I find myself unable to agree with it. I do not feel it necessary to express an opinion on the question which might arise if a vehicle was temporarily not being used for the traffic of the mine and was left unattended on the rails; but I think it would not be difficult to distinguish that case from the present one.

The question whether the doctrine of common employment (which I shall call the rule) is open to the respondents is plainly one of very far-reaching importance. It is important on the present appeal to bear in mind that both Alexander and Andrews had entered the service of the respondents many years before any war legislation. The terms of their contracts of employment must

clearly be ascertained in relation to the surrounding circumstances that either existed or were in contemplation at that time. Counsel in his able argument for the appellants realised this, and contended, without any sacrifice of logic, that the implication of the rule is always based or conditioned on the freedom of the workman to enter or decline to enter a particular employment and to leave it on proper notice in the event of his not being satisfied of the skill and care exercised by his fellow workmen. It must follow, he said, that the rule can in effect be stated as if the workman had said to the master on entering his service, "If you the master will employ reasonably skilful and careful persons to work with me I will accept the risk of their being negligent, provided that I am always to be at liberty on proper notice to leave your employment in the event of my not being satisfied with my fellow workmen." In support of this contention counsel for the appellants referred us to a number of cases in which the rule of common employment has been laid down beginning with the decision in *Priestley v. Fowler* (1), discussed in detail in the independent decision of *Hutchinson v. York, Newcastle and Berwick Ry. Co.* (2), and finally approved in 1858 by the House of Lords in *Bartonshill Coal Co. v. Reid* (3), and in *Bartonshill Coal Co. v. McGuire* (4). Those decisions were followed in *Wilson v. Merry* (5), and in many other cases. My Lords, I think the rule as it has finally emerged is excellently stated in SALMOND ON THE LAW OF TORTS, 9th Edn., p. 107. He begins by citing a well known passage from LORD CRANWORTH's statement of the general principle in *Bartonshill v. Reid* (3), at p. 295, in the following terms :

When several workmen engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks. The rule, that is to say, is an application of the maxim *volenti non fit injuria*. This presumption that a servant agrees to take upon himself the risk of his fellow servants' negligence is, however, not a mere presumption of fact, as in other cases in which the maxim is applied ; it is a presumption of law, which can be excluded by nothing less than an express agreement between master and man by which the master forgoes the benefit of it. The rule applies even though the servant injured is a child.

This passage from SALMOND ON THE LAW OF TORTS has had the approval of SCRUTTON, L.J., in his elaborate judgment in *Fanton v. Denville* (6).

LORD CRANWORTH's statement of the law was cited and accepted as correct by LORD CAIRNS in *Wilson v. Merry* (5), at pp. 330, 331, and has been followed in many cases ; but I will refer only to one other, a recent decision of this House. In *Radcliffe v. Ribble Motor Services, Ltd.* (7), LORD ATKIN delivered the leading judgment and after giving a short account of the history of the rule he observed, at p. 227, that LORD CRANWORTH had given in the passage above quoted "what is now accepted as the true basis of the rule." With that view I think all your Lordships agree.

It is important to note that LORD CRANWORTH bases the rule, which must now be taken to be a rule or presumption of law relating to contracts between master and servant, mainly on the two grounds, on the one hand that the servant knows or ought to know the risks including the risks of carelessness by fellow workmen, and on the other that the master cannot secure him against these risks. LORD CRANWORTH says nothing about the right of the workmen to leave the employment of the master if he thinks that he is exposed to risks from rash or unskilful fellow servants. It is true that this has been mentioned again and again especially in the older cases ; but I do not think the observation is anything more than an attempt to show that generally speaking the rule is not unfair to the workmen. If it were to be regarded as an essential condition of the rule being applicable, it would I think be necessary to deal with the cases of employments which cannot be terminated by the workman except by the giving of a lengthy notice. To give two examples, the case of a seaman signing on for a lengthy voyage would have to be considered, and also the case of an apprentice for a number of years if the contract is mainly one of service.

In the very numerous reported decisions relating to the application of the rule your Lordships have not been referred to any in which it has been held that the rule was inapplicable on the ground that the freedom of the workman to leave the employment was for some reason suspended. I do not think it can

be correct to say that the rule, well settled as it now is, must be regarded as being essentially based upon the continuing freedom of the workman to leave the employment.

It was not contended by the appellants that the effect of the Minister's Order was to put an end to the contracts of service of the workmen then employed in the undertaking. Those contracts clearly continued in force, and they do not purport to be varied by the Order (if indeed that was competent to the Minister) so far as regards the liability of the employers.

The appellants in the present case have to persuade your Lordships that the contracts of service entered into by the two workmen, though it must be admitted that they included as a presumption of law the rule as to common employment, must be held to be subject to an implied term or proviso that the rule would continue applicable only so long as the workmen continued to have the right to leave the employment on giving proper notice. Such a term could be implied only if it could be shown to be reasonably necessary so to do in order to carry out the true bargain between the parties. That cannot, in my view, be established in the present appeal. My Lords, I have already noted that in the present cases the workmen so far from being directed to the particular employment in which they were engaged at the date of the accident had been in the service of the respondents for many years before the Essential Work Order came into force. It is only with those facts that we are dealing. I do not think it would be prudent for this House to express an opinion on the very important question whether the result would be the same in the case of workmen who were directed to an employment under the Essential Work Order. In such a state of facts the contract of employment would be not voluntary on the part of the workmen and an argument to exclude or modify the usual rule might take a very different form from that which counsel for the appellants has felt himself able to adopt on the present appeal. I do not propose to express any view one way or the other as to the result of an appeal if such a case were to come before the House.

For the reasons above stated I have come to the conclusion that the trial judge and the Court of Appeal were right in their decisions on the two points raised on the appeal. It must, therefore, be dismissed with the usual consequences as to costs.

LORD RUSSELL OF KILLOWEN : My Lords, having had the opportunity of reading and considering the opinions prepared by VISCOUNT MAUGHAM and LORD SIMONDS, I find myself unable to suggest any further reasons why we should dismiss this appeal. I will only say, on my own behalf, that I cannot believe that sect. 47 of the Coal Mines Act, 1911, envisages as an obstruction of a haulage road a vehicle which has been constructed for the purpose of running on the haulage road, and which is engaged on the purpose for which it was constructed.

LORD MACMILLAN : My Lords, I concur.

LORD WRIGHT : My Lords, two separate issues are here raised. One is whether the fatal accident in respect of which the appellants bring their action was caused by a breach by the respondents of their statutory obligation under sect. 47 of the Coal Mines Act, 1911, the other is whether the respondents are excused from responsibility by reason of the doctrine of common employment. I shall accordingly first state my opinion on the construction of sect. 47. That section is brief ; it is as follows :

Every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions.

Subject to the limitations conveyed by the words " as far as possible " and to the similar limitation contained in sect. 102 (8) of the Act, the obligation is unqualified. The respondents could not excuse themselves on the ground that the accident was due to the negligence of a fellow servant.

But I do not think that the case falls within the section. The damaged tram which was being drawn by a horse up the haulage road did not in my opinion constitute an obstruction such as the section provides for. The governing word is " obstruction " The reference to " pieces of coal " is by way of illustration and indicates the sort of thing which the legislature had in mind. I think the primary idea is that of something stationary, which is left on the road out of the ordinary course of things, such as baulks of timber, or stones or pieces of coal, which have no proper place on a road. The word " obstruction " seems

to me singularly inappropriate to the case of a vehicle being pulled by a horse up the line for a legitimate purpose in connection with the working of the pit. The trouble was that owing to the mistake and negligence on the part of the foreman who was in charge of the district, he did not warn by telephone the men in control and management of the road that the damaged tram was proceeding up it, with the result that the men started a journey of trucks down the road. The journey ran into the broken tram and killed the horse and the two men.

- A But I do not think that the moving tram was an obstruction within the meaning of the section. Except for the failure to exercise due control of the traffic, nothing would have been out of order. There was no more reason to describe the horse-drawn tram as an obstruction than the moving journey. Each in a sense obstructed the other, but in ordinary parlance neither would be called an obstruction. The accident would be described as a traffic accident between two vehicles each moving on a road on which it was meant to move, so long as the road control did not let them go in different directions on the single line at the same time.

This conclusion is strengthened by the references to pieces of coal. These are things which have no right to be left on the road. They are completely out of place. I put stress of my opinion on the word "obstruction." I do not think that this is a case of applying the *ejusdem generis* rule. Not only is there no *genus*, but the frame of the sentence emphasises that the pieces of coal are merely meant to illustrate what is meant by obstruction.

- C I am of opinion that the appellants fail in their claim based on the Coal Mines Act, 1911, s. 47. They cannot succeed on the ground that the respondents committed a breach of an absolute statutory obligation. Their alternative claim for negligence at common law also fails, in my opinion, because it is met by the plea of common employment, the men who were killed and the man who was negligent being all engaged in the service of the same employers, the respondents. They were engaged in common work, involving exposure to the risk of the negligence of one affecting the others. The doctrine was very fully discussed by this House not so long ago in *Radcliffe v. Ribble Motor Services* (7), and I need not now repeat what was said there. It is difficult to understand why a doctrine so severely attacked has survived so many years. It has, however, been strenuously argued here by counsel for the appellants that it has no application. The colliery in question was a scheduled undertaking within the meaning of the Essential Work (Coalmining Industry) (No. 3) Order, 1941 (S.R. & O., 1941, No. 2096); para. 4 (b) of that Order provided that a person employed in such an undertaking should not leave his employment except with the permission in writing of a national service officer. It was contended that the essential condition of the application of the doctrine of common employment was the consent of the man to undergo the risk of the negligence of the men who were in common employment with him, and that the condition was not fulfilled where the man could not leave the employment of his free choice, but was compelled to continue in it unless he could get the permission of the national service officer.

- E So stated in that bald way, the question raised is one of great importance, which during the period of the present emergency may apply to many millions of workers who are engaged on scheduled undertakings. But I do not think it necessary here to examine the question in its full scope, because it may, I think, be disposed of on a narrower basis. I shall accordingly abstain from discussing the broader question, but merely consider the more limited issue.

- G The Order did not come into force until Dec. 18, 1941. Before that date both the men who were killed were serving in the employment of the respondents, and they continued to do so up to and including the time of the accident. If the true view of the effect of the Order was that it abrogated the doctrine of common employment, there and then, in the case of men in continuous employment before and after the Order came into force, it changed the character of the contract of employment in the vital respect that before the date of the Order the contract was subject to the common employment rule, while after that date it was not so subject.

H Counsel for the appellants, very properly, shrank from contending that the Order itself could so drastically change the conditions of an existing and operative contract. He accepted the current view established by the decisions of this

House that the doctrine of common employment was based on an implied term in the contract of service and, whether it applied or not, must be looked for as at the moment when the man enters the employment. The theory or fiction, he argued, is that he voluntarily enters the employment knowing the risks to which he is to be subject, but that he does so on the footing that he is free to enter the employment and equally to leave it. When freedom to leave the employment is taken away, the position is changed to the detriment of the man. However much he may disapprove of the fellow servants whose conduct may expose him to the risk of injury, he is no longer free to leave of his own choice. He must go on working with fellow servants, however unsatisfactory to him. Counsel for the appellants did not found his claim on the contract being changed as between man and employer, but on a further implied proviso which, he contended, attached to the original contract of employment; this proviso, he submitted, was to the effect that the man was only to be subject to the defence of common employment so long as he was free to choose with what fellow servants he should work, or continue to work, and so long as he was free to leave the employment in the event of his being dissatisfied with them. In the event of the failure of that condition the doctrine of common employment ceased to operate in his case, and if he were injured by a fellow servant's negligence, he could no longer be met by the plea of common employment.

It is no doubt true that the doctrine is based on his freedom of choice (see, for instance, *Smith v. Steele* (8), at p. 129, and the *Ribble* case (7)), but that looks to the date when the contract is entered into. It has never been suggested that such a change as is effected by the Essential Work Order can have been in the contemplation of the parties. The implied term which the law has accepted is indeed theoretical and has little relation to fact, but I am not prepared to extend the theory or fiction beyond its present artificial and arbitrary limits. The new proviso which it is sought to introduce is too far removed from any conceivable contemplation of the parties. There is no authority for it. I agree with all the judges below that no reason is shown why the plea of common employment should not succeed.

LORD SIMONDS: My Lords, the facts of this case which are not in dispute have already been fully stated to your Lordships and need not be repeated by me. I propose to say only a few words upon the two questions of law that have arisen.

The first question concerns the meaning and scope of the Coal Mines Act, 1911, s. 47, which is in the following terms:

Every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions.

The neat question is whether the haulage by animal power of a broken tram up the main haulage road known as Badham's Drift was a breach by the respondents of the statutory duty imposed on them by the section that I have cited. That it was *per se* a breach of such duty could not be contended, for it was not suggested that the broken tram must for ever remain where it lay or that it could be brought to the pit bottom by any other way or that animal power was an improper method of haulage. It was, therefore, in the circumstances of its removal that the appellants were forced to find a breach of duty by the respondents. They, therefore, alleged that the presence of the broken tram at that particular time, at that particular place, was an "obstruction" of which the respondents were bound under sect. 47 to keep the haulage road clear. But this is still an imperfect statement of the position: for the broken tram would not even at that time and place have been an "obstruction," if the proper precautions had been taken and communication maintained with the men in charge of the main haulage engine so as to ensure free passage along the haulage road from the turning marked on the plan "Hydraulic Parting" to the pit bottom. The appellants were in truth driven to the contention that if there was a collision between two trams, each of which was entitled to use the road subject to proper precautions, then one or both of them were obstructions within the meaning of sect. 47. My Lords, I do not find it necessary to decide whether a broken-down tram, if carelessly left in a haulage road, could be an "obstruction" within sect. 47, but I agree with your Lordships in thinking that that word is wholly inappropriate to describe either of two trams which

come into collision in the course of a journey properly undertaken by each of them if proper precautions are observed. In the present case presumably, if negligence had been imputable to those in charge of the main haulage rather than to the fireman who has died, the "obstruction" would on the appellants' argument have consisted of the trams which were being sent down the road. It is, I think, clear that this is not a meaning which can be properly ascribed to the word "obstruction" in the relevant section. It is unnecessary to discuss whether there is room here for the application of the *ejusdem generis* rule of construction.

The second question of law is whether the claim by the appellants is excluded by the doctrine of common employment. I will state that doctrine by repeating the oft cited words of BLACKBURN, J. (as he then was) in *Morgan v. Vale of Neath Ry. Co.* (9), at p. 578 :

B That principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services . . .

C This is the qualification which by the common law is imposed upon the common law rule *respondent superior*. The appellants would impose a qualification upon this qualification. They would deny its applicability wherever the workman is not competent to leave his employer's service at his own free will, as if there were added to the principle as enunciated by BLACKBURN, J., some such words as "provided he is at liberty to give notice to leave, and, having given such notice, to leave, his employment, if and when he thinks fit." Then, assuming this to be the principle of law, they apply it to the present case by saying that the deceased workmen were by the Essential Work (Coalmining Industry) (No. 3) Order, 1941 (S.R. & O., 1941, No. 2096) precluded from leaving their employment except by permission of a national service officer, therefore the condition of the implied contract between them and their employer was not satisfied, and, therefore, they can rely upon the unimpaired doctrine *respondent superior*.

E My Lords, in my opinion there is no foundation for this qualification of the doctrine of common employment in relation to the wider doctrine *respondent superior*. It was candidly admitted by counsel for the appellants that no such qualification is anywhere stated in the numerous cases in which since 1837 the doctrine has been discussed. But he finds justification for it in the not infrequent judicial allusions to the freedom of the workman to come and to go as part of the explanation of the doctrine. It is no doubt attractive to analyse and define a principle of law and to confine its application within the limits which analysis and definition appear to require. And if in the present case the reason for this principle were as precise and clear as is the principle itself, I should not be unwilling to seek to confine its application. But, my Lords, in 1837 LORD ABINGER, whose judgment in *Priestley v. Fowler* (1) may be regarded as the first expression of this principle, was able to say that there was no precedent for the claim made in that case, *i.e.*, for the claim that the master was vicariously responsible to his servants for the negligent act of a fellow servant, and this rule, extolled in one age and condemned in another, has been repeated again and again without even the suggestion that there lay in *gremio judicium* the qualification that it should not apply where the workman could not leave his employment at will.

H If indeed this qualification was imposed on the doctrine of common employment, I do not see why your Lordships should not attack the citadel of the master's vicarious responsibility. Is he to be responsible for the acts of those servants of whom he cannot without permission of the national service officer, be rid, but rest under a new responsibility to his own servants because they cannot, if they would, be rid of him? I do not think that your Lordships would be justified in refining upon either the principle or its qualification. There remains room enough, as such cases as *Radcliffe v. Ribble Motor Services, Ltd.* (7) show, for fine distinctions in determining who by reason of their work are engaged in "common employment," but it is not possible to qualify the principle by importing as a condition of its application the implied term that the workman shall be at liberty as he thinks fit to determine his employment.

My Lords, the present case is one in which the workmen concerned voluntarily entered their employment long before any Essential Work Order was ever thought of and evinced no wish to leave it. It is to their case and to the question whether into their contract of service the suggested new term should be imported that I have confined my observations. If and when the case should arise of a workman being against his will sent under the Order to a service that he would otherwise have declined and of his saying in some such words as counsel suggested: "What I must do, I will do: but I make no contract of service and reject any that might be implied," such a case may be considered on its merits. It is not that which this House has now to consider.

I concur in the motion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Theodore Goddard & Co.*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the appellants); *W. A. Crump & Son*, agents for *A. J. Prosser*, Cardiff (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

BRETT v. THROWER.

[COURT OF APPEAL (Scott, MacKinnon and Morton, L.JJ.), June 12, 1945.]

County Courts—Appeal—Claim not exceeding £20—Action for nuisance—Claim for ancillary injunction—No appeal without leave of county court judge—County Courts Act, 1934 (c. 53), s. 105, proviso (a).

In an action or counterclaim brought in a county court for damages for nuisance, a claim for an injunction ancillary to that claim or counterclaim does not take the case out of the definite prohibition of the County Courts Act, 1934, s. 105, proviso (a), that there shall be no appeal without the leave of the judge "where the damage claimed does not exceed £20."

[EDITORIAL NOTE. The question here is whether there is a right to appeal without leave from a county court when there is a claim for an ancillary injunction in addition to a claim for damages not exceeding £20. The claim is for damages for nuisance, where damages are an essential part of the cause of action, and the court, in holding that there is no appeal without leave, distinguishes *Brune v. James* (2) and *Dixon v. Brown* (3), which were actions for trespass. MORTON, L.J., observes that the opinion of the court in the latter case, that the prohibition against appeal without leave does not apply when an injunction is claimed, is too widely expressed.

The judgment of MACKINNON, L.J., contains some useful *dicta* on the meaning of the ambiguous word "upon," which he here construes as meaning "against."

AS TO APPEALS FROM COUNTY COURTS, see HALSBURY, *Hailsham Edn.*, Vol. 8, pp. 376-380, paras. 810, 812, 813, and Supplement; and FOR CASES, see DIGEST, Vol. 13, p. 525, Nos. 751-754, 757, 758, and Supplement, *County Courts*, 847a.]

Cases referred to:

*(1) *Smith v. Gill*, [1896] 2 Q.B. 166; 13 Digest 525, 754; 65 L.J.Q.B. 556.

*(2) *Brune v. James*, [1898] 1 Q.B. 417; 13 Digest 525, 757; 67 L.J.Q.B. 283; 77 L.T. 802.

*(3) *Dixon v. Brown*, [1915] 2 K.B. 294; 13 Digest 525, 758; 84 L.J.K.B. 1248; 112 L.T. 1033.

APPEAL by the defendant from a decision of His Honour JUDGE PUGH, given at the Norwich County Court and dated Mar. 13, 1945. The respondent took the preliminary objection that the Court of Appeal had no jurisdiction to hear the appeal since the claim was one on which no appeal lay without the leave of the county court judge and such leave had not been obtained. The facts are fully stated in the judgment of SCOTT, L.J.

Linton Thorp, K.C., and *F. T. Alpe* for the appellant.

J. Norman Daynes, K.C., and *C. Montgomery White* for the respondent.

SCOTT, L.J.: This is an appeal from His Honour JUDGE PUGH, at the Norwich County Court, by a defendant. The defendant appealing is met by an objection by counsel for the plaintiff that it is a case in which no appeal lies from the judgment of the county court judge to this court, on the ground that the claim is not one upon which an appeal is allowed without the leave of the county court judge, and that that leave was not asked by the appellant.

The County Courts Act, 1934, s. 105, provides:

If any party to any proceedings in a county court is dissatisfied with the determination or direction of the judge in point of law or equity or upon the admission or rejection of any evidence, the party aggrieved . . . may appeal therefrom to the Court of Appeal . . . subject to . . . the Rules of the Supreme Court : Provided that, without the leave of the judge, there shall be no appeal (a) in any action founded on contract or on tort (other than an action for the recovery of land or an action in which the title to any hereditament has come in question) where the debt or damage claimed does not exceed £20.

A It has been held that the phrase "where the debt or damage claimed" should be construed as covering not only a claim by the plaintiff but a counterclaim by the defendant.

In the present case there is no question but that the plaintiff's claim does not exceed £20, as it was £20 precisely that was claimed. The claim was for damages caused by the defendant unlawfully causing a number of holly and laurel bushes in the plaintiff's garden to be cut and mutilated. The plaintiff's garden was 53, Wroxham Road, Sprowston; the defendant's garden was 51, in the same road, adjoining the plaintiff's premises. The defence is a denial, with an alternative plea that :

If the defendant committed the said trespass as alleged the defendant her servants or agents did so in order to abate a nuisance existing which interfered with the enjoyment of her own adjoining premises.

C As regards the trespass, the judge held that the plaintiff suffered no damage. The notice of appeal by the defendant is against the judgment on her counterclaim, which she desires should be set aside. The counterclaim states that the defendant is the owner and occupier of the adjoining house, and then says :

D In or about 1940 the plaintiff his servant or agents built upon the said premises, known as 53, Wroxham Road, Sprowston, aforesaid, a wooden shed; the said shed was so built that it covers a ditch the property of the defendant on the north side, and upon an adjoining wall the property of the defendant; the said shed so built causes the said wall to be defective damp and unsound, thereby causing the defendant damage and loss.

The objection having been taken at the outset of the defendant's appeal that it is not competent to this court to deal with it on the ground that the leave of the county court judge had not been asked for and granted, we as yet know little of the facts of the case, but the gist of the matter is—and it is not disputed—that for practical purposes there was no dispute at all as to the title or ownership of the wall, and the claim in respect of the ditch was abandoned by mutual consent as being irrelevant. What we do know about the wall is that a plan was put in, which is before this court, showing that the shed was not upon the wall at all as alleged but was merely alongside it. MACKINNON, L.J., has looked into some of the facts of this case as disclosed in the judge's notes and the correspondence and he will deal with what did happen so far as it is necessary; but I do not think it is open to argument that for practical purposes there was no question at all of title in the court below and the allegation, in so far as it was made and pleaded in the counterclaim, that there was anything in the nature of a trespass upon the plaintiff's property, altogether disappeared from the case. The real dispute was on the claim by the defendant that the plaintiff, by maintaining the shed in the neighbourhood of the wall and by growing various bushes near the wall in his garden and a fig tree against the wall, caused a nuisance to the defendant by making the wall damp and unsound. The judge dismissed the whole counterclaim with costs, and it is an appeal against that decision that was intended to be argued in this court.

G On those broad facts as to the issues before the county court and the conduct of the case there, the only question that we have to decide is whether the objection is good. The defendant in her counterclaim not only claimed damages which she estimated at £20—a figure "not exceeding £20", as stated by sect. 105—but also claimed (i) a declaration "that the plaintiff is not entitled to keep the wooden shed on the defendant's wall and covering the defendant's ditch," (which latter point was not a real issue in the proceedings before the county court judge); (ii) a declaration "that the plaintiff is not entitled to keep the laurels, holly or other bushes and fig tree against the defendant's wall"; and (iii) an injunction ancillary to the declaration restraining the plaintiff from continuing to maintain and keep the said wooden shed and laurels, holly or

other bushes and fig tree so as to be a nuisance to the defendant. Quite shortly, the issue upon which the defendant desired to appeal to us was in regard to the counterclaim for a nuisance, including the claim for damages, a declaration and an injunction. The county court has no jurisdiction over an independent injunction ; it can only grant an injunction, as it can only grant a declaration, as ancillary relief to a cause of action within its jurisdiction. In this case it is quite clear that both the declaration and the injunction about the bushes were ancillary to the claim for damages for a nuisance by the continued maintenance of the bushes. No question of trespass or title came into the case at all. A

That being the nature of the litigation below, the case is one in which the damages in an action of tort as claimed by the defendant, equally with the damages claimed by the plaintiff, do not exceed £20, and, therefore, on the wording of sect. 105 of the Act of 1934, *prima facie* the objection is well-founded. There have been certain decisions about the comparable section of the Act of 1888, sect. 120, and it is necessary to refer to them very shortly. The first is *Smith v. Gill* (1), where it was decided by a divisional court that the phraseology of the proviso, where it speaks of an action founded on tort where the debt or damage claimed does not exceed £20, might equally apply to a counterclaim as well as a claim ; and there is nothing to be said about that decision except that I agree with it. In *Brune v. James* (2) the head-note is : B

In an action for trespass in the county court the plaintiff claimed 40s. damages and an injunction. The judge having given judgment for the plaintiff for damages and an injunction : *Held*, that the defendant might appeal against so much of the judgment as granted the injunction without first obtaining the leave of the judge, notwithstanding the provisions of the County Courts Act, 1888, s. 120 [the comparable section to the present sect. 105]. C

There the court treated the injunction as an independent right, rejecting the argument for the plaintiff that an injunction is a remedy and not a cause of action and that, therefore, it is a part of the action for damages. The case is very shortly reported, but in my view that decision cannot be cited as an authority in a case where the claim is for an injunction which is for ancillary relief to a claim for damages for nuisance. It is unnecessary in the present appeal to discuss the question of an injunction to restrain a trespass, and I say no more about that case. In *Dixon v. Brown* (3), a similar question arose. That case also was an action for trespass in which the plaintiff claimed £20 damages for trespass and a mandatory injunction. The headnote says : D

At the trial the county court judge intimated, in effect, that he thought there had been a trespass, but he did not wish to put the defendant to the expense of a mandatory injunction if it could be avoided. The plaintiff thereupon abandoned his claim to the injunction. The county court judge having given judgment for the plaintiff for £15 damages for the trespass : *Held*, that the plaintiff, having claimed the injunction in addition to the £20 damages, might appeal from the judgment without first obtaining the leave of the county court judge notwithstanding the provisions of the section. E

I may say incidentally that the words "the defendant" after the words "£20 damages," were accidentally omitted from the report. I say no more about that case than that it was not a claim for damages for nuisance where the damages are an essential part of the cause of action as distinguished from trespass and that it is not an authority which calls for our consideration in the present case. F

In my view, no question arises in this appeal except as to whether, in an action or counterclaim for damages for nuisance, a claim for an injunction ancillary to that claim takes the case out of the definite prohibition of sect. 105 that there shall be no appeal "where the damage claimed does not exceed £20." In my judgment it would be wrong to read into that section a proviso that the addition of a claim for an ancillary injunction—the only kind of injunction which the county court can grant—will take the case out of the section although the counterclaim claimed damages for nuisance not exceeding £20. The exception, contained in proviso (a) of the section, of a cause of action where title comes in question has no relevance to the present appeal. G

For these reasons I think the objection ought to be upheld and the appeal dismissed with costs. H

MACKINNON, L.J. : I agree. This is an appeal by the defendant complaining of the dismissal of her counterclaim. The objection is taken by

counsel for the respondent that the appeal does not lie, on the ground that the counterclaim was for nuisance in respect of which the remedy asked for was £20 damages and an injunction to abate the nuisance as an ancillary remedy. Now if that was a correct statement of the nature of the claim made in the counterclaim by the defendant, the preliminary objection to the hearing of this appeal on the ground that the damages claimed were only £20 would be a good one. Counsel for the appellant seeks to get out of that result by alleging that in addition to a claim for a nuisance made by the defendant in the counterclaim, there was involved in the pleadings some question of the title of the defendant to the wall, and he bases that solely upon the use of the very ambiguous word "upon" in para. 2 of the counterclaim—the shed was built "upon an adjoining wall the property of the defendant." That is a suggestion that there was a trespass, I suppose of a few inches of the defendant's freehold, by building this shed on the top of the wall so as to overlap the boundary of the defendant's property. Having read the whole of the counterclaim, the judge's note and the correspondence, I am quite satisfied that that interpretation of that ambiguous word "upon" is fallacious and misleading. The real truth is that "upon" meant "up against"—"up against an adjoining wall the property of the defendant." The passage goes on: "The said shed so built causes the said wall to be defective, damp and unsound," (i.e., it is a nuisance) and the next paragraph alleges that the plaintiff has bushes there and a fig tree, and it goes on to say "the said laurels and holly or other bushes and fig tree cause the wall to become defective, damp and unsound," which is exactly the allegation as regards the shed: "The said shed so built causes the said wall to be defective, damp and unsound." "The defendant has verbally requested the plaintiff to abate the nuisance complained of." That, I take it, means both the nuisance caused by the shed and by the bushes. Finally, in the prayer of the counterclaim, one remedy asked for is: "An injunction restraining the plaintiff from continuing to maintain and keep the said wooden shed and laurels, holly or other bushes and fig tree so as to be a nuisance to the defendant." It appears to me upon that that the real basis of the counterclaim was that the shed and the bushes both constituted a nuisance and that when they said the shed was built "upon" the wall it meant up against the wall. There never was any question as to the title to the wall. It was purely an allegation of nuisance by the shed and the bushes being upon the plaintiff's land, and the damages claimed were an ancillary remedy with regard to that nuisance. That being so, it was a claim by way of counterclaim for damages not exceeding £20 for a nuisance. The judge has held there was no nuisance and, therefore, no damages in respect of a cause of action involving such an amount of damages on the claim.

I agree that the preliminary objection succeeds, and that this appeal must be dismissed with costs.

MORTON, L.J.: The relevant proviso of the Act of 1934, sect. 105, provides as follows:

Provided that, without the leave of the judge, there shall be no appeal (a) in any action founded on contract or on tort (other than an action for the recovery of land or an action in which the title to any hereditament has come in question) where the debt or damage claimed does not exceed £20.

This counterclaim was founded on tort; it was not an action for the recovery of land, and, in my view, for the reasons already given by the other members of the court, it was not an action in which the title to any hereditament had come in question. It was plain upon the face of the counterclaim that the debt or damage claimed did not exceed £20. Therefore, *prima facie*, this claim comes within the proviso, and the preliminary objection succeeds, the leave of the county court judge not having been obtained. It is said, however, that in so far as it is a counterclaim for an injunction the proviso does not apply. I express no view as to the position where the action is one founded upon trespass, but in the present case I agree that the counterclaim here is one for damages for nuisance and the injunction asked for is an ancillary remedy. Under these circumstances I do not think that the counterclaim is saved from the operation of the proviso by the insertion of a claim for this ancillary relief.

I would only add that, although I express no view upon the correctness of the decision in *Dixon v. Brown* (3) because that was an action founded upon trespass, I think that the observations of the divisional court in that case are expressed in terms which are too wide. The court there held that :

... the proviso to the County Courts Act, 1888, s. 120, does not apply where there is a claim for an injunction. The proviso only applies where the claim is solely for debt or damages and the claim does not exceed £20.

In my view these statements, couched as they are in extremely wide terms, are not consistent with the judgment of this court in the present case. In an action for nuisance, a claim for the ancillary remedy of an injunction does not prevent the action from coming within the operation of the County Courts Act, 1934, s. 105.

I agree that the preliminary objection succeeds, and that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Theodore Goddard & Co.*, agents for *Chittock & Chittock*, Norwich (for the appellant); *Oldman, Cornwall & Wood Roberts*, agents for *Daynes, Keefe & Durrant*, Norwich (for the respondent).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

HANNAH v. PEEL.

[KING'S BENCH DIVISION (Birkett, J.), June 11, 13, 1945.]

Trover and Detinue—Rights of finder—Brooch found in requisitioned house—Freeholder never in physical occupation of house—True owner of brooch not known—Finder entitled to retain brooch.

The defendant was the owner of a house in Shropshire which had been conveyed to him in 1938, but which he had never actually occupied. The house had remained unoccupied from the time the defendant bought it until after the outbreak of war, when it was requisitioned under the Defence Regulations. In Aug., 1940, the plaintiff, while serving in the Royal Artillery, was stationed in the house and on Aug. 21 he accidentally found a brooch, covered with dust and cobwebs, in an upstairs room which he was occupying at the time. From the condition of the brooch it must have been lost for some considerable time. On realising that the brooch might be valuable, the plaintiff handed the brooch to the police. In Aug., 1942, the police delivered the brooch to the agents of the defendant who gave the chief constable an indemnity against any claim to the brooch. In Oct., 1942, the defendant sold the brooch to a firm of jewellers for £66. The real owner had never been traced. The plaintiff claimed the brooch as the finder. The defendant contended that he was entitled to the brooch since he was the freeholder of the property on which it was found :—

HELD : since the defendant had never been in physical possession of the house and had no knowledge of the brooch until it was brought to his notice by the plaintiff, and since the true owner of the brooch had not been found, the plaintiff was entitled to the brooch or its value.

Bridges v. Hawkesworth (2) followed.

[EDITORIAL NOTE. The authorities upon the title to goods found are conflicting and unsatisfactory. It is undoubtedly the general principle, deducible from *Armory v. Delamirie* (1), and expressed by SALMOND ON JURISPRUDENCE, that the first finder of a thing has a good title to it against all but the true owner, even though it is found on the property of another. BIRKETT, J., then regards two propositions as established (i) that a man possesses everything attached to or under his land ; (ii) that he does not necessarily possess a thing lying unattached on the surface, even though it is not possessed by anyone else. The second proposition, however, gives rise to a divergence between those who regard the possession of an occupier as synonymous with intention to exclude others, and those who regard it as equivalent to *de facto* control. Here the owner of the premises was never physically in possession of them, and had no knowledge of the goods found, and the court holds that the finder is entitled as against the owner of the premises, following *Bridges v. Hawkesworth* (2), the case of the bank-notes found upon a shop floor.

AS TO RIGHTS OF FINDER, see HALSBURY, Hailsham Edn., Vol. 25, pp. 199-201, paras. 335, 336; and FOR CASES, see DIGEST, Vol. 3, pp. 64-67, Nos. 75-95.]

Cases referred to:

- * (1) *Armory v. Delamirie* (1722), 1 Stra. 505; 3 Digest 64, 75; 1 Sm. L.C., 13th Edn., 393.
- * (2) *Bridges v. Hawkesworth* (1851), 15 Jur. 1079; 3 Digest 64, 77; 21 L.J.Q.B. 75; 18 L.T.O.S. 154.
- A * (3) *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44; 3 Digest 65, 80; 65 L.J.Q.B. 460; 74 L.T. 761.
- * (4) *Elwes v. Brigg Gas Co.* (1886), 33 Ch.D. 562; 3 Digest 65, 79; 55 L.J.Ch. 734; 55 L.T. 831.

ACTION for the return of a diamond brooch or its value. The action was brought by the finder of the brooch against the owner of the house in which it was found. The brooch had been handed to the police by the plaintiff and in Aug., 1942, it was delivered by the police to the agents of the defendant, who gave the chief constable an indemnity against any claim to the brooch. The true owner of the brooch had not been found. In Oct., 1942, the defendant sold the brooch to a firm of jewellers. The facts are set out in the judgment.

D. A. Scott Cairns for the plaintiff.

Cecil Binney for the defendant.

Cur adv. vult.

C BIRKETT, J.: This is an interesting and a difficult point, and, in view of the conflicting state of the authorities, I thought I should like time to look into them. I am bound to say that my researches have been none too helpful, and, it would seem, there is need of an authoritative decision of a higher court.

D The plaintiff in this case was Duncan Hannah and the defendant was Hugh Edmund Ethelston Peel. By the pleadings the plaintiff claimed the return of a brooch or the due value, on the ground that he was the finder of the said brooch and had a title against all the world save the true owner. The defendant, on the other hand, denied the plaintiff's right and set out that he was in fact the freeholder of the premises upon which the brooch was found and his title was superior to that of the finder, the plaintiff. Happily there was no dispute about the facts. Evidence was given by the plaintiff and by his commanding officer, Major Lawrie, and there was, in addition, an agreed statement of facts, E but there was no issue of fact in the case.

F For the purposes of my judgment the facts can be stated quite shortly. In Aug., 1940, the plaintiff, Hannah, was serving as a lance-corporal in a battery of the Royal Artillery and was stationed at Gwernhaylod House, Overton-on-Dee, near Ellesmere, in the county of Shropshire. On Aug. 21, 1940, he was occupying an upstairs room in that house which was being used as a sick bay, and whilst he was adjusting the black-out curtains his hand touched something loose which, at the time, he thought to be a piece of dirt or plaster. He got hold of it and dropped it outside the window on to the window-ledge. The next morning, in the daylight, he found that the thing which he had thought the previous evening, in the black-out, to be a piece of dirt or plaster was still upon the window-ledge outside the window, and it was a brooch, at that time covered with spider's web and dirt. At the moment of finding it in the daylight G he thought it to be an object of little value from its appearance, but later at home he cleaned it and showed it to his wife. They then considered that it might be more valuable than was at first supposed, and at the end of Oct., 1940, the plaintiff consulted the officer commanding, Major Lawrie, and took his advice; with the result that the brooch was handed by Major Lawrie on behalf of the plaintiff to Sergeant Blodwell Williams of the Flintshire police at the police station at Overton, and a receipt was given. H

The plaintiff then made a statement in writing, and certain correspondence passed between the parties. In a letter of Nov. 22, 1941, the agents to the defendant set up their claim in contradiction to the claim made by the plaintiff. The material words of that letter are:

On the assumption that the brooch was in the wall crevice when Major Peel purchased the house the brooch is Major Peel's property.

Major Peel offered the brooch to Spink & Son, Ltd., who offered him £60 for it and later raised that to £66. They themselves sold the brooch for £88.

The only other fact to be mentioned is that on Dec. 13, 1938, the freehold of this house had been conveyed to the defendant. The defendant never occupied the house, and it remained unoccupied from the time when he bought it until Oct. 5, 1939, when it was requisitioned under notice under the Defence Regulations. The house was then used for some months by the requisitioning authorities. It was then released and remained unoccupied until July 16, 1940, when it was again requisitioned. The defendant received £250 a year as compensation for the requisitioning.

The rival claims can be stated in this way: The plaintiff says: "I claim the brooch as the finder of the brooch and I have a good title against all the world save only the true owner." The defendant says: "My claim is superior to yours inasmuch as I am the freeholder. The brooch was found upon my property, although I was never in occupation, and my title, therefore, ousts yours and in the absence of the true owner I am entitled to the brooch or its value." Unhappily the law is in a very uncertain state. Obviously my difficulties would be resolved if it could be said with certainty either that the law is that the finder of a lost article, wherever found, has a good title against all the world save the true owner, or that the law is that the possessor of land is entitled as against the finder to all chattels found on the land. But unhappily those two conflicting statements are by no means clear, and the state of the authorities gives some support to both of them.

Armory v. Delamirie (1) which was referred to and relied upon by counsel for the plaintiff, is so well known that I need not read it *in extenso*. There:

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under a pretence of weighing it, took out the stones, and calling to the master to let him know it came to three-halfpence, the master offered the boy the money, who refused to take it and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. [An action was brought in trover against the master, and] these points were ruled: (1) [the only one that affects this case] That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

Bridges v. Hawkesworth (2), the next case upon which counsel for the plaintiff relied, is in process of becoming almost equally as famous because of the dispute which ranged around it. It is now nearly 100 years old. The headnote reads:

The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner. The case was an appeal against a decision of the county court judge at Westminster. The facts appear to have been that in 1847:

... the plaintiff, who was [a commercial traveller] called at Messrs. Byfield & Hawkesworth's on business, as he was in the habit of doing, and as he was leaving the shop he picked up a small parcel which was lying upon the floor. He immediately showed it to the shopman, and opened it in his presence, when it was found to consist of a quantity of Bank of England notes, to the amount of £65. The defendant, who was a partner in the firm of Byfield & Hawkesworth, was then called, and the plaintiff told him he had found the notes, and asked the defendant to keep them until the owner appeared to claim them. [Advertisements were put in the papers asking for the owner, but the true owner was never found.] No person having appeared to claim them, and three years having elapsed since they were found, the plaintiff applied to the defendant to have the notes returned to him, and offered to pay the expenses of the advertisements, and to give an indemnity. The defendant had refused to deliver them up to the plaintiff, and an action had been brought in the county court of Westminster in consequence of that refusal.

The county court judge decided that the defendant, the shopkeeper, was entitled to the custody of the notes as against the plaintiff, and gave judgment for the defendant. Therefore this appeal was brought which came before the court composed of PATTESON and WIGHTMAN, JJ., and there was a most interesting argument upon both sides. The court considered its judgment, which is exceedingly important in this case and is relied upon very strongly by counsel for the plaintiff. At p. 1082 PATTESON, J., said:

The notes which are the subject of this action were incidentally dropped, by mere

accident, in the shop of the defendant, by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by someone. The general right of the finder to any article which has been lost, as against all the world, except the true owner, was established in the case of *Armory v. Delamirie* (1) which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant; and if he once had the right, the case finds that he did not intend, by delivering the notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear . . . The case, therefore, resolves itself into the single point on which it appears that the learned judge decided it, namely, whether the circumstance of the notes being found inside the defendant's shop gives him, the defendant, the right to have them as against the plaintiff, who found them.

PATTESON, J., then discussed the cases and the argument, and said :

If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house ? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there ; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement . . . We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment, therefore, is, that the plaintiff is entitled to these notes as against the defendant ; that the judgment of the court below must be reversed . . .

It is to be observed that neither counsel put any argument upon the fact that the notes were found in a shop. Counsel for the appellant assumed throughout that the shop was the same as a private house, and the judge spoke of the protection of his house. The case for the appellant, through his counsel, was that the shopkeeper never knew of the notes. The second thing to be observed is that there was no suggestion that the place where the notes were found was at all material ; indeed, the judge in giving the judgment of the court expressly repudiated it and said :

. . . the learned judge was mistaken in holding that the place in which they were found makes any legal difference.

In those circumstances it is a little remarkable that in the next case to which my attention was drawn, *South Staffordshire Water Co. v. Sharman* (3) LORD RUSSELL OF KILLOWEN, L.C.J., in delivering the judgment, referred to *Bridges v. Hawkesworth* (2), and said, at p. 47 :

The case of *Bridges v. Hawkesworth* (2) stands by itself, and on special grounds ; and on those grounds it seems to me that the decision in that case was right. Someone had accidentally dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. [Stopping there one moment—that might be a matter of some doubt. Customers were invited there, but whether the public at large was might be open to some question.] A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by PATTESON, J., that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or “ within the protection of his house.”

PATTESON, J., never made one single word of reference to the public part of the shop and, indeed, went out of his way to say that the county court judge was wrong in holding that the place where they were found made any legal difference at all. That shows some of the difficulties with which one is confronted in a case of this kind.

Bridges v. Hawkesworth (2) as I said, has been the subject of very considerable disputation by the text-book writers, some of them very distinguished names in law—e.g., OLIVER WENDELL HOLMES, one of the great figures in law, in *THE COMMON LAW* ; another great figure, SIR FREDERICK POLLOCK, in *POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW* ; and another great figure, SIR JOHN SALMOND, in his book on *JURISPRUDENCE*. They all deal with *Bridges*

v. *Hawkesworth* (2), and, whilst agreeing that the case was rightly decided, they differ as to the grounds upon which it was decided and put forward grounds, none of which, so far as I can discover, were ever put forward by the judges who decided the case. For example, O. W. HOLMES deals with two kinds of intent, and so far as I can discover from the report of *Bridges v. Hawkesworth* (2), the judges never referred to "intent" at all. HOLMES says, at p. 222 :

Common law judges and civilians would agree that the finder got possession first, and so could keep it as against the shopkeeper. For the shopkeeper, not knowing of the thing, could not have the intent to appropriate it, and, having invited the public to his shop, he could not have the intent to exclude them from it.

So he introduces the matter of two intents which are not referred to in the case. SIR FREDERICK POLLOCK, whilst he agrees with HOLMES that *Bridges v. Hawkesworth* (2) was properly decided, says, at p. 39 :

In such a case as *Bridges v. Hawkesworth* (2), where a parcel of bank-notes was dropped on the floor in the part of a shop frequented by customers, it is impossible to say that the shopkeeper has any possession in fact. He does not expect objects of that kind to be on the floor of his shop, and some customer is more likely than the shopkeeper or his servant to see and take them up if they do come there.

He emphasises the lack of *de facto* control on the part of the shopkeeper.

SIR JOHN SALMOND, when dealing with the case, says, at p. 382 :

In *Bridges v. Hawkesworth* (2) a parcel of bank-notes was dropped on the floor of the defendant's shop, where they were found by the plaintiff, a customer. It was held that the plaintiff had a good title to them as against the defendant. For the plaintiff, and not the defendant, was the first to acquire possession of them. The defendant had not the necessary *animus*, for he did not know of their existence.

PROFESSOR GOODHART in our own day in *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* has put forward a further view that perhaps *Bridges v. Hawkesworth* (2) was wrongly decided.

I mention these matters to show that, whilst the decision in *Bridges v. Hawkesworth* (2) as it stands is quite clear, and, if the headnote is right, permits of no dispute, *viz.*, "the place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner," it is impossible to find any unambiguous *ratio decidendi* for that case. I think, however, that it is clear from *Bridges v. Hawkesworth* (2), so far as it affects the present case to-day, that the occupier of land does not in all cases possess an unattached thing on his land even though the true owner has lost possession of it. *Bridges v. Hawkesworth* (2) may perhaps be the authority at least for that proposition.

With regard to the cases relied upon by counsel for the defendant the first was the *South Staffordshire Water Co. v. Sharman* (3). I am not sure that the first line in the headnote is strictly accurate, but it reads thus :

The possessor of land is generally entitled, as against the finder, to chattels found on the land. The defendant [Sharman] while cleaning out, under the plaintiff's orders, a pool of water on their land, found two rings [embedded in the mud at the bottom of the pool]. He declined to deliver them to the plaintiffs, but failed to discover the real owner.

In an action brought by the plaintiffs, the South Staffordshire Water Co., against Sharman in detinue it was held that the plaintiff company were entitled to the rings. LORD RUSSELL OF KILLOWEN said that in his view the county court judge (who gave judgment for the defendant on the authority of *Bridges v. Hawkesworth* (2)) was wrong, and the decision must be reversed and judgment entered for the plaintiffs. At p. 46 he said :

The plaintiffs are the freeholders of the *locus in quo*, and as such they have the right to forbid anybody coming on their land or in any way interfering with it. They had the right to say that their pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must show that they had actual control over the *locus in quo* and the things in it ; but under the circumstances, can it be said that the Minster Pool and whatever might be in that pool were not under the control of the plaintiffs ? In my opinion they were . . . The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges v. Hawkesworth* (2), is to be found in a passage in POLLOCK AND WRIGHT'S *ESSAY ON POSSESSION IN THE COMMON LAW*, p. 41 : "The possession of land carries with it in general, by our

law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. [If that is right, it would clearly cover the case of the rings embedded in the mud of the pool, "attached to or under that land."] And it makes no difference that the possessor is not aware of the thing's existence . . . It is free to anyone who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorised interference." That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from BLACKSTONE. Those were cases in which a thing was cast into a public place or into the sea—into a place, in fact, of which it could not be said that anyone had a real *de facto* possession, or a general power and intent to exclude unauthorised interference.

LORD RUSSELL OF KILLOWEN, L.C.J., then cited the passage I have already cited with regard to *Bridges v. Hawkesworth* (2), and continued, at p. 47 :

It is somewhat strange [I venture to echo those words] that there is no more direct authority on the question ; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*.

It is to be observed that LORD RUSSELL OF KILLOWEN there is extending the quotation which he has made from POLLOCK AND WRIGHT. POLLOCK AND WRIGHT speak of the possession of everything which is attached to or under that land, but in this passage LORD RUSSELL is saying, "the things which may be upon or in it." Counsel for the defendant said that the *South Staffordshire Water Co.* case (3) was an authority in his favour and that this brooch, which was in the crevice by the window-sill, was covered by that authority. That case, too, has been the subject of some discussion. It puts the doctrine of the right of the finder on the ground that, if anyone finds a thing as the servant or agent of another, he finds it not for himself but for his employer. That seems a sufficient explanation of *Sharman's* case (3). The rings found at the bottom of the pond were not in the possession of the company, but it seems that though Sharman was the first to obtain possession of them, he obtained them for his employers and could claim no title for himself.

The only other case relied upon by counsel for the defendant to which I need refer is *Elwes v. Brigg Gas Co.* (4). There land had been demised to a gas company for 99 years with a reservation to the lessor of all mines and minerals. A prehistoric boat was embedded in the soil 6ft. below the surface and was discovered by the lessees in the course of excavating for the foundations of the gas works. It was held :

. . . that the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease.

At p. 568, CHITTY, J., said :

The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or as a chattel. If it was a mineral or part of the soil in the sense above indicated, then it clearly belonged to the owners of the inheritance as part of the inheritance itself. But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff, for the following reasons.

He then gave the reasons. Later he said, at pp. 568, 569 :

The plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established ; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The plaintiff, then, had a lawful possession, good against all the world, and, therefore, the property in the boat. In my opinion it makes no difference, in these circumstances, that the plaintiff was not aware of the existence of the boat.

The statement of CHITTY, J., that the plaintiff was entitled to the boat because he was in possession of the ground, was another authority, said counsel for the defendant, for his contention that the defendant was entitled to the brooch.

Those are the reasons which led me to say that the authorities are in a rather

unsatisfactory state, and I observe that SALMOND ON JURISPRUDENCE (9th Edn., p. 383), after referring to *Elwes v. Brigg Gas Co.* (4), and *The South Staffordshire Water Co.* (3) says :

Cases such as these, however, are capable of explanation on other grounds, and do not involve any necessary conflict either with the theory of possession or with the cases already cited, such as *Bridges v. Hawkesworth* (2). The general principle is that the first finder of a thing has a good title to it against all but the true owner, even though the thing is found on the property of another person (*Armory v. Delamirie* (1), *Bridges v. Hawkesworth* (2)). This principle however, is subject to important exceptions, in which, owing to the special circumstances of the case, the better right is in him on whose property the thing is found. [He names three cases as the principal ones.] (1) When he on whose property the thing is found is already in possession not merely of the property, but of the thing itself; as in certain circumstances, even without specific knowledge, he undoubtedly may be . . . (2) . . . if anyone finds a thing as the servant or agent of another, he finds it not for himself, but for his employer . . . (3) A third case in which a finder obtains no title is that in which he gets possession only through a trespass or other act of wrongdoing.

I think it is fairly clear from the authorities that this proposition would not be doubted, *viz.*, that a man possesses everything which is attached to or under his land. Secondly, it would appear to be the law from the authorities I have cited, and particularly *Bridges v. Hawkesworth* (2), that a man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else. But the difficulty arises because the rule which governs things an occupier possesses as against those which he does not has never been very clearly formulated in our law. He may possess everything upon the land from which he intends to exclude others, if O. W. HOLMES is right; or, he may possess those things over which he has a *de facto* control, if SIR FREDERICK POLLOCK is right. These things are not clearly laid down in cases. That is all that I think I can usefully say about the authorities. Neither do I think that a discussion of the merits helps at all.

There is no doubt that the brooch was lost in the ordinary connotation of that term, and from the appearance of the brooch when found, *i.e.*, the dirt and cobwebs, it had apparently been lost for a very considerable time. Indeed, from this correspondence it appears that at one time the predecessors in title of the defendant were considering making some claim. But the moment the plaintiff discovered that it might be of some value, he did the very proper thing, he took advice and handed it to the police. His conduct was most commendable and meritorious.

It is clear that the defendant, as I gather from the agreed statement of facts, was never physically in possession of these premises at any time. It is clear the brooch was never his in the ordinary acceptation of the term, in that he had the prior possession. He had no knowledge of it until it was brought to his knowledge by the finder. As I say, a discussion of the merits does not seem to help a great deal, but it is clear on the facts (i) that the brooch was lost in the ordinary meaning of words, (ii) it appears to me clear that the brooch was found by the plaintiff in the ordinary meaning of words, and (iii) it is clear that the true owner of the brooch has never been found. The defendant was the owner of the premises and had his notice drawn to this matter by the plaintiff who found the brooch. In all those circumstances I asked for a little time in order that I might consider these authorities which are very difficult to reconcile. The conclusion to which I have come is that I propose to follow the decision in *Bridges v. Hawkesworth* (2) and I propose to give judgment in this case for the plaintiff. The brooch itself cannot now be returned, and the only matter of dispute in this case is whether the amount I should fix should be the sum of £66 or the sum of £88. £88 includes the profit which Spink made upon the sale of this brooch. £66 is the amount the defendant received. I propose to give judgment for the plaintiff for £66, with such costs as are permissible to a poor person.

Judgment for the plaintiff for £66 with costs.

Solicitors: *Slaughter & May* (for the plaintiff); *Rooper & Whately* (for the defendant).

[Reported by P. J. JOHNSON, Esq., Barrister-at-Law.]

BADHAM v. LAMBS, LTD.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge),
June 12, 1945.]

Street Traffic—Motor vehicle—Car sold with defective brakes—Accident caused thereby—Statutory liability of vendor—Penalty prescribed by statute—No right of action to purchaser for vendor's statutory offence—Road Traffic Act, 1930 (c. 43), ss. 3, 59, 113 (2)—Road Traffic Act, 1934 (c. 50), s. 8—Motor Vehicles (Construction and Use) Regulations, 1937 (S.R. & O., 1937, No. 229), regs. 39 (1), 68—Motor Vehicles (Construction and Use) (Amendment No. 2) Provisional Regulations, 1938, reg. 7.

Sale of Goods—Motor car sold with defective brakes—Accident caused thereby—Condition in contract disclaiming any liability of vendor regarding quality or fitness of car—Statutory offence to sell car with deficient braking system—Statutory penalties—No right of action by purchaser against vendor for breach of statutory duty—Road Traffic Act, 1930 (c. 43), ss. 3, 59, 113 (2)—Road Traffic Act, 1934 (c. 50), s. 8—Motor Vehicles (Construction and Use) Regulations, 1937 (S.R. & O., 1937, No. 229), regs. 39 (1), 68—Motor Vehicles (Construction and Use) (Amendment No. 2) Provisional Regulations, 1938, reg. 7.

In July, 1944, the plaintiff bought a second-hand motor car from the defendants. Owing to a defect in the braking system of the car, the plaintiff was involved in an accident. In an action for damages brought by the plaintiff against the defendants, it was found that the defendants had sold the car with defective brakes, but the plaintiff had no right of action under the contract of sale because the contract contained a condition that no warranty, guarantee, etc., as to the quality or fitness for any purpose of the car was given by the seller, nor was any such warranty, etc., to be implied by statute, common law or otherwise. There was no accusation of negligence against the defendants. Under the Road Traffic Acts, 1930 and 1934, and the Motor Vehicles (Construction and Use) Regulations, 1937, regs. 39 (1) and 68, it was unlawful to sell a car with a deficient braking system. The defendants were, therefore, guilty of a statutory offence, penalties for which were prescribed by sect. 113 (2) of the 1930 Act. It was contended by the plaintiff that he had a right of action against the defendants for breach of a statutory duty because, in making the sale of a car with a deficient braking system a statutory offence, the object of the legislature was to protect the purchaser and give him a right of action :—

HELD : (i) upon the true construction of the Road Traffic Acts, 1930 and 1934, and the regulations in question, in making the sale of a car with a deficient braking system a statutory offence the main object of the legislature was punishment. There was no indication that the aim of the legislature was to protect the purchaser as such, or to give him a right of action for damages as a member of the public using the highway,

Phillips v. Britannia Hygienic Laundry Co. (2) applied.

(ii) the principle that where a specific remedy was given by statute no other remedy was available, therefore, applied. The plaintiff had no right of action for damages merely by reason of the defendants' statutory offence, because penalties for the offence had been prescribed by the 1930 Act.

Pasmore v. Oswaldtwistle Urban Council (3) applied.

[EDITORIAL NOTE. The question here is whether breach of the statutory prohibition against selling a car with a deficient braking system enables a purchaser to sue his vendor for breach of contract notwithstanding a condition in the contract excluding any guarantee or warranty of fitness. It is held that the sanction of the provision in the Motor Vehicles (Construction and Use) Regulations is punishment only and, therefore, gives no cause of action to the purchaser.

AS TO THE ENFORCEMENT OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 550-552, paras. 736-740 ; and FOR CASES, see DIGEST, Vol. 42, pp. 749-752, Nos. 1734-1767.

FOR THE ROAD TRAFFIC ACTS, 1930 AND 1934, see HALSBURY'S STATUTES, Vol. 23, p. 607, and Vol. 27, p. 534.

FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, see HALSBURY'S STATUTES, Vol. 30, p. 833, and Supplement.]

Cases referred to :

- (1) *Monk v. Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.
- * (2) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 42 Digest 870, 197; 93 L.J.K.B. 5; 129 L.T. 777.
- * (3) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 42 Digest 752, 1758; 67 L.J.Q.B. 635; 78 L.T. 569; *affg. S.C. sub nom. Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q.B. 625.

ACTION for damages for breach of contract and breach of a statutory duty. A
The facts are fully set out in the judgment.

Ronald Hopkins for the plaintiff.

J. L. S. Hale for the defendants.

DU PARCQ, L.J. : This is an interesting case, and I am happy to say that it has been so admirably argued that I have had all the assistance that I am entitled to expect from the Bar.

The plaintiff bought a second-hand motor car from the defendants, who are people of a high reputation in their business; but on this occasion they sold to the plaintiff a car the brakes of which were, I think, to some extent defective. It was not a new car; in fact, its history starts somewhere about 1936 and this sale was in July, 1944. The car was bought under a contract which is partly written and partly printed. The contract said, on the face of it: "Subject to the terms and conditions overleaf." In addition there was written in at the head of the contract: "The car is sold as seen, tried and approved." According to the plaintiff there had been a short trial of the car, but according to the defendants there had not; so it is a little odd that those words are written in. However, I do not attach a great deal of importance to them. What is more important is among the terms and conditions was one to this effect:

No warranty, condition, representation or guarantee as to the quality or fitness for any purpose of the said car is given by the seller, nor is any such warranty, condition, representation or guarantee to be implied by statute, common law or otherwise.

It is not disputed that, if that condition applied, apart from the point taken about statutory duty the plaintiff would be out of court. I do not think there can be any possible doubt that that condition does apply. I quite believe Badham when he says he did not read it. He did what so many people have done before him; he signed the contract without reading its terms and conditions.

In connection with the point which arises under the statute, I think I can usefully say a word or two about my finding that these brakes were not thoroughly efficient. The Road Traffic Act, 1930, s. 3, made it unlawful to use on a road a motor vehicle which did not comply with the regulations applicable, and powers to make regulations were given by sect. 59 of that Act. The Road Traffic Act, 1934 (which is to be read as one with the 1930 Act) went further and provided by sect. 8 (1) that:

... it shall not be lawful to sell, or to supply, or to offer to sell or supply, a motor vehicle or trailer for delivery in such a condition that the use thereof on a road in that condition would be unlawful by virtue of the provisions of sect. 3 of the principal Act. Under sect. 113 (2) of the 1930 Act the penalty for a breach of sect. 8 was a fine of £20 for the first offence, with a rising scale for subsequent offences. The material regulation made under the Act of 1930 is the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 39 (1), which provides that:

Every motor car shall be equipped with an efficient braking system or efficient braking systems, in either case having two means of operation...

It then gives the details necessary. I would also refer to reg. 68 which (as amended by the Motor Vehicles (Construction and Use) (Amendment No. 2) Provisional Regulations, 1938, reg. 7) provides that:

... every part of every braking system and of the means of operation thereof fitted to a motor vehicle or trailer, and all steering gear fitted to a motor vehicle shall at all times while the motor vehicle or trailer is used on a road, be maintained in good and efficient working order and shall be properly adjusted.

I find that regulation relevant, because if you sell to a man a motor vehicle with defective brakes, knowing that he is likely to use it, you are selling it in a condition which would be a breach of reg. 68, because the brakes are not in "good and efficient working order." But the really important regulation is reg.

39. I do not think you can construe this regulation to mean—to quote the words used by Cundy, one of the expert witnesses—“reasonably satisfactory,” unless that means so satisfactory that any reasonable man would be satisfied with them; because what would satisfy the reasonable man would necessarily be something approaching perfection in the way of brakes.

I accept, up to a point, the evidence given by both the expert witnesses Holliman and Cundy. They agreed as to one matter, *i.e.*, that, so far as the rear wheels were concerned, the brakes were not quite satisfactory because there was a great deal of oil, from a leakage, which had got on to the brake drums and the linings. Holliman gave me a reason for saying that that existed before the accident. I asked Cundy whether the brakes were in good and efficient working order and he said that the average person would not notice the difference. That was not quite a satisfactory answer. He then added what I think is equally unsatisfactory: “The brakes were reasonably satisfactory.”

He did not say, and I do not think he would have been prepared to say, that they were a good and efficient braking system or “efficient” to use the words of reg. 39. It is of the highest importance that it should be understood that brakes must be good enough to be reliable in an emergency so as to avoid an accident. Badham was a very careful and experienced driver. I accept his evidence as a witness of truth. I believe he acted with promptitude when faced with the possibility of killing or injuring a child, and I think it was due to his presence of mind that there was not a more serious accident; but the brakes did not act just when he expected them to do so, which Holliman says was due to the grease or oil on the linings. I suppose that, but for a sudden stress, the brakes might not show any defect for some time, but there comes a time when inefficient brakes show a defect, and that happens, very often, just when you want to rely on them. Therefore, I think there was a breach of the statute on this sale. I do not say it was a serious one. I am quite sure Lambs thought the brakes were all right. They had not made a thorough examination of the car, and they do not pretend they had, but they thought, and had reason to think, that the brakes were all right. I do not think that they were.

The question then is whether the plaintiff, Badham, has a right of action. As far as the contract is concerned he is completely out of court in my opinion, but, as his counsel says with great ability—and it is a point which needs careful consideration—here is a regulation of statutory force which says that every motor car shall be equipped with an efficient braking system, and here is an Act of Parliament which says that it is unlawful to sell, or to supply, or to offer to sell or supply, a motor car or trailer which has not an efficient braking system; once you have got such words in a section (says counsel for the plaintiff) you may assume that Parliament was trying to protect the purchaser and give him a right of action. Parliament, however, does not say so. Parliament says that if you sell a motor vehicle which is not what it should be according to the regulations, you will be fined £20, and I do not think that in the light of the authorities I can accept the argument of counsel for the plaintiff. I am not at all satisfied that Parliament was seeking to protect the purchaser. After all, the purchaser can always look after himself. He usually buys a car from somebody who knows about cars, and usually, unless he is an expert, he does rely on the vendor. The vendor knows more about the car he is selling than the purchaser. Therefore, if the purchaser enters into no express contract, he will have a cause of action, because the car must be reasonably fit for the purpose for which it is known to be intended, unless he is so misguided or unfortunate as to deprive himself of that remedy. If he wants specially to provide against inefficiency of the brakes or any other defect in the car, he can do so by contract. I do not think that Parliament was trying to protect the purchaser by that Act. The object of Parliament was not to allow anyone to sell a car unless it was fit, according to the regulations, to be on the road; and if vendors did so supply a car, they committed an offence and would be punished. I think that punishment was the main object of the regulation.

I think this case is very different from *Monk v. Warbey* (1), and I do not think it is distinguishable from *Phillips v. Britannia Hygienic Laundry Co.* (2) I am not able to find, applying the principle affirmed in the latter case which after all is a very old one, that I can say an action is maintainable here for

breach of statutory duty against the defendants.

The cases which have dealt with this principle go back to quite old authorities. It is stated by EARL OF HALSBURY, L.C., in *Pasmore v. Oswaldtwistle Urban Council* (3), and was enunciated in 1831. LORD MACNAGHTEN in 1898 said in *Pasmore's case* (3), at p. 397 :

Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act . . . and on considerations of policy and convenience.

When LORD MACNAGHTEN said "the general rule" it must be understood that the general rule was that, where a specific remedy was given, it deprived the subject of any other form of remedy, and therefore, if I accept the argument of counsel for the plaintiff, I would have to say this case came within the exception and not the rule. I am not satisfied that it does, for the reason I have given. I cannot find any indication that Parliament was seeking to protect the purchaser nor do I think, in the light of *Phillips' case* (2), that it would be right to say that Parliament was seeking to protect purchasers in the sense that it was giving a right to an action for damages to them as a class of persons, *viz.*, as members of the public using the highway.

For these reasons, although one feels sympathy with Badham, I think his action fails and must be dismissed.

Judgment for the defendants with costs.

Solicitors : J. H. Fellowes (for the plaintiff) ; Cartwright, Cunningham & Co. (for the defendants).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

R. v. KEEPERS OF THE PEACE, COUNTY OF LONDON, JJ.,

Ex parte HOEY.

[KING'S BENCH DIVISION (Humphreys and Croom-Johnson, JJ.), June 22, 26, July 2, 1945.]

Intoxicating Liquors—Offences—Sale of liquor by retail without excise licence—Dismissal of informations—Appeal by excise officer to quarter sessions—Appeal suspended pending application for order of prohibition—Excise officer person "aggrieved"—Statutory right of appeal—Excise Management Act, 1827 (c. 53), ss. 82-85—Finance (1909-10) Act, 1910 (c. 8), s. 50 (3).

A metropolitan police magistrate dismissed three informations preferred by an officer of excise alleging that the applicant did sell by retail intoxicating liquor without licence contrary to the Finance Act, 1910, s. 50 (3), which prescribed in each case an excise penalty of £50, or, alternatively, an excise penalty equal to treble the amount of the full duty. From this dismissal the officer gave notice of appeal to quarter sessions, contending that, by the Excise Management Act, 1827, s. 82, a right of appeal was given to any person "aggrieved" by the decision of the magistrate. At the hearing of the appeal a preliminary objection was taken to the jurisdiction of the court on the ground that there was no right of appeal from the dismissal of a criminal charge. Quarter sessions adjourned the further hearing of the appeal to enable an application to be made to the High Court for an order prohibiting the appeal from being heard and determined :—

HELD : on the proper construction of the Excise Management Act, 1827, s. 82, the excise officer who exhibited the informations against the applicant was a person "aggrieved." The appeal against the dismissal of the informations was, therefore, within the jurisdiction of quarter sessions.

Benson v. Northern Ireland Road Transport Board (1) applied. *R. v. Gamble* (5) applied.

[EDITORIAL NOTE.] The point in this case is whether there is a right of appeal against an acquittal in proceedings upon information for selling by retail intoxicating liquor without a licence. There is, *prima facie*, no right of appeal against an acquittal in English law. This was recently referred to by VISCOUNT SIMON, L.C., in *Benson v. Northern Ireland Road Transport Board* (1), as an extremely important and universally

accepted principle, and very clear statutory language is necessary before the principle will be held inapplicable. It is held in this case that the Excise Management Act, 1827, s. 32, which gives a right of appeal "in case any officer who shall exhibit any information shall feel aggrieved by the judgment given by such justices thereon" applies to the circumstances under consideration, on a true construction of the section. The right of appeal in such a case has apparently never been challenged and in *R. v. Gamble* (5) CHIEF BARON POLLOCK expressly observed that it was open to an excise officer to appeal against acquittal.

A AS TO APPEAL IN CRIMINAL MATTERS, see HALSBURY, *Hailsham Edn.*, Vol. 9, pp. 263-266; and FOR CASES, see DIGEST, Vol. 14, pp. 500-503, Nos. 5513-5528.]

Cases referred to :

* (1) *Benson v. Northern Ireland Road Transport Board*, [1942] A.C. 520; [1942] 1 All E.R. 465; 111 L.J.P.C. 1.

(2) *R. v. Tyrone County JJ.* (1906), 40 I.L.T. 181.

B * (3) *Cox v. Hakes* (1890), 15 App. Cas. 506; 16 Digest 250, 508; 60 L.J.Q.B. 89; 63 L.T. 392; *reversing S.C. sub nom. Ex p. Cox (Bell)* (1887), 20 Q.B.D. 1, C.A.; *reversing S.C. sub nom. Ex p. Cox (Bell)*, 19 Q.B.D. 307.

* (4) *R. v. Woodrow* (1846), 15 M. & W. 404; 14 Digest 34, 50; 2 New Mag. Cas. 1; 2 New Sess. Cas. 346; 16 L.J.M.C. 122.

* (5) *R. v. Gamble* (1847), 16 M. & W. 384.

* (6) *R. v. McFeely* (1845), 7 I.L.R. 395.

(7) *R. v. Stock* (1838), 8 Ad. & El. 405; 16 Digest 108, 71; 3 Nev. & P.K.B. 420; 1 Will. Woll. & H. 394; 7 L.J.M.C. 93.

C (8) *R. v. London County Keepers of the Peace and JJ.* (1890), 25 Q.B.D. 357; 26 Digest 460, 1760; *sub nom. R. v. London JJ., Ex p. Fulham Vestry*, 59 L.J.M.C. 146; 63 L.T. 243.

MOTION for an order of prohibition. The facts and arguments are fully set out in the judgment of HUMPHREYS, J.

G. O. Slade, K.C., and *Colin Duncan* for the applicant.

D *Valentine Holmes* for the respondents.

Cur adv. vult.

HUMPHREYS, J.: This was an application for an order of prohibition addressed to the appeals committee of the county of London quarter sessions prohibiting that committee from hearing and determining an appeal by the respondent, Edwin Percival Furber, against an order made by Sir Bertrand Watson, chief magistrate at Bow Street police court dismissing an information preferred by the said Furber against the applicant.

E The material facts which were admitted are as follows: On Oct. 3, 1944, the respondent, an officer of excise, exhibited three informations against the applicant alleging that the applicant on May 2 and 18, 1944, at 189, Regent Street, did sell by retail intoxicating liquor without a licence contrary to the Finance Act, 1910, s. 50 (3), whereby he had incurred in each case an excise penalty of £50, or in the alternative an excise penalty equal to treble the amount of the full duty. On Nov. 24, 1944, the magistrate dismissed these informations and ordered the respondent to pay 15 guineas costs. By notice of appeal, dated Dec. 1, 1944, the respondent gave notice of his intention to appeal to the county of London quarter sessions against the said dismissal. On June 10, 1945, the appeals came on for hearing before the appeals committee, when the applicant took the preliminary objection that the court had no jurisdiction to hear or determine the said appeals. After hearing argument, the chairman intimated that the committee were of opinion that they had jurisdiction, but adjourned the hearing of the appeals *sine die* to enable the applicant to apply to the High Court of Justice. In due course application was made to this court for an order of prohibition, when the matter was fully argued, and the court reserved its judgment.

H The respondent relied upon the Excise Management Act, 1827, s. 82, in support of his contention that he had a right of appeal. That section so far as it is material provides as follows:

That in case any officer of excise who shall exhibit any information or any person or persons against whom any information shall have been exhibited, or who shall appear and claim any goods, commodities, or chattels alleged to be forfeited in any information exhibited before the commissioners of excise, shall feel aggrieved by the judgment given thereon by such commissioners, it shall be lawful for such officer, or such person or persons, upon giving such notice as hereinafter mentioned, to appeal therefrom to such commissioners of appeal as aforesaid; and it shall be lawful for such

commissioners of appeal, or the major part of them, upon being served with such notice, and they are hereby respectively authorized and required, at such place and at such time as they shall in that behalf appoint, to hear, adjudge, and finally determine such appeal; and in case any officer who shall exhibit any information, or any person or persons against whom any information shall have been exhibited, or who shall appear and claim any goods, commodities, or chattels alleged to be forfeited in any information exhibited before any justice or justices of the peace as aforesaid, shall feel aggrieved by the judgment given thereon by such justices, it shall be lawful for such officer, or such person or persons, upon giving such notice as hereinafter mentioned to appeal therefrom to the justices assembled at the next general quarter sessions of the peace . . .

The question for our decision appears to depend almost entirely upon the true construction of that section, but there are, in my opinion, two general principles which have to be borne in mind. The first is that rights of appeal to quarter sessions are the creation of statute and no such right can be implied. The second is that a right of appeal against the dismissal of a criminal charge is so unusual that it may be said to be a general rule that there is no such right. That this is so may be gathered from numerous decisions of the courts, but it is unnecessary in my judgment to refer to those decisions, with the exception of the latest one in the House of Lords, *Benson v. Northern Ireland Road Transport Board* (1). Having examined the authorities, VISCOUNT SIMON, L.C., in the course of his speech referred to the extremely important and universally accepted principle of our law which has been recognised again and again by the highest authorities both in England and Ireland. He said, at p. 526 :

Thus, in *Reg. v. Tyrone County Justices* (2) PALLES, C.B., in granting *certiorari* to quash a conviction for trespassing in pursuit of game, which was pronounced at quarter sessions on the hearing of an appeal from justices who had dismissed the charge, spoke of the "elementary" principle that "an acquittal made by a court of competent jurisdiction, and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned and brought before any other court." The Chief Baron went on to point out that the statute 27 Geo. III, c. 35, which was then being discussed, could not be construed to give an appeal to the prosecutor in a criminal matter, for it contained no clear, express words which provided for a departure from the general rule, and he added, "I, therefore, first rest my view on settled principles, that, before you can appeal against an acquittal, the words must be clear, express, and free from any ambiguity."

After reference to some other authorities, and in particular to the emphatic language of LORD HALSBURY, L.C., in *Cox v. Hakes* (3), when the Lord Chancellor insisted upon the need of express legislation before the right of personal freedom can be made subject to the delay and uncertainty of appeal, VISCOUNT SIMON, L.C., summed up his conclusion in these words, at p. 528 :

In the light of the above pronouncements, very clear statutory language would be needed to establish, by way of exception to the general rule, a right of appeal from a decision dismissing a criminal charge . . .

On the other hand, Parliament not only can but has provided for such an appeal where it has been thought necessary in the public interest that such should exist. For instance, the Diseases of Animals Act, 1894, creates a number of offences which may be committed, and by sect. 54 provides that all such offences may be prosecuted summarily, and then goes on in sect. 55 to enact as follows :

If any person thinks himself aggrieved by the dismissal of a complaint by, or by any determination or adjudication of, a court of summary jurisdiction under this Act, he may appeal therefrom to a court of quarter sessions.

I proceed, therefore, to consider the language of sect. 82 in order to see whether that very clear statutory language referred to by VISCOUNT SIMON, L.C., as being needed to establish a right of appeal in this case is to be there found.

It cannot, I think, be disputed, nor did counsel for the applicant contend to the contrary, that some right of appeal to quarter sessions is given by the section to an officer of excise who has been unsuccessful in the court of summary jurisdiction, but counsel contends that the language of the section is satisfied by holding that the only appeal so given is one against a refusal to admit a claim to goods made by the excise, and he refers us to sect. 83 in support of that contention. Sect. 83, as originally enacted, was as follows :

Provided always, and be it enacted, that no such appeal as aforesaid shall be allowed,

unless the party or parties appellant shall, at and immediately upon the giving of the judgment appealed against, give notice in writing of such appeal to the commissioners of excise or justices of the peace respectively from whose judgment such appeal shall be made, and also to the adverse party or parties on such appeal, and shall lodge such notice at the office or with the registrar of the commissioners of appeal, or with the clerk of the peace for the justices of the peace at such general quarter sessions as aforesaid, respectively, by and before whom such appeal is to be finally adjudged and determined; and no such appeal as aforesaid shall be heard, unless the party or parties appellant on such appeal shall, within one week at least before such appeal is to be finally adjudged and determined, give notice in writing to the adverse party or parties on such appeal of the time and place where such appeal is to be heard: Provided always, that where the judgment appealed against shall be a conviction in any penalty or penalties of the party or parties appellant, such party or parties shall also, within three days next after the giving of the judgment appealed against, place and deposit in the hands of the commissioners of excise, or of the collector of excise in whose collection, or of the supervisor of excise in whose district the information shall have been exhibited, the amount of the penalty or penalties in which such party or parties shall have been convicted, or where the judgment appealed against shall be either for or against the condemnation of any goods, commodities, or chattels seized as forfeited, such goods, commodities, and chattels shall be left and deposited with the commissioners of excise, or the collector of excise in whose collection, or the supervisor of excise in whose district the information shall have been exhibited, until the final adjudication of such appeal.

C It is true that sect. 83, which deals primarily with notices, mentions only notices of appeal against condemnation or refusal to condemn goods, chattels and commodities alleged to be forfeited, and appeals against conviction for penalties, but the section is in the form of a proviso to sect. 82, and in my opinion is not in the least inconsistent with the contention that sect. 82 does apply to penalties incurred as well as claims to goods.

D We were referred to numerous other sections of the Act, but I find nothing in any of these sections to alter or interfere with what I regard as the very plain language of sect. 82. I ask myself what can be the meaning of these words: "In case any officer who shall exhibit any information shall feel aggrieved by the judgment given by such justices thereon," unless they include the case of an officer who has exhibited an information asking for penalties against a person who has been acquitted.

E Counsel for the applicant further contends that an unsuccessful officer of excise cannot be a person who feels aggrieved by a judgment against his contention. The short answer to that argument is, in my opinion, that Parliament has said in terms that an officer who has exhibited an information may "feel aggrieved" by the judgment of the court of summary jurisdiction, which to my mind must include a judgment of acquittal. The rest of the argument of counsel for the applicant, if I have followed it correctly, was concerned to show that various sections of this Act, together with some other Acts and authorities relied upon by the Crown, were not inconsistent with his contention.

F Counsel for the respondents suggested that excise penalties may be regarded somewhat differently from penalties imposed merely for the purpose of punishment. It may be said perhaps that the imposition of excise penalties is merely a method of collecting the King's revenue, and he has drawn our attention to the state of the law as it existed in 1827, though since altered by various modern statutes.

G Excise penalties were originally only recoverable by proceedings in the Court of Exchequer and they may still be sued for in the King's Bench Division of the High Court of Justice as the successor of that court.

H In 1827 for the first time, so far as I am aware, such penalties were made recoverable summarily—in London at the chief office of excise as created by sect. 14 of the Act, the procedure being by information laid before three commissioners of excise; in all other districts by information before justices of the peace—see sect. 65.

The commissioners did not constitute a court in the sense in which that term is generally understood, but they appear to have had precisely the same powers in regard to the imposition of penalties and condemnation of goods seized as the justices had. Sect. 81 created a tribunal called commissioners of appeal by whom appeals from the three commissioners were to be heard. This tribunal again seems to be lacking in most of the attributes of a court, but is given by

sect. 82 as originally enacted the power to hear and determine any appeal from the three commissioners brought by (i) any officer of excise who shall have exhibited any information, (ii) any person against whom an information has been exhibited, or (iii) any other person claiming the goods alleged in the information to be forfeited who shall feel aggrieved by the judgment of such three commissioners, and the commissioners of appeal were required to hear, adjudge and finally determine such appeal.

This first portion of sect. 82 has been repealed together with sect. 81 and so much of sect. 65 as related to the powers of the three commissioners in the London district; the remaining portion of sect. 82 conferring the right of appeal to quarter sessions appears to be in precisely the same terms *mutatis mutandis* as the repealed portion.

It is argued that there could have been no impropriety in giving the officer mentioned in the first part of the section the right to appeal from a dismissal to the tribunal specified, and there is no ground for assuming that his rights under the latter part of the section were any less extensive.

All these matters are no doubt relevant in considering whether sect. 82 does create a clear and unmistakable right of appeal in the excise officer, but I repeat that in my opinion the question must ultimately be decided upon the language of sect. 82 itself.

Counsel for the respondents was further instructed to inform the court that during the 118 years which have elapsed since the passing of the 1927 Act there have been numerous appeals to quarter sessions under sect. 82 by excise officers who have felt aggrieved by the dismissal of their informations, and so far as the records of the excise show in no case has the right of appeal ever been challenged. Some of those cases have found their way to the Court of Exchequer and have been reported. There are at least two cases in England where the absence of any challenge to the right of appeal is in my judgment inexplicable if the point is a good one. The first is *R. v. Woodrow* (4). That was a case in the Court of Exchequer argued by Wilde for the Crown and Crompton *contra*, the judges being CHIEF BARON POLLOCK, BARON ALDERSON and BARON ROLFE. The case raised a point as to the sufficiency of notices of appeal to quarter sessions under sect. 83 of the 1927 Act, and involved a consideration by the court of sects. 82 and 83. I find it difficult to believe that judges and counsel of such eminence overlooked the question of whether an appeal lay, the case being one in which an officer of excise by whom an information for penalties had been exhibited had appealed to quarter sessions against the dismissal of the information. Had the point as to the right of appeal been considered even arguable it must have been taken, since if successful it would have disposed of the case.

R. v. Gamble (5) was a case where the justices had convicted on the fourth count of an information and acquitted on three others, and the defendant had given notice of appeal from the judgment on the fourth count to quarter sessions, but the excise officer had given no notice of appeal against the judgment of acquittal on the three counts. It was held no judgment could be given by the court of quarter sessions for the excise officer upon the second count although in the opinion of the court the defendant ought to have been convicted upon that count since the officer had not exercised his undoubted right to appeal from the acquittal on that count. The judgment of the court was delivered by POLLOCK, C.B., who observed in the course of his judgment as follows, at p. 415:

The learned recorder appears to have doubted his power to go into the case on any other count than the fourth and we think his doubt in that respect was well founded. The judgment of the convicting justices being against the information as to three of the counts contained in it, it was as open to the officer to appeal against that part of their judgment, as to the defendant to appeal against their judgment on the fourth count, which was adverse to him. But the defendant alone appealed . . . Then, as the officer did not avail himself of that power to appeal against it [an acquittal] . . . which is expressly given to him by the same section, [namely, sect. 82] the defendant would naturally . . . [be] prepared only to refute the charge against him on the fourth count . . . If the Crown wished to rely on any other count besides that on which the justices had convicted, their officer had a perfect right to appeal in respect of the counts, . . . upon which the defendant had been acquitted.

If that decision is not actually conclusive of this case, it so clearly expresses

the view held by the Chief Baron of the Exchequer upon the very question arising for our determination that I should be very loth to differ from so eminent an authority upon the point, but as already stated my own opinion coincides with that of the Chief Baron.

A Counsel for the respondent also referred us to *R. v. McFeely* (6), in which the court held that an officer of excise who had prosecuted a person for an offence against a Customs Act had no right to appeal to quarter sessions against an acquittal. The argument and the judgment appear to assume that he would have had such a right if the penalty had been incurred under the Excise Act. Counsel for the respondent took certain other points which I think it unnecessary to refer to except to say that the language of the Customs Inland Revenue and Savings Bank Act, 1877, s. 10, does seem to assume the existence of a power of appeal to quarter sessions against an acquittal, at least in Ireland, but I think the section is principally relevant as an answer to any attempt to distinguish between a dismissal and an acquittal.

B On the whole I am of opinion that the right to appeal in question here is given in such clear and definite terms as to leave no doubt upon the matter. I think the prohibition asked for should be refused.

C CROOM-JOHNSON, J.: I agree with the judgment of HUMPHREYS, J., but as the question is one which is of some importance, and counsel for the applicant seems to have suggested that we are bound by a recent decision of the House of Lords to decide in his favour, I think it desirable to express my reasons in my own words. I need not state the facts again. It is enough to say that the applicant by the leave of this court applies for an order of prohibition directed to the justices of the appeals committee of the London quarter sessions prohibiting them from hearing or determining the said appeal on the ground that they have no jurisdiction to hear or determine the said appeal because it is against the said dismissal of the said information. Included in the general grounds of such appeal was one numbered (3):

D That the applicant was guilty of the offences charged in the said informations and should have been convicted.

E The appeal in question being from a court of summary jurisdiction, it was accepted by both parties that an appeal does not lie unless given expressly by statute and that an appeal cannot be given by implication only. (See *R. v. Stock* (7).)

The right to appeal with which we are concerned arises, if at all, from sect. 82 of the Excise Management Act, 1827 (which I will call the Act), which according to its long title was:

F An Act to consolidate and amend the laws relating to the Collection and Management of the Revenue of Excise throughout Great Britain and Ireland.

And, by sect. 3:

... shall be deemed and taken to apply to all Acts of Parliament relating to the revenue of Excise which should thereafter be made . . .

G Before the Act the Crown could apparently sue for and recover duties of excise and penalties connected therewith in England in the Court of Exchequer, a right which so far as penalties and condemnation of goods, commodities and chattels seized as forfeited were concerned was preserved by sect. 57. The Act set up a Board of Commissioners of Excise to sit at the chief office of excise established in London (sects. 1 and 14). It envisages claims by the proprietors of such goods so seized as forfeited (sect. 62). It then provided for a new and permissive procedure in cases arising within the limits of the chief office by information before any three or more commissioners of excise or before justices of the peace in cases arising out of the limits of the said chief office (sect. 65). In the former case a right of appeal was given to commissioners of appeal appointed under sect. 81 and in the latter to quarter sessions (sect. 82). A general power to mitigate penalties was conferred on the commissioners and to justices (sect. 78).

H The appeal commissioners were swept away in 1841, and an appeal from the commissioners of excise to the Court of Exchequer substituted by the Excise Management Act, 1841, s. 25, in chief office cases. In such cases concurrent jurisdiction was later given to metropolitan police magistrates, and this is now

the normal procedure. It was not contended that the position in this matter of a single metropolitan magistrate is any different from that of two or more justices sitting elsewhere in petty sessions.

I have referred to the original two jurisdictions, since it might have been a possible view that the present case arose out of a civil or *quasi* civil remedy, but the point has not been raised or argued before us, and I, therefore, express no opinion on it: the case was dealt with throughout by both sides as if the proceedings at Bow Street were criminal proceedings.

It was admitted on behalf of the applicant that sect. 82 gave a right of appeal to quarter sessions from justices to an excise officer, and (in his final address) even from a dismissal upon certain matters; the question debated before us was how far does that right extend; does the right cover the case of an appeal against what was called a clean acquittal, that is, an out and out acquittal or dismissal? On behalf of the applicant it was argued that the language of the section did not give such an extensive right of appeal to the excise officer. The basis of the contention was (i) the rule that there is no right of appeal by a prosecutor against a dismissal, since as representing the Crown he cannot nor can anyone else be aggrieved because someone is held not to have done wrong—*per* LORD COLERIDGE, C.J., in *R. v. London County Justices* (8); and (ii) the further rule that “very clear statutory language would be needed to establish by way of exception to the general rule a right of appeal from a decision dismissing a criminal charge”—*per* VISCOUNT SIMON, L.C., in *Benson v. Northern Ireland Road Transport Board* (1), at p. 528.

We were referred to a number of other decisions showing the application of the general rule to which I have referred, but in view of the review of the authorities by VISCOUNT SIMON, L.C., in *Benson v. Northern Ireland Road Transport Board* (1), at pp. 526 to 528, I see no useful purpose to be served in examining them for the purposes of this judgment. I accept the two general rules to which I have referred and I direct myself accordingly. I inquire, therefore, whether the language of sect. 82 of the 1827 Act is sufficiently clear to establish the full and exceptional right of appeal which is in question.

The relevant portions of sects. 65 and 82 of the Act as unrepealed are as follows: Sect. 65 is:

For the recovery of any penalty imposed by this Act, or any other Act, or Acts of Parliament relating to the revenue of excise, and incurred for or by reason of any offence committed against this Act, or the said other Acts or any of them, or for the condemnation of any goods, commodities, or chattels, seized as forfeited under or by virtue of this Act, or the said other Acts or any of them . . . wherein the offence shall have been committed, or the person or persons, committing the same shall be found or where the goods, commodities, or chattels shall have been seized as aforesaid, within the limits of the chief office of excise in London, an information thereupon may be exhibited before, and be heard, adjudged, and determined by any three or more of the commissioners of excise; and where the offence shall have been committed, or the person or persons committing the same shall be found, or where the goods, commodities, or chattels shall have been seized as aforesaid, in any part of the United Kingdom out of the limits of the said chief office, the information thereupon may be exhibited before any one or more of His Majesty's justices of the peace for the county, shire, division, city, town or place wherein the offence shall have been committed, or the person or persons committing the same shall be found, or where the goods, commodities, or chattels shall have been seized as aforesaid; and such information shall and may be heard, adjudged, and determined by any two or more of His Majesty's justices of the peace for the said county, shire, division, city, town, or place.

Sect. 82 is:

That in case any officer of excise who shall exhibit any information, or any person or persons against whom any information shall have been exhibited, or who shall appear and claim any goods, commodities, or chattels alleged to be forfeited in any information exhibited before the commissioners of excise, shall feel aggrieved by the judgment given thereon by such commissioners, it shall be lawful for such officer, or such person or persons, upon giving such notice as hereinafter mentioned, to appeal therefrom to such commissioners of appeal, aforesaid; and it shall be lawful for such commissioners of Appeal, or the major part of them, upon being served with such notice, and they are hereby respectively authorised and required, at such place and at such time as they shall in that behalf appoint, to hear, adjudge, and finally determine such appeal; and in case any officer who shall exhibit any information, or any person or persons against whom any information shall have been exhibited, or who shall appear and claim

any goods, commodities, or chattels alleged to be forfeited in any information exhibited before any justice or justices of the peace as aforesaid, shall feel aggrieved by the judgment given thereon by such justices, it shall be lawful for such officer, or such person or persons, upon giving such notice as hereinafter mentioned, to appeal therefrom to the justices assembled at the next general quarter sessions of the peace . . .

It is to be observed that the language of sect. 82 is "in case any officer who shall exhibit any information . . . shall feel aggrieved by the judgment given thereon by such justices . . . it shall be lawful for such officer . . . to appeal therefrom" —words which would seem, apart from authority, to be tolerably plain.

Sect. 83 deals with a case where the judgment appealed against shall be either for or against the condemnation of any goods seized as aforesaid, in which case the goods are to be deposited meantime—it is a proviso to sect. 82, and it reads as follows :

. . . Provided always, that where the judgment appealed against shall be a conviction in any penalty or penalties of the party or parties appellant, such party or parties shall also, within three days next after the giving of the judgment appealed against, place and deposit in the hands of the commissioners of excise, or of the collector of excise in whose collection, or of the supervisor of excise in whose district the information shall have been exhibited, the amount of the penalty or penalties in which such party or parties shall have been convicted, or of the sum or sums of money to which such penalty or penalties shall have been mitigated ; or where the judgment appealed against shall be either for or against the condemnation of any goods, commodities, or chattels seized as forfeited, such goods, commodities, and chattels shall be left and deposited with the commissioners of excise, or the collector of excise in whose collection, or the supervisor of excise in whose district the information shall have been exhibited, until the final adjudication and determination of such appeal.

That proviso seems to recognise the right to an appeal by the excise officer at least so far. Sect. 84 gives power to the justices in quarter sessions to make a new or different judgment with power to mitigate the penalty, which is consistent with the right of appeal now in question ; and sect. 85 provides for the enforcement of another or different judgment where the original judgment is reversed. No express mention is made in either of those two sections of an appeal being against what has been called a clean acquittal. On the other hand, the words "for or against" in sect. 83 seem to indicate the possibility of an appeal in a case of acquittal at least in part, and the power to mitigate may lead to the same result.

It is not easy to see why this express power to mitigate a penalty could be needed in the case of a new or different judgment unless quarter sessions were ordering a penalty for the first time, that is, the appeal was against an acquittal. I do not think the language of those three sections, however, can be said to be any more helpful than being not inconsistent with the full right of appeal suggested to exist.

For the past 118 years we were told that appeals to quarter sessions by excise officers under sect. 82 have been heard and determined without objection by anybody, and apparently this is the first case in which the point has been taken that they had no right to appeal in a case of acquittal. All the text books dealing with the subject assume the contrary. There is no authority either way, but in three cases the existence of such a right has been assumed ; they are *R. v. Woodrow* (4) ; *R. v. Gamble* (5) ; and *R. v. McFeeley* (6).

I adopt the analysis by HUMPHREYS, J., of these cases, contenting myself with saying that in the first of them the appeal was by an excise officer against a dismissal of an information by the justices, and the court was engaged in an examination of the question whether due notice of the appeal had been given, for reasons which it is unnecessary to elaborate, and the point does not seem to have occurred either to the strong court which decided it or the experienced counsel who argued it. The last of these cases also dealt with an appeal against a dismissal, and the point successfully argued was that the right of appeal by the excise officer did not extend to a case of penalty in respect of a customs matter as distinct from an excise one.

By the Excise Management Act, 1834, ss. 23, 24, provision is made as to appeals as follows : sect. 23 :

. . . any notice of appeal shall be given by any officer of excise who shall attend and conduct the proceedings on the part of the revenue of excise, notwithstanding such officer may not be the officer named in the information as informing or exhibiting the

same; and it shall be lawful for any court of quarter sessions before whom any appeal shall be brought to adjourn the hearing thereof to the next quarter sessions, then to hear and finally to determine the same.

Then sect. 24:

... where the commissioners of excise or justices of the peace respectively before whom any information shall be exhibited shall dismiss such information without examination of witnesses, or shall refuse to examine any witness produced on the hearing of any information, the several witnesses refused to be examined shall be tendered to the said commissioners or justices respectively for examination on the part of the informer or defendant, as the case may be, and the said commissioners or justices respectively shall, on ascertaining the witnesses so tendered for examination to be present cause their names to be taken down in writing, and shall transmit the same with the information and judgment to the commissioners of appeal or quarter sessions respectively; and the several witnesses so tendered for examination, and whose names shall be so transmitted, shall on the hearing of the appeal be examined in the case, although not examined before the commissioners or justices on the original hearing and judgment.

We were referred to the Customs and Inland Revenue and Savings Bank Act, 1877, s. 10. The original statute applied to Ireland, and sect. 10 seems to me to recognise beyond question that in Ireland at least the section extended to cover cases of acquittal.

Finally, our attention was directed to the language of two sections of other statutes which give a right of appeal in express terms from an order of dismissal of complaint, with a view, as I understand, of showing what sort of language we ought to look for in the present case, and so that we might compare the different sections. These were the Diseases of Animals Act, 1894, s. 58, and the Railway Rolling Stock Protection Act, 1872, s. 6, which speaks of "by dismissal of complaint." The language used is certainly different from that used in sect. 82, but it does not lead me to the view that the language of sect. 82 is thereby shown to be insufficiently plain or precise.

I have come to the conclusion that the language used in sect. 82 plainly confers on the officer who exhibited the information (subject to sect. 23 of the 1834 Act) who is aggrieved by the judgment given on his information the right to appeal against that judgment, whatever the judgment may be. Accordingly in my judgment the court of quarter sessions had jurisdiction to entertain the appeal, and this application for an order of prohibition should be dismissed.

Application dismissed.

Solicitors: *Philip Conway, Thomas & Co.* (for the applicant); *Solicitor for Customs and Excise* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

KAFTON v. KAFTON, [1943] R. 435. | *Applied.* RICHARDSON v. RICHARDSON. [1949] 2 All E.R. 330. | *Applied.* ELWES v. ELWES. [1950] 1 All E.R. 826.

BEARD v. BEARD.

[COURT OF APPEAL (Scott, Lawrence, L.JJ., and Vaisey, J.), July 2, 3, 24, 1945.]

Divorce—Adultery—Condonation of adultery—Subsequent desertion but not for statutory period—"Matrimonial offence"—Adultery revived by desertion.

The parties were married in 1929. In 1940 the petitioner husband, while serving abroad as a soldier, was taken prisoner. In 1943 the petitioner was repatriated and lived with his wife until Apr., 1944, so far as his army service permitted. His wife then sent him a letter enclosing a letter from the co-respondent which made it plain that she had committed adultery while the petitioner was a prisoner of war. Subsequently they met and she admitted the truth in the co-respondent's letter but the petitioner persuaded her to live with him again. The period of renewed cohabitation lasted for three weeks in Apr., 1944, at the end of which the wife refused to live with the petitioner any more and the parties had never lived together since. On Aug. 2, 1944, the petitioner filed a petition for divorce on the ground of his wife's adultery. The questions for the determination of the court were: (i) whether the condonation was absolute and final or only conditional and provisional; (ii) if conditional, whether the rule of "revival" was brought into operation by any matrimonial misconduct (other than such a minor degree of misconduct as should be disregarded

either on the *de minimis* principle or because the court did not regard it as sufficiently serious to treat it as misconduct), or only by such misconduct as would of itself justify the court in granting a decree for it alone :—

HELD (VAISEY, J., dissenting) : (i) marriage being a status, its continuance or dissolution alike depended not on the law of contract but on that of status which governed the position and its incidents.

(ii) on that footing the ecclesiastical courts treated the continuance of the full marriage status as conditional upon no recurrence of matrimonial misconduct, and by matrimonial misconduct was meant conduct by one spouse which those courts or their successors have judicially recognised under the law in force at the relevant times as wrong towards the other spouse.

Worsley v. Worsley (6), *Durant v. Durant* (7), *D'Aguilar v. D'Aguilar* (8), *Palmer v. Palmer* (13) followed.

(iii) a difference in kind between the new and the old matrimonial misconduct would not prevent the new from reviving the old. It was the generic and not the specific quality of the conduct that mattered.

Dent v. Dent (4) followed.

(iv) subsequent matrimonial misconduct, provided it was sufficiently serious for the court to regard it as a substantial breach of conjugal duty, would revive a condoned matrimonial offence even if such misconduct would not in itself be sufficient to justify a decree of divorce. The petitioner, therefore, was entitled to a decree *nisi*.

Higgins v. Higgins (1) followed.

Ainley v. Ainley (2), *Harrison v. Harrison* (3) overruled.

Decision of HODSON, J. ([1945] 1 All E.R. 704) reversed.

[EDITORIAL NOTE. The Court of Appeal here decides that condoned adultery may be revived by subsequent desertion insufficient in point of time to entitle the injured spouse to a decree of divorce, thus reversing HODSON, J., in the court below, and overruling the decisions to the contrary of BARNARD, J., and WALLINGTON, J. SCOTT, L.J., holds that too much stress has been laid upon the purely judicial phrase "matrimonial offence" and too little upon the decisions of the older ecclesiastical courts upon which the statutory jurisdiction in divorce has been superimposed. It is clear from those decisions that any desertion, long or short, constituted a matrimonial offence, as being an interference with the continuity of conjugal intercourse. It is thus inconsistent with matrimonial duty, and SCOTT, L.J., reviewing the cases on condonation in detail, finds that "the trend of judicial decision from 1730 onwards till the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty." The fundamental question of whether condonation is conditional is, therefore, answered in the affirmative.

This statement of the law depends upon regarding marriage as a status, while the dissenting judgment of VAISEY, J., is based rather upon a view of marriage as a sacrament, from which angle it follows that no revival is possible, since condonation is equivalent to a new marriage. He regards revival as originally no more than a rule of practice in the ecclesiastical courts, relating to pleading and evidence, and holds that justice and the public interest alike require that forgiveness should be final.

AS TO CONDONATION AND REVIVAL OF OFFENCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679, 680, paras. 1004-1006; and FOR CASES, see DIGEST, Vol. 27, pp. 345, 346, Nos. 3266-3276.]

Cases referred to :

* (1) *Higgins v. Higgins and Bannister*, [1943] P. 58; [1943] 2 All E.R. 86; 112 L.J.P. 55; 169 L.T. 45.

* (2) *Ainley v. Ainley*, [1945] P. 27; [1945] 1 All E.R. 265; 172 L.T. 185.

* (3) *Harrison v. Harrison*, unreported.

* (4) *Dent v. Dent* (1865), 4 Sw. & Tr. 105; 27 Digest 339, 3183; 34 L.J.P.M. & A. 118; 13 L.T. 252.

* (5) *Collins v. Collins* (1884), 9 App. Cas. 205; 27 Digest 346, 3272.

* (6) *Worsley v. Worsley* (1730), 2 Lee 572; 27 Digest 347, 3277.

* (7) *Durant v. Durant* (1825), 1 Hag. Ecc. 733; 27 Digest 337, 3171.

* (8) *D'Aguilar v. D'Aguilar* (1794), 1 Hag. Ecc. 773; 27 Digest 406, 4064; 1 Hag. Con. 134, n.

(9) *Snow v. Snow* (1842), 2 Notes of Cases, Supp. i; 27 Digest 342, 3231.

(10) *Evans v. Evans* (1843), 2 Notes of Cases, 470; 27 Digest 340, 3198.

(11) *Hart v. Hart* (1855), 2 Ecc. & Ad. 193; 27 Digest 347, 3281.

* (12) *Bostock v. Bostock* (1858), 1 Sw. & Tr. 221; 27 Digest 345, 3260; 27 L.J.P. & M. 86; 31 L.T.O.S. 331.

- * (13) *Palmer v. Palmer* (1860), 2 Sw. & Tr. 60; 27 Digest 337, 3172; 29 L.J.P.M. & A. 124; 2 L.T. 363.
- (14) *Winscom v. Winscom and Plowden* (1864), 3 Sw. & Tr. 380; 27 Digest 345, 3264; 33 L.J.P.M. & A. 45; 10 L.T. 100.
- * (15) *Newsome v. Newsome* (1871), L.R. 2 P. & D. 306; 27 Digest 346, 3271; 40 L.J.P. & M. 71; 25 L.T. 204.
- (16) *Ridgway v. Ridgway* (1881), 29 W.R. 612; 27 Digest 338, 3174.
- * (17) *Blandford v. Blandford* (1883), 8 P.D. 19; 27 Digest 338, 3175; 52 L.J.P. 17; 48 L.T. 238.
- (18) *Moore v. Moore*, [1892] P. 382; 27 Digest 366, 3517; 62 L.J.P. 10; 67 L.T. 530.
- * (19) *Houghton v. Houghton*, [1903] P. 150; 27 Digest 346, 3274; 72 L.J.P. 31; 89 L.T. 76.
- (20) *Copsey v. Copsey*, [1905] P. 94; 27 Digest 346, 3275; 74 L.J.P. 40; 91 L.T. 363.
- (21) *Jordan v. Jordan*, [1939] P. 239; [1939] 2 All E.R. 29; Digest Supp.; 108 L.J.P. 104; 160 L.T. 368.
- * (22) *Henderson v. Henderson*, [1944] A.C. 49; [1944] 1 All E.R. 44; 113 L.J.P. 1; 170 L.T. 84.

APPEAL by the petitioner husband from a decision of HODSON, J., dated Apr. 17, 1945, reported [1945] 1 All E.R. 704, dismissing the petition for divorce. The facts and arguments are fully set out in the judgment of SCOTT, L.J.

R. T. Barnard for the appellant.

C. R. Havers, K.C., and *E. Holroyd Pearce, K.C.*, for the King's Proctor.

Cur. adv. vult.

SCOTT, L.J. : This appeal from HODSON, J., raises the important question upon which opposing views have been taken during the last two years in the Divorce Court, as to whether a matrimonial wrong, insufficient of itself to entitle the injured spouse to a decree of divorce, nevertheless suffices to remove the bar effected by a previous condonation and thus to revive the original right of the injured spouse to a decree by reason of the former wrong. PILCHER, J., answered the question in the affirmative in *Higgins v. Higgins* (1); BARNARD, J., in *Ainley v. Ainley* (2); and WALLINGTON, J., in *Harrison v. Harrison* (3), a case decided at Birmingham Assizes on Feb. 3, 1945, answered it in the negative. HODSON, J., in the present case has followed the two latter decisions and held that no desertion short of the statutory three years can revive the right of petition based on the original adultery. The ground of the decision of PILCHER, J., was that, whilst a condonation bars further resort to the condoned breach of matrimonial duty as a ground for the intervention of the court in favour of the condoning spouse, any fresh breach of matrimonial duty by the forgiven spouse will undo the condonation, and enure to the benefit of the aggrieved spouse by reviving the original breach and so enabling the court to base a decree upon it. I think the view of PILCHER, J., is right; but unfortunately the underlying reasons for that legal conclusion have got a little obscured by a tendency in the discussion for the disputants and the court to express the issue between the opposing views in the terms of a too limited phraseology, with the result that the test to be applied has seemed to depend on the meaning of a particular judicial phrase, "matrimonial offence," used in certain reported cases, rather than on the basic reasons of principle which underlie the controversy. It is said by the one side that "matrimonial offence" means only such a breach of matrimonial duty as will entitle and, perhaps require the divorce court to grant a decree to the aggrieved spouse; and that no degree of matrimonial breach of duty, short of what calls for such a decree, can constitute a "matrimonial offence" within the meaning of the decisions. Their argument is based on the contention that the word "offence" correctly construed carries their meaning. The other side reply that the word "offence" has no statutory force, and is merely a word used compendiously in the cases to cover any matrimonial wrongdoing, whether any decree could or could not be based upon the particular wrongdoing in fact established. The dispute has thus seemed to turn on a problem of interpreting a judicial phrase. I think the broader viewpoint is the sounder and that it would be fallacious to limit the argument of principle by any such verbal and restrictive interpretation of a convenient judicial phrase.

The respondent wife did not appear either below at the hearing in Dec., 1944, or before us. The co-respondent appeared below in person, but not before us.

After hearing evidence HODSON, J., thought it right to ask that the case should be argued on behalf of the King's Proctor and that course was followed at an adjourned hearing in Apr., 1945, the Attorney-General arguing as *amicus curiae*, Mr. Holroyd Pearce, K.C., with him. The same course was followed before us and the court is greatly indebted to Mr. Havers, K.C., who reviewed the statute and the case law, fully, but with admirable conciseness.

A The logical, and I think the legal, questions involved in this appeal may perhaps be stated thus: (i) Is it a principle of divorce law that condonation is an absolute bar to future proceedings based on the matrimonial misconduct which occurred before and was the subject of the condonation, or may the right to proceed on that misconduct be subsequently "revived" and the bar of condonation removed by fresh matrimonial misconduct? In other words, is condonation absolute and final, or only conditional and provisional? (ii) If condonation is conditional and the rule of "revival" is good law, is that rule brought into operation by any matrimonial misconduct (other than such a minor degree of misconduct as should be disregarded either on the *de minimis* principle, or because the divorce court does not regard it as sufficiently serious to treat it as misconduct) or only by such misconduct as would of itself justify the court in granting a decree for it alone?

C The facts and findings are sufficiently stated by HODSON, J., in the first three paragraphs of his judgment ([1945] 1 All E.R., at p. 705):

D The parties were married in 1929 and had three children. They lived together happily until the war when the husband, who was a territorial, joined his unit. He went abroad and in 1940 was taken prisoner. He remained in captivity until Oct., 1943, when he was repatriated and rejoined his wife. Thereafter he lived with her so far as his army service permitted until Apr., 1944. He then got a letter from her enclosing a letter from the co-respondent. These two letters made it plain to him that she had been unfaithful while he was a prisoner of war. When the parties met, the wife admitted the truth of the matters stated in the co-respondent's letter but the petitioner persuaded her to live with him again thereby condoning her adultery. This period of renewed cohabitation lasted for three weeks in Apr., 1944, at the end of which the wife refused to live with the husband any more. Since that date the parties have never lived together. On Aug. 2, 1944, the husband presented a petition for divorce based on the adultery which his wife had confessed to him. In order to anticipate the defence of condonation, a plea of desertion as from the end of Apr., 1944, was included in the petition. On these facts, having regard to the circumstances in which the admission was made, I found that the wife had committed adultery. I further found that the adultery had been condoned. And that the wife had deserted her husband as from the date pleaded.

F The jurisdiction of, and the law applied by the divorce court today (that is to say by the Probate, Divorce and Admiralty Division sitting in Divorce) is purely statutory: but by the combined effect of the Matrimonial Causes Act, 1857, s. 6, of the Judicature Acts and of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 21, the whole of the matrimonial jurisdiction of the Ecclesiastical Courts is now vested in it: and wherever the various statutory provisions, and the decisions of the courts since 1857 have not modified the older principles of law, recourse may properly be had to the decisions of the Ecclesiastical Courts before 1857. To that extent the old principles continue in force.

G Mr. Havers, K.C., addressed us as *amicus curiae*, but I am not sure that he was not entitled to be heard as of right under the Judicature Act, 1925, on the ground that the judge had made a direction under sect. 181 (1) of that Act.

H The relief formerly granted by the Ecclesiastical Courts is clearly summarised in RAYDEN ON DIVORCE, 4th Edn., Introduction, p. viii, sect. 5. As he says there:

Desertion was remedied not by a divorce but by a decree for restitution of conjugal rights, disobedience to which resulted in the disobeyed being pronounced contumacious and excommunicated, though subsequently (by Ecclesiastical Courts Act, 1813) imprisonment for not more than six months was substituted for a sentence of excommunication.

It is of cardinal importance in the present controversy to keep in mind this ancient procedure for so-called restitution of conjugal rights as the ecclesiastical remedy for the matrimonial offence of desertion. Any desertion, long or short, of sufficient reality for the court to take cognizance of it, gave rise to the jurisdiction to make the decree of restitution. The very essence of conjugal rights

was then, as it is now, to insist on continuity of conjugal intercourse; and any wanton breach constituted the matrimonial offence of desertion. The notion that desertion differs in kind according as it is long or short, and that it does not constitute a "matrimonial offence" unless it continues for some period specified in some statute as entitling the divorce court to make some decree, is I think a misapprehension due to confusion of thought. From 1857 to 1937 the power of the divorce court to make a decree for desertion did not arise till two years desertion was established, when it might decree judicial separation. Since 1937 the court may decree divorce, but only if the desertion has lasted three years. But desertion has always been a "matrimonial offence" and was so treated by Parliament in giving magistrates a power to make orders for desertion. A

The statutory history of the matrimonial wrong of desertion can be stated shortly. The Matrimonial Causes Act, 1857, s. 16, was the first enactment, when desertion was definitely made a direct or positive ground for relief. Previously it was only an indirect or negative ground in that it was conclusive evidence that conjugal rights were being repudiated or neglected: but sect. 16 made desertion lasting for two years or more ground for an order of judicial separation: and sect. 21 gave magistrates' courts jurisdiction (slightly enlarged by sect. 8 and 9 of the Matrimonial Causes Act, 1858) to protect the property of the deserted wife. This magistrates' jurisdiction was further enlarged as time went on. By the Matrimonial Causes Act, 1884, s. 5, desertion was made an express ground in the High Court for a decree for restitution of conjugal rights; and that decree carried a statutory presumption of desertion without reasonable cause, which in the case of the husband coupled with his adultery entitled the wife to a decree of divorce *a vinculo*. The Summary Jurisdiction (Married Women) Act, 1895, s. 4 treated desertion as on a par with cruelty as a ground for an order in favour of the wife: and this jurisdiction was enlarged by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (2), to include (a) persistent cruelty, (b) insistence on intercourse when suffering from venereal disease, (c) compulsion by husband to submit herself to prostitution. Finally desertion for three years was by the Matrimonial Causes Act, 1937, made by itself a substantive ground for divorce at the suit of either spouse. B C D

These statutory provisions show plainly enough that desertion has been consistently treated by Parliament as a grave matrimonial wrong. E

"Condonation" first appeared in our legislation in the 1857 Act, s. 30, which made it obligatory on the court to dismiss any petition on being satisfied by evidence of condonation by the petitioner. There can be no doubt that we must treat the word in that section as being then a word of art with a well-settled meaning; and for the purpose of interpretation we must look back to the reported decisions of the Ecclesiastical Courts to see what in 1857 were already its meaning and its incidence. If those courts treated it as an absolute and final bar, preventing the condoning party from ever again reverting to the matrimonial wrong so forgiven and blotted out, then *prima facie* Parliament in 1857 used the word in that sense: see *Dent v. Dent* (4). If on the other hand those courts treated it as only conditional forgiveness of the guilty party, that is to say, as being granted upon a condition imposed by the law of the court, that the married status so preserved might again be lost if the forgiven spouse again broke his or her marriage vows and became guilty of new matrimonial misconduct, then we too ought to treat the word in sect. 30 of the 1857 Act as connoting only a conditional wiping out of the offence condoned, which would revive on the happening of the new misconduct. The latter is I think clearly the doctrine which the old pre-1857 cases applied to the question. F G

As LORD BLACKBURN pointed out in the leading case of Scots law, *Collins v. Collins* (5), at pp. 234, 235, marriage is a status, and its continuance or dissolution alike depend on the law of contract. It follows that to think of the words or intentions of the spouses at the moment of condonation as if they represented a contractual compromise of proceedings for dissolution of the marriage, plus a new contract of marriage, absolute or conditional, is a misconception. It is the law of status rather than of contract which governs the position and its incidents. But that does not mean that a condonation cannot be conditional. A status may be continued in law upon a resolutive condition, equally imposed by law, which may thereafter alter the status. And it is, in my opinion, on that H

footing, that the old Ecclesiastical Courts, upon deliberate consideration, treated the continuance of the full marriage status as conditional upon no recurrence of matrimonial misconduct; and by "matrimonial misconduct" I mean conduct by one spouse, which those courts or their successors have judicially recognised under the law in force at the relevant times, as wrong towards the other spouse.

A The first case to which we have been referred is *Worsley v. Worsley* (6). I regard that decision given more than two centuries ago, as of primary importance: for it covers the whole ground of the present appeal. It is shortly reported, at p. 572, and I quote it at length:

B Worsley *Mulier contra Worsley Virum*. After a reconciliation fresh acts of cruelty will revive acts of cruelty, and also of adultery. In this case several facts of cruelty and adultery were charged by the wife in an allegation offered by her, which were laid to have been committed some years ago. Since that there had been a reconciliation between the husband and wife; and since that reconciliation he was charged in this allegation with fresh acts of cruelty, but with no new act of adultery. Dr. Cottrell, for the husband, said that since he was charged with fresh acts of cruelty since the reconciliation, they would indeed revive the former acts of cruelty before the reconciliation; but that since no new acts of adultery were pretended, the former acts of that kind did not come within the rule, and that, therefore, all the articles of the allegation relating to the adultery were irrelevant, and ought to be struck out. The court held clearly that new acts of cruelty would revive the whole, as well the acts of adultery that were committed before the reconciliation (though there were no new acts of this sort) as the acts of cruelty, and that she was now as much at liberty to charge him with these acts of adultery, notwithstanding the reconciliation, as she would have been if there had been no reconciliation at all.

It was cited in full in *Durant v. Durant* (7), a petition by a wife, and SIR JOHN NICHOLL, Dean of Arches, after reading it, said, at p. 735:

D I wish to hear a full argument on the doctrine of condonation; its principles, and the authorities respecting it. What takes off its effects, and revives a former charge? Will any offence, short of subsequent adultery, namely, an approach to adultery, set aside condonation as a bar? Will solicitation of chastity have that effect? Must the injury be *ejusdem generis*? Will cruelty revive adultery? If so, will anything short of what would substantively and separately establish a case of cruelty? Will an unfounded charge of adultery, of which there is not a tittle of proof, against a mother with twelve living children, and an unjust dismissal of the wife from her husband's house, be sufficient to revive condoned adultery? Can condonation be set up as an effectual bar without being pleaded?

E The judge's questions show how very much the various aspects of the present appeal were in his mind at the time. He finally ruled in effect that condonation is forgiveness with an implied condition, that the injury shall not be repeated and that the other party shall be:

F . . . treated with conjugal kindness; and that on breach of the condition the right to a remedy for the former misconduct revives.

The latter part of the judgment shows how strongly that judge felt the justice of the rules of law upon which the doctrines of "implied condition" and revival rests.

G *D'Aguilar v. D'Aguilar* (8) was referred to in *Durant v. Durant* (7), and, I think, accepted as a plain authority that condonation is conditional and, therefore, not final. *Snow v. Snow* (9) was a pleading case: but it was again recognised that condonation is conditional. In *Evans v. Evans* (10), at pp. 473, 474, DR. LUSHINGTON recognises that condoned cruelty may be revived by fresh cruelty; he added:

. . . it is not necessary that it should be so strong as the original cruelty.

H In *Hart v. Hart* (11) the doctrine of revival was again recognised, although the subsequent cruelty, there proved, was not sufficient to revive the antecedent acts of cruelty which had been condoned; in both the last two cases it was said that the new matrimonial misconduct must, if they are to revive the condoned misconduct, be of the same kind as the former. This seems to me an artificially narrow view: and in those two cases neither *Worsley v. Worsley* (6) nor *Durant v. Durant* (7) were cited to the court.

In *Bostock v. Bostock* (12) the Judge Ordinary, SIR CRESSWELL CRESSWELL, said this, at p. 224:

After an examination of the authorities on this point, to be found in the reports

of cases in the Ecclesiastical Courts, I do not hesitate to declare my opinion, that where there have been acts of violence followed by condonation, threats subsequently uttered, if of such a nature and so expressed as to satisfy the court that further cohabitation would be attended with danger to the party threatened, do constitute a sufficient ground for a decree of judicial separation.

But the decision was that the threats in that case were not serious enough to justify a decree.

In *Palmer v. Palmer* (13) we again get back towards a pronouncement of principle on p. 61 :

This was a petition for dissolution of marriage at the suit of the wife, on the grounds of cruelty and adultery. The answer of the husband denied the cruelty and adultery, and, among other things, pleaded condonation of the cruelty; the reply took issue on the allegations in the answer, and further pleaded that the cruelty, if condoned, was revived by the subsequent adultery. [The respondent in effect demurred to the reply]: Mr. Murray, for the respondent, now moved the court to direct this part of the replication to be struck out on the ground that cruelty, once condoned, could not be revived by subsequent adultery; the reviving act must be *ejusdem generis* . . . Dr. Spinks for the petitioner [put forward what I regard as the true view]: "Dr. Spinks, in support of the paragraph of the replication, argued that the term *ejusdem generis* used by SIR JOHN DODSON in *Hart v. Hart* (11), must be understood of any act which would lay the foundation for a sentence in a matrimonial court; in the then state of the law desertion was not such an act. The principle of the doctrine of revival is, that all condonation is conditional. In the words of SIR JOHN NICHOLL, in *Durant v. Durant* (7), the plainer reason and the good sense of the implied condition is, that 'you shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law)—with conjugal kindness; on this condition I will overlook the past injuries you have done me.' In principle it seems impossible to distinguish between adultery revived by cruelty, and cruelty revived by adultery, with respect to the state of the law before the Divorce Act." The Judge Ordinary [used these words]: I cannot accede to this application. The cases cited establish that, if a marital offence which might have been the foundation of a sentence in a matrimonial court has been condoned, it is revived by any subsequent offence which might itself have been the ground of a sentence of divorce *a mensa et thoro*: and this on the ground that condonation is always assumed to be conditional, and the condition extends not only to repetition of the same, but of any other marital offence which falls within the cognizance of a matrimonial court . . .

That principle covers one aspect of the present appeal. The phrase "marital offence within the cognizance of a matrimonial court" deserves notice: for it was less than two years after the Matrimonial Causes Act, 1858 had increased the powers of the divorce court in connection with desertion, which was expressly treated in both that Act and the principal Act of 1857 as a "marital offence within the cognizance of the court."

Palmer v. Palmer (13) however leaves undecided the particular question on which HODSON, J., differed from PILCHER, J., namely as to whether the marital "offence" which will revive the condoned misconduct must reach such a degree of gravity as of itself to justify a decree by the court. *Winscom v. Winscom and Plowden* (14) is relevant on that very question. Intimacy falling short of adultery was there regarded as sufficient to revive an antecedent condoned adultery.

Dent v. Dent (4) (to which I have already referred) is an authority for the proposition that a difference of kind between the new and the old matrimonial misconduct will not prevent the new from reviving the old. It is the generic quality of the conduct that matters not its specific kind. The judge in his direction to the jury there said, at p. 106:

It is said on the part of the husband, that the adultery committed by him was condoned or pardoned by the wife. It is very properly admitted by the Queen's Advocate that the adultery of the husband was condoned by the wife; and you will have no difficulty in finding that issue for the respondent. But then it is said, that although that adultery was condoned, the condonation was done away with by the subsequent misconduct of the husband. Now the rule of law is, that all condonation is conditional, and the condition is, in future you shall treat me as a husband ought to treat his wife; and if you hereafter break your matrimonial obligations, and are guilty of adultery, or of cruelty, the condoned offence is revived. The question for you is, whether there was any subsequent cruelty by the respondent which did away with that pardoning or condonation. The pardoning having taken place in 1861, there is evidence that in 1864 the husband was guilty of cruelty. If you are satisfied of that fact, you will find that, although the wife did pardon the husband's adultery, there was subsequently

cruelty committed by the husband which revived that adultery.

In *Newsome v. Newsome* (15) LORD PENZANCE said, at p. 311 :

Condonation in its ordinary acceptation is a forgiveness by the wife implied from her restoring her husband to the original position which he occupied before the condoned offence was committed. When the husband is restored to his original position the law implies forgiveness, but forgiveness of a peculiar character, because it is coupled with the condition that the husband shall not in future be guilty of any marital offence.

A The whole doctrine of condonation—a very useful doctrine no doubt—is a structure of the courts founded on the necessities of the case. But the question does not arise here, for the parties have entered into a written agreement, and whatever ground there may be for saying that the wife forgave the husband must be found in the agreement itself, which supersedes any presumption of law, and the conduct of both parties must be referred to that agreement.

On p. 312 that judge added :

B In answer to this it was argued that incestuous adultery which had been condoned could not be revived by ordinary adultery. That depends on the condition which the court implies in cases of condonation. When a wife condones a husband's incestuous adultery, what is the condition upon which the condonation is to protect him against a suit ? The condition must be the same as in all other cases of condonation, namely, that the husband shall not be guilty of adultery or of any other marital offence. When incestuous adultery is condoned, I think the condition is not merely that the husband shall not again commit incestuous adultery but that he shall be true to his marriage vows.

C That case is important because the decision rests of broad principles. SIR JAMES HANNEN, P., expressed the same view in *Ridgway v. Ridgway* (16), at p. 613. There he held that solicitation of chastity revived not only previous adultery—with which it is *ejusdem generis*, but also cruelty, a matrimonial wrong generically dissimilar. The same judge propounded the same broad rule in *Blandford v. Blandford* (17), saying, at p. 20 :

D There had, therefore, been legal desertion for the requisite period, and the petitioner would have been entitled, by reason of the adultery and desertion, to institute a suit for dissolution of marriage . . . But the letters show that she forgave him on condition that he "sinned no more," and that is the legal definition of condonation. It is forgiveness upon condition that no matrimonial offences shall be committed for the future. It has been held in the cases cited that where the right has thus accrued from a combination of matrimonial offences to have the marriage dissolved, if one of these offences is committed again, that combination is revived. Adultery revives cruelty, cruelty revives adultery, and I can see no reason in principle why subsequent adultery should not revive the right of the wife to complain of the desertion as well as of the adultery of the past.

E In Scots law condonation is final and unconditional. The observations of LORD BLACKBURN in the Scottish case of *Collins v. Collins* (5), upon the English rule are therefore *obiter* : and indeed he assumed the English rule of revival which he personally criticised is too well established to be overruled judicially.

F In *Moore v. Moore* (18) GORELL BARNES, J., accepted, at p. 384, *Dent v. Dent* (4) as good law on "the revival of a matrimonial offence" and treated LORD BLACKBURN'S observations as not "overruling it."

G *Houghton v. Houghton* (19) is important in the present appeal because it was an express decision that desertion can revive a condoned adultery. It is true that the desertion there was of sufficient length to enable the divorce court to grant a judicial separation—the only direct relief open before the Act of 1937 : but that qualification of that decision is irrelevant in the present appeal, except on the secondary contention based on the meaning of the phrase "matrimonial offence," namely that if misconduct is to cause a "revival" it must amount in degree to an offence for which a decree of divorce or at least some other H*decree can be given. The whole of the judgment of SIR FRANCIS JEUNE, P., at p. 152 is directly relevant. He said *inter alia* :

The principle is as clear as possible. When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her guilty spouse goes back on that implied condition alone. Desertion is as serious a matrimonial offence as can be imagined, because it probably results in breaking up the matrimonial home.

And expressly following *Dent v. Dent* (4), on p. 154, SIR FRANCIS JEUNE, P.,

treated that case as covering desertion just as much as adultery or cruelty and added :

... I think I am justified in holding that the Act of 1857 is as efficacious to revive by subsequent desertion as it is to revive by subsequent cruelty or adultery. I am prepared to take this step on principle—a principle which may be said to be to some extent supported by judicial authority, or, at any rate, not to be contradicted by it.

GORELL BARNES, J., followed *Houghton v. Houghton* (19) in *Copsey v. Copsey* (20), calling desertion a continuing offence (just as a nuisance at common law may be called a continuing offence), see p. 95. A

LORD MERRIMAN, P., in *Jordan v. Jordan* (21), at p. 251 ([1939] 2 All E.R., at p. 36), discusses the nature of "desertion" in divorce law, in a passage which in my respectful opinion covers the whole question raised by the present appeal with great force and perfect clarity. He then sums it up in these words :

But it is clear from the Act of 1857 itself that the offence of desertion was from the first regarded as existing independently of the period of its duration, for by sect. 21 "a wife deserted by her husband" may obtain protection of her property "at any time after such desertion"; and until the references to the Divorce Court in that section were repealed by the Judicature Act, 1925, she could resort not only to the justices but to the Divorce Court for the purpose. B

PILCHER, J., in *Higgins v. Higgins* (1) held, in accordance with the view which I think right, that desertion for less than the statutory period of three years sufficed to undo a preceding condonation and revive the other spouse's right to a decree for the antecedent misconduct which had been condoned. No authorities seem to have been cited, but that judge referred to *Jordan v. Jordan* (21) as authority for the view he took. C

BARNARD, J., on the other hand in *Ainley v. Ainley* (2) refused to follow *Higgins v. Higgins* (1), and held that matrimonial misconduct does not undo a condonation and cause the former misconduct which, *ex hypothesi*, would, but for the condonation, have entitled the aggrieved spouse to a divorce, to revive. The judge drew attention to the confusion which had arisen from the expression "matrimonial misconduct," but took the view that for the doctrine of revival it must be such as of itself to warrant a decree. He relied in support of his view on a phrase of VISCOUNT SIMON, L.C., in *Henderson v. Henderson* (22), p. 54 ([1944] 1 All E.R., at p. 46): D

It is, of course, quite true that condonation is subject to one implied condition, but that is the condition that, if the spouse who has been forgiven past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for a divorce, but condonation cannot be treated as cancelled because an erring wife who makes promises as to her future conduct withdraws the promise later on. Condonation is not a contract in which one party may claim to be discharged by the other's repudiation. Condonation is not a contract at all. E

But VISCOUNT SIMON, L.C., was there dealing with an argument based upon the contention that condonation was a contract of forgiveness, and pointing out its fallacies; his Lordship was not addressing his observation to the question upon which BARNARD, J., differed from PILCHER, J., and I cannot think he was intending to make any pronouncement upon that issue. BARNARD, J., was obviously impressed by the possibility of the principle upon which PILCHER, J., founded his judgment being applied in a very extreme case. That possibility is necessarily present: but equally extreme possibilities are inherent in the view endorsed by BARNARD, J., and WALLINGTON, J.,. Where the post-condonation offence is desertion, the adoption of the principle of HODSON, J., would have the practical effect of depriving the revival rule of any practical value: for it would not operate till the desertion had lasted long enough to make it superfluous. But in truth comparison on grounds of public policy is for Parliament, which can legislate, rather than for the courts. The trend of judicial decision from 1730 onwards till the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the divorce court can accept as consistent with matrimonial duty; and that when a fresh matrimonial wrong is done the condonation ceases to confer protection and the right of the other spouse to proceed in the divorce court revives. F

In my opinion any other rule of law would not only be socially intolerable, but G

H

inconsistent with the real principle, underlying the long line of cases and expressly mentioned in several of them, though in slightly varying language, namely, that there must be no substantial digression from the path, to which their marriage vows have bound the parties, of what is sometimes called in old but telling words "conjugal kindness." A "matrimonial" or "marital offence within the cognizance of the Divorce Court" in my opinion simply means conduct which in the eye of that court is wrong, whether it does or does not reach the duration, or gravity, or completeness which is necessary to permit of a decree; provided always that it be sufficiently serious for the court to regard it as a substantial breach of duty.

A For these reasons I agree with the view of PILCHER, J., and in spite of the differing views of BARNARD, WALLINGTON and HODSON, JJ., I think that this appeal must be allowed, with the usual consequences on costs. I would give leave to appeal to the House of Lords were there a party to prosecute it: as there is not, I have stated my reasons and quoted from the authorities as fully as I could.

B Since writing the above judgment I have read and given deep consideration to the dissenting judgment of VAISEY, J., Its matter is intensely interesting and its reasoning very powerful, provided always that its partly unexpressed first premiss be conceded; but it is there that in my respectful opinion it breaks down. The falseness of its first premiss makes its conclusion erroneous. He C assumes and almost asserts that the matrimonial law of England today still approaches the marriage status from what I may for brevity call "the sacramental" angle; so that it regards a condonation as the equivalent of a new marriage, to the status of which the past sins of the bride and bridegroom have no relevance: for *ex hypothesi* they the parties there owed no duty to each other. In such a new married status there can be no revival of a past breach, for there was no duty. Such being the true nature of condonation it follows, D VAISEY, J., says, that the party sinned against must be deemed in law as in religion to have forgiven the sin of the sinner for ever. I appreciate the force of the word "*remisisse*," which he quotes in his argument based on the above religious premiss; but I venture to call that premiss fallacious in law today, at any rate because of the secular characteristics of the marriage status engrafted on it by the legislation which began in 1857. But I venture, in spite of his E great knowledge of ecclesiastical law, to go further: for in my opinion the views expressed in those decisions of the ecclesiastical courts themselves, which I have quoted, are inconsistent with the postulate which he makes his first premiss; in order, quite logically, to draw from his conclusion that the whole doctrine of conditional condonation with its corollary of "revival" never really was a part of the law of the Ecclesiastical Courts.

F In conclusion let me say that I should not have added this rider to my judgment had I thought this case could go as I would wish, to the House of Lords for revision.

LAWRENCE, L.J.: The fundamental question in this case is whether in divorce law condonation is absolute and unconditional. If it is, then the doctrine of revival of matrimonial offences by other matrimonial offences after condonation has no practical existence. If it is not, then condoned matrimonial offences G must be capable of revival by offences of a less serious nature which would not by themselves give ground for divorce otherwise the condition is nugatory and the revival unnecessary.

Since 1730 many of the greatest authorities on the laws of matrimony and divorce have expressed the view that condonation is conditional and that matrimonial offences can be revived after condonation by offences of a less serious nature which do not by themselves give ground for divorce, namely, H by LORD STOWELL in *D'Aguilar v. D'Aguilar* (8); by SIR JOHN NICHOLL, Dean of Arches, in *Durant v. Durant* (7); and by DR. LUSHINGTON arguing in that case and in *Snow v. Snow* (9); by LORD PENZANCE in *Winscom v. Winscom* (14) in *Dent v. Dent* (4), and in *Newsome v. Newsome* (15); by HANNEN, P., in *Ridgway v. Ridgway* (16), and in *Blandford v. Blandford* (17), and by GORELL BARNES, J., in *Moore v. Moore* (18), where he distinguished the Scottish case of *Collins v. Collins* (5), and in *Copsey v. Copsey* (20).

I see no reason for disregarding the principles laid down by these eminent authorities in the Eighteenth and Nineteenth centuries at a time when the

attitude of the legislature to divorce is so fundamentally altered.

Our attention was called by VAISEY, J., at the hearing to OUGHTON'S *ORDO JUDICIORUM* (1738), Vol. 1, p. CCXIV, where the Latin word *remisisse* is used in conjunction with the word *condonasse* to describe condonation but, even if the use of the word *remisisse* indicates that the author thought that the doctrine of condonation was not conditional, I cannot think that his opinion ought to be adopted in preference to the authorities which have been cited. In my own view apart from authority the conditional nature of condonation is justified by the fact that it proceeds not from any person or authority other than the spouses but from one of the spouses who is intimately and personally concerned in the future matrimonial conduct of the other spouse.

In the present case HODSON, J., found the desertion by the wife after condonation proved and although the desertion had only continued for three months at the date of the petition desertion is in my opinion a serious matrimonial offence even when it has not continued for the period necessary to give ground for divorce and that it is so regarded by the legislature is shown by the Matrimonial Causes Act, 1857, s. 2, the Act of 1856, s. 6, the Act of 1884, s. 5, the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (3) (c), and the Matrimonial Causes Act, 1937, s. 4 (see also *Jordan v. Jordan* (21)).

I agree, therefore, that this appeal ought to be allowed and the prayer of the petitioner granted.

VAISEY, J.: I find myself with regret, in disagreement with my Lords, and would dismiss this appeal; adopting the reasoning of the judge in the court below, of BARNARD, J., in *Ainley v. Ainley* (2), and of WALLINGTON, J., in *Harrison v. Harrison* (3); and overruling *Higgins v. Higgins* (1).

In approaching this matter it is, to my mind, important at the outset to observe how greatly the consequences of reviving a condoned matrimonial offence would seem to have varied according to changes in the law from time to time, and I propose to deal as briefly as I can with three successive periods.

In the first period, prior to 1858, divorce, as we now use the word, could not be judicially decreed, but could only be statutorily enacted by Parliament, for the Ecclesiastical Courts having then the sole jurisdiction in matrimonial causes could only decree what we now call a separation, leaving the status of the parties as married persons for the most part unaffected. Even more important is the fact that such a decree could never be claimed as of right, but was always in the discretion of the court. In those conditions, the question of whether a condoned offence could be revived was chiefly, if not solely, a question of pleading and of evidence. Thus in the earliest of the cases cited to us, *Worsley v. Worsley* (6), the decision was merely that the wife was "at liberty to charge" her husband with the condoned offence; it by no means followed that she would thereby obtain a decree, and indeed we know that this particular case never proceeded to sentence: see *per* LORD STOWELL in *D'Aguilar v. D'Aguilar* (8), at p. 785. All that the revival did was to allow the condoned offence to be brought, as it were, into the picture of the conjugal relationship; both the offence itself and its condonation were made part of the story, enabling the court to pay such attention to it as it deserved, and no more.

I come to the second period from 1858, the passing of the Matrimonial Causes Act, to 1923. Two vital changes are to be noticed; first the new jurisdiction to decree divorce in the proper sense, and thereby to destroy or at least fundamentally affect the status of the parties, and secondly, what is even more important for the present purpose, the substitution for the discretionary powers of the superseded Ecclesiastical Courts of a positive obligation on the court to pronounce such a decree on proof of adultery on the part of a wife, or of adultery plus cruelty on the part of a husband; see the Matrimonial Causes Act, 1857, s. 31. In these conditions, the revival of a condoned offence was mainly, if not exclusively, material when one of the two acts which form the component parts of the husband's offence had been committed and condoned, and the other of such acts was committed afterwards. The position was that the wife could only divorce her husband on proof of his being a cruel adulterer, and when he had supplied her with half the proof and had been forgiven, it was not unreasonable that she should be allowed to revert to it when he supplied the other half.

I wish at this point to refer, not, of course, as an authority but with a view to

making my meaning clear, to the short paragraph relating to this matter in the Report of the Royal Commission on DIVORCE AND MATRIMONIAL CAUSES. Of that Commission the first LORD GORELL was chairman, and he signed the Report, which was presented in 1912, the paragraph in question being No. 375. It reads as follows :

A The Defence of Condonation. This is the blotting out of an offence, with knowledge of the facts, not by mere forgiveness, but by such conduct as amounts to a resumption of the married life. It is a complete answer to a charge, but if a subsequent marital offence is committed, it is held that the condoned offence is revived, the condonation being treated as conditional upon proper future conduct. It was suggested by Sir Edward Clarke, K.C., that there should, in no case, be a revival of a condoned offence. If grounds of divorce such as we recommend are adopted, the point does not become of much importance, because these questions arise, chiefly in cases of suits by women, where two offences have to be proved to found a suit, *e.g.*, cruelty and adultery in a wife's suit. If one offence has been condoned, and another of a different kind is committed, the present rule permits of both being proved, but this will be unnecessary, if the one is sufficient foundation for the suit. Moreover, in cases of cruelty, condonation of first acts is natural, and, if all proof of these acts be shut out, a culminating act of cruelty might not by itself be sufficient proof of cruelty. It might be productive of hardship in cases of cruelty, if the doctrine of revival were departed from. We think that there is not sufficient ground for making any change in respect of this doctrine.

C On that paragraph I desire to make one or two observations. SIR EDWARD CLARKE'S views upon what he calls "the very mischievous state of things set up by the existence of the present doctrine," that is to say the doctrine by which a condoned offence is revived "because," as he puts it, "of the occurrence of some minor matrimonial offence afterwards," are expressed in his answers to questions No. 42135 and 42233 in the third volume of the evidence, but the main point that I should wish to make is that the recommendations of the Report have, in fact, now been altogether adopted, as to part in 1923 and as to the rest in 1937, and the Commissioners quite evidently expected that when that happened the doctrine (that is of revival) would lose its importance and become unnecessary. This expectation presupposes (as it seems to me) that the law would be as it is declared to be by the judgment under appeal, and not as it will be held to be when that judgment is reversed. The part of the paragraph which relates to cases of cruelty exactly expresses what appear to me to be the fundamental differences between adultery and cruelty as matrimonial offences, and I wish what I am saying in this judgment to be considered as applicable only to the particular kind of condoned offence with which we are concerned in this case, namely adultery.

E I come to the third period, from the passing of the 1923 Act to the present time. This really consists of two periods ; the first ending on Dec. 31, 1937, during which period adultery alone committed by either sex was a sufficient ground for divorce, and the second, beginning with the coming into operation of the Matrimonial Causes Act, 1937, and continuing to the present time, when desertion and cruelty have been additional independent grounds, full effect having thus been given to the whole of the recommendations of the Royal Commission. That being so, I think that there is no longer any room for the use of the doctrine of revival in such a case as that with which we are now dealing.

G Condonation appears to me to rest on sound legal, moral, and logical principles ; to be entirely consistent with reason and fairness ; and to be in the interest as well of the individuals immediately concerned as of the public. I find the doctrine of revival much less easy to explain and to justify, and I have sought in vain for its historical origin. At first sight it is surprising that works of high authority such as AYLIFF'S *PARERGON JURIS CANONICI ANGLICANI* (1726) and H OUGHTON'S *ORDO JUDICIORUM* (1738), when dealing with the subject of condonation, make no reference whatsoever to its conditional quality, and do not deal at all with any doctrine of revival. I believe the explanation to be that while condonation is a principle of law, revival was originally at any rate no more than a rule of practice in the Ecclesiastical Courts, relating to pleading and evidence, as I have already said. Both rules (of condonation or of revival) were imported into the rather alien procedure of the courts established under the 1857 Act, and applied thenceforward in the manner which I have tried to explain. It matters not now that SIR EDWARD CLARKE thought that the

doctrine of revival operated mischievously, if it be true (as for my part I think it is) that the rounding off, as it were, of the grounds for divorce by the Acts of 1923 and 1937 has removed, as the Royal Commission thought that it would, all occasions for the application of the principle of revival in such a case as the present. I do not doubt that condoned offences may be revived in cases of cruelty, and in other cases also, to complete a picture, but I do not think they can be revived to convict the offender by their own force, as is suggested on the present appeal. In my view, the principle of revival exists, but has become of extremely limited application, and in any case does not apply here.

I do attach some importance to OUGHTON's use of the word "*remisisse*" in conjunction with the word "*condonasse*" (Vol. I, Tit. CCXIV, at pp. 317, 318). For the terminology of the Ecclesiastical Courts had very close association with theology, and the "*remissio peccatorum*" of the Creeds undoubtedly implied finality. Neither in classical nor in mediaeval Latin is there any word, so far as I know, which expresses more strongly and definitely than do *remissio* and *condonatio* the absolute and irrevocable quality of release, the primary significance of the former word being legal and of the latter moral.

I may mention that the best exposition which is known to me of the principles involved in this appeal is to be found in the American treatise, BISHOP'S NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION (published in New York, 1891), Vol. II, Book IX, ch. 10, paras. 267 to 366. My Lord has dealt very fully with the reported cases, and as to these I need only say that for my part I find nothing in them which would have precluded this court, had it been so minded, from arriving at the conclusion which I am venturing, with all due deference, to express.

Some of the consequences which will follow the success of this appeal are, I think, surprising. I dare to suggest that when a wife or a husband condones the other's offence and particularly the offence of adultery by the resumption of sexual intercourse with full knowledge (which OUGHTON calls *notitia probabilis* and appears to identify with *scientia*) of the offence, the marriage not only ought to be, and is meant to be, but actually is, reconsummated, reconsecrated, and in the fullest sense rehabilitated. I believe that in the vast majority of such cases the intention and purpose of both is to re-establish the marriage as securely as it was established before. "Let us not refer to this again," would be their thought, "let things be as if it had never happened." I am quite aware that condonation does not lie in contract, but arises by operation of law, yet at least such a purpose as I have attributed to the parties would be praiseworthy, and I do find it very hard to believe that the law is compelled (with what seems to me to be incredible cynicism) to frustrate it. Must these people really be told that the law actually forbids them to re-establish their marriage on any other than a precarious basis; that they were mistaken in supposing that they had thrown into the sea—twenty years before, it may be—the hatchet that might then have severed their lives; and that the hatchet was in fact (without their knowledge and contrary to their wishes) buried in quite a shallow grave, and has lain there ready to be disinterred, for use with fatal results on the happening of comparatively slight matrimonial misconduct in the future? I hope that I may be excused for the homeliness of the illustration of the buried hatchet. But the matter goes further still, for the revival of the ancient wrong would today leave the court no option. Given the act of adultery however long ago, and given a month's desertion now, the court has no option or choice, or discretion, and the decree of divorce *a vinculo* must inescapably and automatically follow. I have the greatest difficulty in persuading myself that this can be the law, and that the invariable consequence of, and penalty for, a condoned offence is a lifelong period of probation, rendering the offender liable to be called up for inevitable judgment thereon if he or she commits any other conjugal offence whatsoever at any time, however distant, thereafter. With all respect to those who think otherwise, there seems to me to be something almost inhuman in a law which enables a wife or a husband to obtain, as of right, a divorce from the other in their old age, upon the ground of one single act of adultery committed by that other in the time of their far off youth and immediately condoned, but now raked up from the past upon some petty provocation insufficient in itself to be a ground for the relief so tardily sought. No statute of limitation applies to such a case; no plea of acquiescence or delay or un-

reasonableness could avail; nor could the court draw any distinction between a single act of adultery committed under exceptional temptation, and a series of such acts of a really heinous character. In the circumstances of the present time, there must be many husbands and wives who have erred and been taken back, and I cannot but think that it would be in the public interest that they should hold their forgiving spouses upon a firm rather than a precarious tenure. The question before us, however, is as to what the law is and not as to what it ought to be, and these considerations are only to my mind material to be mentioned as tending to make it at least probable that the law was correctly interpreted and applies in the court below.

I fully recognise the difficulties in the case, and the strength of the arguments which have found favour with my Lords, but in conclusion I ask leave to suggest one further consequence which has occurred to me. Suppose that a husband commits an act of adultery; that the wife condones it; and that both resolve that the condonation shall be absolute and unconditional, so as to render the offence incapable of being revived between them in any circumstances whatsoever. They might well feel a sense of insecurity if they had to live the rest of their lives together in the knowledge that an act of cruelty (for example) by itself too slight to entitle the forgiving wife to a divorce would, nevertheless, in view of what happened, enable her to get one for the asking. Such a resolve might be thought to merit both encouragement and applause; how, then are these people to obtain the security for which they seek? Only, so far as I can see, by refusing the condonation, proceeding to divorce, and then marrying each other again after the decree has been made absolute. I would dismiss this appeal.

Appeal allowed. Decree nisi granted as from the date of judgment in the court below.

Solicitors: *Mowll & Mowll* (for the appellant); *Treasury Solicitor*.

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

Re THE HON. MRS. DEIRDRE SAMUEL. THE TRUSTEE v. ISIDORE KERMAN (No. 2).

[COURT OF APPEAL (Lord Greene, M.R., du Pareq and Morton, L.J.J.), **July 5, 1945.**]

Practice—Appeal—Notice of appeal—Intention of appellant not to prosecute appeal—Respondent's consent given to dismissal on terms that appellant should pay respondent's costs—Appeal not dismissed—Appellant desiring to proceed with appeal—Original notice of appeal effective—R.S.C., Ord. 58, r. 8 (practice note).

After serving a notice of appeal from an order, the appellant, a trustee in bankruptcy, found that he had not sufficient funds to prosecute the appeal and decided not to proceed with it. He informed the respondent's solicitors, and a form of consent was signed by the solicitors to both parties expressing their consent to the appeal being dismissed on the terms that the appellant paid the respondent's costs. That document, however, never came before the President of the Court to be initialled, as required under the practice direction in the notes to the R.S.C., Ord. 58, r. 8, with the result that the appeal was not dismissed. A few days later, the appellant obtained a satisfactory indemnity from the creditors in the bankruptcy and decided to proceed with the appeal. He applied to the court to serve a fresh notice of appeal, but it was pointed out to him that the old notice was still alive. He therefore applied for leave to proceed with the original notice of appeal. It was contended by the respondent that, in the circumstances of the case the appellant was precluded from proceeding under the original notice. The respondent admitted, however, that he had not in any way changed his position by reason of the appellant's original intention not to proceed with the appeal, and it would be no hardship to him if the original appeal were proceeded with:—

HELD: under the modern practice, the consent notice could not be treated as a binding contract, because an appellant could procure the dis-

missal of an appeal by his own unilateral action, provided he could obtain the initialling of the President of the Court. In the circumstances of the case, the appellant was not precluded from proceeding under the original notice of appeal.

Watson v. Cave (1) distinguished.

[EDITORIAL NOTE. When an appellant did not desire to proceed with his appeal it was the former practice to apply to the court for leave to withdraw the appeal. It is now held that an appeal cannot be withdrawn even with the consent of the respondent, since an appeal can only succeed or fail, and the proper procedure is now to present a request signed by the appellant's solicitor and initialled by the President of the Court that the appeal should be dismissed. Once dismissed it cannot be revived by serving a new notice of appeal. In view of this, there does not appear, in the present circumstances, to be any question of contract to withdraw, as between the appellant and the respondent, for no consent is necessary, and there is no consideration. Where the proper procedure had not been followed, owing to the omission of the signature of the President of the Court the court, therefore, holds that the original appeal is still on foot and may be proceeded with, in the absence of evidence that the respondent had been in any way damnified by the attempted withdrawal.]

As to ABANDONMENT OF APPEAL, see YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 1279; and FOR CASES, see DIGEST, Practice, p. 796, Nos. 3589-3592.] Case referred to:

**(1) Watson v. Cave* (No. 2) (1881), 17 Ch.D. 23; Digest Practice 796, 3589; 50 L.J.Ch. 561; 44 L.T. 117.

APPEAL by the plaintiff from a decision of EVERSHED, J., dated May 3, 1945, and reported [1945] 2 All E.R. 71. The court dealt with an application by the appellant for leave to proceed with the notice of appeal. The facts are fully stated in the judgment of LORD GREENE, M.R.

V. R. Aronson for the appellant.

C. Gallop for the respondent.

LORD GREENE, M.R.: The appellant, the trustee in bankruptcy, was minded to appeal from an order of EVERSHED, J., and he duly served a notice of appeal. He discovered, however, that he had not the funds necessary to enable him to prosecute the appeal without running the risk of having to pay costs out of his own pocket, and in those circumstances he decided that he would not go on with it. His solicitors informed the respondent's solicitors of that decision on the telephone, and the respondent's solicitors submitted a form of consent under which the parties were expressed to consent to the appeal being dismissed on the terms "that the appellant do pay the respondent's costs of the appeal, to be taxed if not agreed." That was signed by both solicitors.

That procedure was in accordance with the modern practice, which is set out in the ANNUAL PRACTICE, 1944, in the notes to Ord. 58, r. 8, at p. 1301. The practice direction there set out took the place of an earlier direction, and has finally settled what the practice ought to be. It provides:

Where an appellant is *sui juris* and does not desire to prosecute an appeal, he may present a request signed by his solicitor stating that he is *sui juris* and asking to have the appeal dismissed, in which case (subject to the request being initialled by the President of the Court) the appeal will be dismissed and struck out of the list, and an order will if necessary be drawn up directing payment of the costs by the appellant, such costs to be taxed in case the parties differ.

In the ordinary course the document in this case did not require the signature of the respondent's solicitors. Under that practice the appellant who does not wish to go on with his appeal can, by unilateral action, procure the dismissal of his own appeal, on the terms, of course, that he pays the costs. If he wishes that it be dismissed on some other terms—*e.g.*, without costs—obviously the consent of the other side is required; and the practice direction so provides.

For some reason which has not been fully explained to us, that document never came before the President of this Court to be initialled, and, accordingly, the appeal was never dismissed. A few days afterwards the trustee succeeded in obtaining from the creditors an indemnity which satisfied him; he decided that he wished to go on with the appeal, and his solicitors informed the respondent's solicitors to that effect. On June 21 the respondent's solicitors wrote a letter to the appellant's solicitors in which they said that they had made inquiries, "as a result of which we are advised that it will not be possible for this appeal to be withdrawn without formal application being made to the Court

of Appeal." That, as a matter of fact, was wrong. The appeal would have been dismissed if the consent had been initialled by the President of the Court. They go on to say :

We shall be glad to receive written notice of your client's intention to withdraw the appeal, and no doubt at the same time you will inform us when your counsel proposes to make the necessary application to the Court of Appeal so that we can instruct our counsel accordingly.

A They ask to hear by return of post, otherwise they would deliver their briefs. On the face of that letter it is made clear that in the view of the respondent's solicitors the consent which had previously been signed would not be effective to procure the dismissal of the appeal and that an application to the court should be made. But on June 28 the trustee's solicitors wrote, saying that they had by telephone informed the respondent's solicitors, "and this letter is to confirm that under the circumstances we are not proceeding with this appeal but at the hearing (which we believe is in the list for next Tuesday . . .) the trustee would ask that leave be given to serve a fresh appeal." That is not a very accurately worded letter, because "to serve a fresh appeal" is not correct. What was really meant (it was just a slip, no doubt) was "to serve a fresh notice of appeal": all that the letter says is that they are not proceeding with this appeal, which appears to mean: "We are not proceeding with this notice of appeal."

C That being the position, the matter comes before us. Counsel for the appellant opened his argument by saying that he was applying for leave to serve a fresh notice of appeal. It is to be observed that the old notice of appeal, so far as the court is concerned, is still alive. No order has been made dismissing the appeal: the notice is still a live notice unless there be some reason which would induce the court to say that in the circumstances the appellant should not be allowed to proceed with that notice. This was pointed out to counsel for the appellant, and he was invited to argue that it was still competent to him, notwithstanding what had happened, to proceed with his original notice of appeal. The court granted counsel for the respondent an adjournment, because that obviously was not the kind of application that he came here to meet. We have now had the benefit of his observations at the adjourned hearing. Quite naturally and quite properly, he opposed the application, and also argued that, in view of what had happened, it was not competent to the appellant to go on with the original notice of appeal and that in the circumstances no leave to serve a fresh notice of appeal should be given, the time having lapsed for service of a notice of appeal.

E The position is a very curious one, and it has been necessary to examine the practice a little closely. In times past it used to be common practice for appellants to withdraw their appeals. This could only be done by leave of the court. There have been from time to time different views taken as to what is the proper order but it is now quite clearly settled, beyond any possibility of doubt, that the phrase "withdraw the appeal" is not the right phrase, nor is an order giving leave to withdraw an appeal the right order to make. The right order to make is an order dismissing an appeal. An appeal either succeeds or it fails. If it fails because the appellant abandons it, the one and only order that can be made is that it should be dismissed, and the court's records are, accordingly, kept in order. In the old days it was necessary, if an appellant did not wish to go on with his appeal, to come to the court and obtain the necessary order, which sometimes, apparently, took the form of leave to withdraw his appeal and sometimes took the form of dismissal of the appeal. But the modern practice is what I have stated.

H We were referred to *Watson v. Cave* (1), decided in this court in 1881, when the practice was that an appeal could only be disposed of on application to the court. The court consisted of JAMES and LUSH, L.JJ. There the appellant had notified the respondent that he proposed to withdraw his appeal and asked for his consent to the withdrawal, and submitted to pay the costs. That consent was given, but the appellant subsequently changed his mind because, he said, he was under a misapprehension as to a material fact. The appeal came on, and the respondent's counsel objected to its being heard on the ground that the defendant had withdrawn his notice. JAMES, L.J., thought it would be *pessimi*

exempli to allow a withdrawal of the appeal such as had been given to be rescinded. He pointed out that such action on the part of the appellant, if allowed, might result in injustice to the respondent, who might have acted on the faith of the withdrawal. There was no evidence one way or the other as to whether he would suffer any such ill effects. JAMES, L.J., went on to say, at p. 25 :

... if the appellant afterwards [*i.e.*, after the acceptance by the respondent's solicitors of the notice to withdraw] wished to withdraw from his withdrawal and return to his former position, his proper course would have been to apply for leave to give fresh notice of appeal. If there had been any mistake of fact under which the first notice was given, the court might have acceded to such an application, but at present we know nothing about the facts.

That is putting the matter on the basis that the court will not allow its process to be manipulated in such a way as to produce a possible injustice ; and the matter was left quite open by the remarks of JAMES, L.J., giving the appellant leave to put himself right by applying for leave to give a fresh notice of appeal. It is to be observed that JAMES, L.J., does not put the matter on the ground of contract ; not does he suggest that the proper order would be an order dismissing the appeal. LUSH, L.J., on both those points expresses himself in this way. He says that the proposal amounted to a contract which was binding on the parties. I feel some difficulty about that, but I am not prepared to say, nor am I called upon to say, whether under the old practice the view that there was a contract made by such actions as took place in that case was correct ; I will assume that it was.

It seems quite clear, however, that under the modern practice it would not be right to treat such a notice as was given in this case, even when it was agreed to by the other side, as in the nature of a contract. I cannot see that there is any consideration for it ; and the matter is made perfectly clear when it is remembered that under the modern practice an appellant, provided he can obtain the initialling of the President of the Court, can, by his own unilateral action, procure the dismissal of his appeal. Therefore, there is nothing to be done by the respondent in the way of producing that result, and I do not see that there is any room for consideration at all in the present practice. On the other hand, the initialling by the President of the Court is not necessarily done as a matter of course. The practice was introduced merely to save the expense of applications to the court, which in 99 cases out of 100 were quite unnecessary. But the court is the master of its own procedure, and merely because one party asks for an order, or both parties concur in asking for an order, it does not in the least follow that the court is in any way constrained to make the order asked for, at any rate, to make it without knowing more about the facts. In the ordinary simple case the matter goes as a matter of practice without any difficulty. Accordingly, it seems to me that there is no room under the modern practice for the conception of a binding contract in such circumstances.

But now comes the further difficulty that I find in the judgment of LUSH, L.J. He concluded his judgment by saying, at p. 26 :

I am of opinion that when the proposal of the appellant had been accepted, there was a contract constituted from which the appellant was not at liberty to recede. The appeal must be dismissed with costs . . .

But the court then, on the application of the appellant's counsel, gave leave to give notice of motion to enlarge the time for appealing, as the time had expired. It does not appear whether there was an order dismissing the appeal with costs, as LUSH, L.J., thought ought to be done. My difficulty is this. If the appeal was dismissed the appeal was dismissed, and I cannot see what room there was in those circumstances to give leave to the appellant to revive a dismissed appeal by serving a new notice of appeal. It is to be noticed that all the court did was to give leave to serve a notice of motion to enlarge the time for appealing ; and there is a note in the report that no motion to enlarge the time was made. So the matter never came up for argument as to whether, in view of the dismissal—if, indeed, there was an order dismissing the appeal—it was competent to the court to allow the appeal to be revived by serving a new notice of appeal. I cannot myself see how such an order could have been made. Similarly, under the present practice, once an order has been drawn up and entered, pursuant to an application by the appellant duly initialled by the President of the Court to dismiss the appeal, there is an end of the appeal ; and I see no

means by which the court would have jurisdiction to grant leave to serve a fresh notice of appeal in respect of an appeal which *ex hypothesi* is dead and buried by the order dismissing it. That case is not, in my opinion, an authority which binds us under the present practice to treat the attempted withdrawal as in any way a binding contract.

A The position now is that the appeal is still on foot ; it has never been dismissed. It is competent to us to consider, in those circumstances, whether or not something has happened which would justify the court in saying that the appellant ought not in the circumstances to be allowed to proceed with his appeal, for the reason that the respondent had in some way changed his position. The court can always prevent an abuse of its own process. But counsel for the respondent, very fairly, disclaimed any such suggestion. The respondent has not in any way altered his position, and it will be no hardship from that point of view if the original notice of appeal is proceeded with. The appeal still being on foot, B the original notice of appeal being still a perfectly good notice of appeal, provided (as is the case, in view of what counsel for the respondent said) that there will be no hardship in allowing the appellant to proceed upon it, I cannot see that we should be justified in saying that the appellant is now precluded from proceeding under that notice of appeal.

C If we took the view that he ought not to be allowed to proceed under his original notice, we should then have to consider the further question whether, in the circumstances, he should be allowed to serve a fresh notice on the footing not that the appeal had been dismissed but that the original notice had now become waste paper by virtue of a withdrawal of it. In the circumstances of the case, if we were driven to consider that question, I cannot myself see, in view of the fact that the respondent is not damnified, why we should not be justified in giving leave to serve another notice of appeal out of time. But D I do not think it is necessary to go so far as that because, the appeal being still on foot and the notice being still on foot, I can see no reason on the facts of this case for declining to allow the appellant to treat the original notice of appeal as entirely effective. I think that the letter of June 28 from the appellant's solicitors really means : " We are not proceeding with this notice of appeal " (i.e., the original notice of appeal) " but we are going to ask leave to serve a fresh notice of appeal." That is not a notice that they are going to submit E to their appeal being dismissed : on the contrary, it seems to me to say the exact opposite, viz., " We are going to treat our appeal as still an effective appeal but the particular piece of paper by which we seek to bring the appeal before the court will not be the original piece of paper which we served but a new piece of paper which we wish to serve and which we shall ask the court's leave to serve." In those circumstances, it seems to me that the appeal is still competent and must be heard in due course.

F In regard to the position of *Watson v. Cave* (1) under the new practice where an appellant wishes to abandon his appeal he can do so without any consent from the other side, and the mere fact of giving notice to the other side or obtaining a quite unnecessary signature of the solicitors to the other side does not in any way put him into contractual relationship : there is no contract at all. Further, if in any given case a court came to the conclusion that the original G notice of appeal ought not to be proceeded with the proper order for the court to make would not be to dismiss the appeal then and there, because once dismissed there can be no question of a fresh notice of appeal ; the proper course for the court to take would be, if the circumstances warranted it, to refuse to allow the original notice of appeal to be proceeded on and then take into consideration whether it would grant leave to serve a new notice of appeal. I cannot think that such a question would really be likely to arise in practice H because, assuming that there would be no reason to refuse leave to serve a new notice of appeal, it would seem to follow that, similarly, there could be no reason for insisting that the original notice of appeal should be treated as defunct.

In the circumstances of this case, the appeal must be proceeded with. The costs of this hearing must be paid by the appellant because it is due to his change of mind—and, indeed, it is rather a stroke of luck for him that the consent to the dismissal of the appeal never reached the President of the Court. If it had, the appeal would have been dismissed and there would have been an end of the matter.

DU PARCQ, L.J. : I agree.

MORTON, L.J. : I agree.

Date for the hearing of the appeal fixed.

Solicitors : *Spector & Spector* (for the appellant) ; *Forsythe, Kerman & Phillips* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

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ANGLO-AMERICAN ASPHALT CO. LTD. v. CROWLEY RUSSELL & CO., LTD.

[CHANCERY DIVISION (Romer, J.), June 7, 1945.]

Contracts—Licence to manufacture and sell road-making specialities—Payment of royalties—Provision for licensor to inspect accounts—Request to inspect after agreement terminated and receipt given for payment of final royalty—Licensors entitled to ask for inspection—Principle of settled account not applicable.

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On Nov. 25, 1932, the plaintiffs entered into an agreement with the defendants whereby the plaintiffs appointed the defendants their sole licensees for the manufacture and sale of their road-making specialities in Scotland and certain parts of England. The licence, which took effect from Feb. 1, 1933, was for 21 years, but the defendants might determine it at the end of the 5th, 10th or 15th year on 6 months' previous notice in writing. Cl. 10 provided for the payment by the defendants of certain royalties on all materials manufactured by them under the licence. Under cl. 12, the defendants were to keep true accounts and were to deliver to the plaintiffs on or before Aug. 31 and Feb. 28 each year half-yearly statements, made up to the previous July 31 and Jan. 31, showing the amounts due to the plaintiffs by way of royalty. The clause further provided that the defendants should permit the plaintiffs at all reasonable times to inspect any accounts, documents, etc., connected with the manufacture, sale or user of articles manufactured under the licence, and to check and verify the statement of royalties furnished by the defendants. Cl. 13 provided that the royalties should be paid within 7 days after Aug. 31 and Feb. 28 each year. Under cl. 14, the plaintiffs might end the licence if any royalties had not been paid within 6 months of becoming payable, and also in certain other events. In actual practice, instead of submitting half-yearly a statement as to the amount due by way of royalty, the defendants merely submitted a statement as to the quantity of material which they had sold. The plaintiffs accepted this form of statement, themselves worked out the amount payable to them by way of royalty and then wrote to the defendants asking for that amount; the defendants would then send a cheque for the amount due, which the plaintiffs duly acknowledged. On July 29, 1942, the defendants wrote to the plaintiffs terminating the licence on Jan. 31, 1943, and on Apr. 23, 1943, they sent details of their output for the 6 months ending Jan. 31, 1943. On May 5, 1943, the plaintiffs wrote to the defendants acknowledging their letter of Apr. 23, and inclosed "without prejudice" a debit note for the amount of royalty involved, which was paid by the defendants on May 21, 1943, the payment being acknowledged by the plaintiffs by their official receipt on May 25, 1943. On Aug. 9, 1943, the plaintiffs wrote to the defendants asking for an inspection of their books. This was refused by the defendants. The defendants contended that (i) upon the true construction of the licence, the plaintiffs' right to inspect could only be exercised, in relation to any particular half-yearly payment, within 7 days of that payment being made, because cl. 13 of the licence, under which the royalties were payable within a fixed period, also imposed a time limit on the right to inspect; (ii) the right to inspect did not remain after the licence had been duly terminated; the conduct of the plaintiffs in accepting the defendants' half-yearly statements and in accepting, and passing through their books, the amounts payable by way of royalties and in sending their final receipt of May 25, 1943, precluded them from reopening the transaction, which

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was in the nature of a settled account :—

HELD : (i) upon the true construction of the licence, the right to inspect under cl. 12 was not limited by the obligation under cl. 13 to pay the royalty within a fixed time.

(ii) in view of the nature of the transactions, the plaintiffs were not precluded from pursuing the rights expressly reserved to them under cl. 12 of the licence. In giving the defendants a receipt for the amount arrived at by quantifying the figures given to them by the defendants, the plaintiffs had not waived their right to inspect.

(iii) the principle of settled account did not apply where the whole accounting was to be rendered by one party to the other. The fact that the plaintiffs had received the defendants' statements without objection over a period of years did not make the principle applicable.

Hunter v. Belcher (1) and *Bramston v. Robins* (2) distinguished.

[EDITORIAL NOTE. It is held here that where a licensee under an agreement to manufacture and sell goods submitted a half-yearly account to the licensor for the purpose of quantifying royalties, which were duly paid, the principle of settled account did not prevent the licensor from obtaining inspection of the accounts after termination of the licence in accordance with a clause permitting such inspection. The judge holds that the theory of settled accounts is properly applicable to a case of mutual debits and credits, and not to a case where one party has to do all the accounting.

AS TO LICENCES, see *HALSBURY*, Hailsham Edn., Vol. 24, pp. 713-725, paras. 1329-1344; and **FOR CASES,** see *DIGEST*, Vol. 36, pp. 677-688, Nos. 1579-1650.]

Cases referred to :

**(1) Hunter v. Belcher* (1864), 2 De G.J. & Sm. 194; 1 Digest 445, 1348; 10 L.T. 548.

**(2) Bramston v. Robins* (1826), 4 Bing. 11; 12 Digest 459, 3734; 12 Moore, C.P. 68; sub nom. *Bramston v. Robins*, 5 L.J.O.S.C.P. 13.

(3) Andrew v. Hancock (1819), 1 Brod. & Bing. 37; 31 Digest 293, 4390; 3 Moore, C.P. 278.

(4) Brisbane v. Dacres (1813), 5 Taunt. 143; 35 Digest 159, 545.

(5) Re Liddell's Settlement Trusts, [1936] Ch. 365; [1936] 1 All E.R. 239; Digest Supp.; 105 L.J.Ch. 161; 154 L.T. 558.

ACTION by the licensors claiming (i) a declaration that they are entitled to see certain books and other documents of the licensees, (ii) an order for inspection and (iii) an account of all sums due to them by the licensees. The facts are fully set out in the judgment.

Charles Harman, K.C., and Raymond Jennings for the plaintiff.

Roland Burrows, K.C., and B. L. A. O'Malley for the defendants.

ROMER, J.: This is an action brought by Anglo-American Asphalt Co., Ltd., against Crowley, Russell & Co., Ltd., in which the plaintiffs ask for certain relief by way of a declaration, to which they claim they are entitled, to see certain books and other documents of the defendants, and for an order that the defendants do permit the plaintiffs, their accountants, solicitors and agents to inspect, and also an account of all sums due to the plaintiffs. The litigation arises out of a licence entered into between the parties on Nov. 25, 1932, which replaced an earlier licence entered into on Feb. 10, 1928. The indenture of Nov. 25, 1932, was made between the plaintiff company of the first part, the defendant company (thereinafter called the "licensees") of the second part, one of the directors of the defendant company of the third part and another director of the defendant company of the fourth part. It recites the agreement in writing of Feb. 10, 1928, which was made between the licensors of the one part and the licensees of the other part, whereby the licensors granted sole licence and authority to the licensees to manufacture and sell certain road-making specialities in Scotland (but not elsewhere) upon the terms and conditions therein set forth for the term of 5 years; then it recites that it had been mutually agreed by and between the parties that the said licence should cease as from Jan. 31, 1933, except for certain purposes therein mentioned; and it recites that the licensors (i.e., the plaintiff company) had agreed to grant a new licence to the licensees to manufacture the aforesaid road-making specialities in Scotland and the counties thereinafter mentioned, for a consideration therein stated; and the operative part of the indenture witnesseth: "1. The original licence shall cease and determine as from Jan. 31, 1933, except for the purpose of settling outstanding accounts between the parties and excepting and reserving unto the licensors" certain rights of action. By cl. 2 the licensors appointed

the licensees to be their sole licensees and representatives for the manufacture and sale of their road-making specialities, and then a list is set out :

. . . and (subject to the provisions of cl. 11 hereof) any other road materials introduced by the licensors during the continuance of this licence all of which are hereinafter referred to as "the aforesaid road-making specialities" for use in Scotland and in the counties of Northumberland, Durham and Yorkshire (but not elsewhere) and the licensees agree and undertake that they will not at any time knowingly manufacture sell or use or be concerned directly or indirectly in the manufacture sale or use of any of the aforesaid road-making specialities elsewhere . . .

Cl. 3 provides :

This licence shall take effect as from Feb. 1, 1933, and shall remain in force for a period of 21 years provided nevertheless that the licensees shall have the right to determine the same at the end of the 5th, 10th or 15th year of the said term by giving to the licensors 6 calendar months previous notice in writing.

Cll. 8-10 and 12-15 provide :

8. The licensees shall keep secret the formulae methods and specifications of the licensors but shall be at liberty to disclose the same to such of their directors officers and employees as shall be absolutely necessary for the purpose of manufacture provided that before making any such disclosure the licensees shall require any such director officer or employee to enter into an agreement [in the form which is set out in the schedule]. 9. If during the currency of this agreement the licensees fail at any time to carry out the provisions of the last preceding clause or shall disclose any of the formulae methods or specifications or other information supplied to them by the licensors relating to the manufacture of the aforesaid road-making specialities to any person firm or company other than to such person or persons as are authorised in the last preceding clause or shall knowingly be directly or indirectly concerned in the manufacture sale or use of any of the aforesaid road-making specialities outside the territory licensed to them under cl. 2 hereof the licensors may forthwith determine this licence without prejudice to any of their rights of action . . . 10. The licensees shall pay to the licensors on all materials manufactured by them hereunder the following royalties, namely : (a) On all dressings grouts and binders (liquids or solids) 1 farthing per gallon and (b) 1s. 8d. per ton on all Eureka asphalt or Eureka mortar with a guaranteed minimum of £1,500 in each and every year during the continuance of this licence. 12. The licensees shall keep true and particular accounts of all matters connected with the materials manufactured sold and used under this licence and will on or before Aug. 31, and Feb. 28 in each and every year deliver to the licensors half-yearly statements made up to the previous July 31 and Jan. 31 respectively showing the amount due to the licensors by way of royalty during the current half year under the terms of this licence. The licensees shall permit the licensors and/or their accountants, solicitors or agents at all reasonable times to inspect and take copies of or extracts from any such books accounts receipts papers and documents in the possession or under the control of the licensees relating in whole or in part to the manufacture or sale or user of the articles manufactured under this licence and shall render all necessary assistance to enable the licensors their accountants solicitors or agents to check and verify the statement of royalties from time to time furnished by the licensees as aforesaid. 13. The royalties due and payable to the licensors hereunder shall be paid within 7 days after Aug. 31 and Feb. 28 respectively in each and every year. 14. If any half-yearly payment of royalties shall not have been made within 6 months of their becoming payable or if the licensees shall at any time become bankrupt or go into liquidation voluntarily or otherwise except with the consent of the licensors (which shall not be unreasonably withheld) for the purposes of amalgamation or reconstruction the licensors may forthwith declare this licence to be at an end . . . 15. On the determination of this licence the licensees shall wholly discontinue the manufacture sale and use of the aforesaid road-making specialities and of the aforesaid trade names and shall not at any time thereafter directly or indirectly be concerned with the manufacture sale or use of the said road-making specialities either in the aforesaid territory or elsewhere and shall not disclose any of the aforesaid formulae methods or specifications to any person whomsoever . . .

It will be observed that under cl. 12 the licensees assumed the obligation of keeping true accounts and twice yearly of delivering to the plaintiffs half-yearly statements made up to the previous July 31 and Jan. 31, showing the amounts due to the plaintiffs by way of royalty. In fact what happened may be sufficiently seen by referring to the early part of the agreed correspondence, which shows the form of statement and the procedure which was adopted in relation to the statement for the 6 months to July 31, 1939. On Oct. 17, 1939, the defendant company sent the plaintiffs a letter :

Dear Sirs, We have pleasure in giving particulars hereunder of our output for the 6 months ending July 31, 1939.

They then set out the gallonage sold from Glasgow and Castleford in Yorkshire, totalled that up and then brought into account the stock which they had in hand as compared with the stock which they had in hand at the beginning of the 6 months period, and then they also quantified the amount of mortar, etc., sold during the 6 months in question. It will be seen that that is merely a statement of the quantity of material which the defendant company had sold; it is not a statement showing the amount due by way of royalty. That form of statement has always been accepted by the plaintiffs, who themselves worked out, in the light of the formula laid down by cl. 10 of the agreement, how much money would be payable to them having regard to the figures so shown. On Oct. 19, Warnock, the secretary to the plaintiff company, wrote to the defendant company:

Dear Sirs, Royalty: We thank you for your letter of the 17th instant giving details of the output for the half year to July 31 last. We now inclose our invoice No. C 7169 in respect of the royalty for this period, and as payment is now somewhat overdue we shall be glad if you will let us have a cheque by return.

The invoice inclosed with that letter showed a gross amount of £1453 odd as owing to the plaintiffs in respect of the figures shown on the defendant company's letter of Oct. 17, and from that is deducted a sum for income tax at 7s. in the £ totalling £508 odd, leaving a nett amount of £945 0s. 4d. due to the plaintiff company. In response to that letter and invoice from the plaintiff company, on Oct. 25, 1939, the defendant company sent a letter to the plaintiffs inclosing their cheque for £945 0s. 4d. "in payment of royalty due to you for the half year ended July 31, 1939. We also inclose certificate of deduction of income tax." This transaction is finally concluded by a letter from the plaintiff company of Oct. 26, 1939, to the defendant company:

Dear Sirs, We thank you for your letter of yesterday's date inclosing cheque for £945 0s. 4d. in respect of royalty for the half year ended July 31, 1939. We also acknowledge receipt of certificate of deduction of income tax.

That was the practice on each occasion, twice a year, which was followed by the parties, the plaintiff company and the defendant company. But eventually the defendant company made up their minds that the time had arrived, having regard to certain circumstances which made it desirable in their interests, to bring this licence to an end, and to terminate it as they were entitled to do under the relevant provisions; and on July 29, 1942, the defendant company wrote to the plaintiffs:

Dear Sirs, We refer to the indenture between this company and your good selves dated Nov. 25, 1932. For some time we have been concerned regarding the prospects of maintaining the output during the war, due, as you are aware, to the bitumen position and the tendency to use tar on Government contracts in place of bitumen which would affect the position seriously. After careful consideration we regret to inform you of our intention to terminate this indenture to operate as at Jan. 31, 1943, in terms of para. 3 of the indenture which permits a break of the said agreement in our favour at the end of the tenth year from 1933. Accordingly we confirm that this agreement shall terminate as stated above. We would like to record the pleasant associations which have existed between the personnel of both companies.

On Aug. 1, 1942, the defendant company acknowledged receipt of that letter and said the matter would be placed before their board, which was done.

On Apr. 23, 1943, the defendant company sent to the plaintiffs a letter as follows:

Dear Sirs, We have pleasure in inclosing details of our output for the 6 months ended Jan. 31, 1943.

They gave the figures of gallonage sold, less stock, and the figures of mortar. On May 5, 1943, the plaintiffs wrote to the defendant company:

Dear Sirs, We are in receipt of your letter of Apr. 23, giving details of your royalty for the half-year to Jan. 31 last. We inclose, without prejudice, our debit note for the amount of royalty involved, and shall be glad to receive your cheque at an early date. A debit note was inclosed and amounted, less tax, to £495 14s., which was paid on May 21, 1943, by the defendant company, who wrote on that date to the plaintiffs:

We have pleasure in inclosing cheque for £495 14s. in payment of royalty account. We also inclose certificate of deduction of income tax,

The invoice of May 5 has upon it a receipt by the plaintiff company for that amount. On May 25, 1943, there is a letter to the defendant company which the defendants rely upon for certain purposes. It was signed on behalf of Warnock, the secretary and general manager of the plaintiffs, by a clerk who had his authority to sign :

Dear Sirs, Royalty : We thank you for your letter of the 21st instant inclosing cheque value £495 14s. in settlement of the above. Our official receipt is inclosed herewith. Yours faithfully, Anglo-American Asphalt Co., Ltd. A

On Aug. 9, the plaintiffs wrote to the defendant company saying :

Dear Sirs, I have been instructed by my board to ask you to be good enough to allow us to have inspection of your books to check your royalty figures, and our auditors, Messrs. Thomson McLintock & Co., will be communicating with you in due course to arrange a convenient time for this inspection.

On Aug. 19 (*i.e.*, 14 days later) the defendant company answered : B

Dear Sirs, We would refer to your letter of the 9th instant which awaited the writer on his return to Glasgow. First of all we have to inform you that our records for the greater part of our agreement with you have been destroyed. In any event, accounts have been rendered by you covering the period of the agreement, and since these have all been paid, the indenture has been implemented and is no longer in operation so far as the royalties are concerned, and we consider the matter finally closed.

On Aug. 26 the matter had passed into the hands of the plaintiff company's solicitors, and they wrote saying that their clients, or they on their behalf, were entitled to inspection of the books ; but the defendant company and their advisers took the view that the whole matter of the royalties was definitely closed and should not be reopened. They wrote to that effect on Sept. 8, 1943, to the plaintiffs' solicitors, and they went on to say : C

Notice of termination was duly given to end the licence at Jan. 31, 1943. Sales accounts were rendered in Sept., 1942, for the half year to July 31, 1942, and for the half year to Jan. 31, 1943. Notice of termination was accepted as in order and your clients' final account was rendered on May 5, 1943, showing balance due to them of £495 14s. That account was paid and we have before us the receipt dated May 28, 1943. In view of this it is too late in our opinion to raise questions about the royalties due under the licence and there is, therefore, no purpose in giving your clients facilities to examine the books. The legal doctrine applicable is called in Scotland "settled account" but we take it you have a similar principle in the law of England although it may be called a different name. D

Later on there was a suggestion or offer by the defendants to submit their relevant books to the inspection of an independent firm of accountants, but for certain reasons which were mentioned in the plaintiff's solicitors' letter of May 16, and were elaborated by the plaintiff company's secretary in the witness box, that offer was found unacceptable and was not adopted. Thereupon the writ in this action was issued. A list was put in showing the total amounts, and the dates on which they were paid, of the royalties received by the plaintiff company from the defendants throughout the period of the licence, ranging from the first entry of Sept. 4, 1933, down to the final one of May 5, 1943 ; this list was extracted from the plaintiff company's books, showing the royalties on each occasion paid less tax, and the invoice number. The document of indenture which was entered into on Nov. 25, 1932, is to be interpreted by the law of this country, notwithstanding the fact that the head office of the defendant company is in Glasgow ; but the matter is of no conceivable importance because as counsel for the defendants conceded, precisely the same construction would be put upon it by the Scottish courts as would be put upon it by the courts in this country. Therefore I need say no more about that aspect of the matter. E

The issue is whether the plaintiffs are still entitled to avail themselves of the rights which were reserved to them, and to enforce the obligations which were accepted by the defendant company under cl. 12 of this licence, notwithstanding the course of events which has occurred since the licence was brought into operation, and notwithstanding that the agreement has come to an end. The defendant company says they are not. They say in the first place that although admittedly during the currency of the agreement the plaintiffs had a right of inspection of the defendant company's books for the purpose of seeing that proper amounts were being paid, nevertheless, as a matter of construction, F

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that right could only be exercised, in relation to any particular half-yearly payment, within 7 days of that payment being made; and they found that argument upon cl. 13 of the agreement which says:

The royalties due and payable to the licensors hereunder shall be paid within 7 days after Aug. 31 and Feb. 28 respectively in each and every year.

Founding themselves upon that and resorting also to cl. 14 for some corroboration of the argument, they say that that imposes a time limit upon the plaintiffs'

A right to inspect the books.

I am wholly unable to accept that argument. The obligation to pay is imposed upon the defendants by cl. 10, and that clause lays down the method of arriving at the royalties which the licensees are to pay. Cl. 12 is introduced manifestly for the benefit of the plaintiffs and to ensure to them that the royalties payable under cl. 10 of the licence by the defendant company are in fact paid and that the full amount is paid. The effect of cl. 13, as I read it, is to impose an extra obligation on the defendants rather than to diminish the rights which the plaintiff company have under cl. 12. Cl. 10 says that the defendant company have to pay the royalties; cl. 13 says they have to pay them within a fixed time. I am quite unable to see how the effect of cl. 13 can be that, unless the plaintiff company exercise the right of inspection which is given to them by cl. 12 within 7 days of a particular date, they lose their right altogether. If it was intended that they were to exercise that right within 7 days of July 31 or Jan. 31 in each year, as the case might be, nothing would have been easier than to have put it in express terms in cl. 12. It seems to me as a matter of construction that that was not intended, and that the time limit which the defendant company seeks to impose by pointing to cl. 13 is not available for the purpose for which they try to introduce it.

D It was suggested that, in any case, the rights of the plaintiffs would not remain open after the agreement had come to an end; but I do not see how that can be, because the agreement might come to an end, and indeed it would have to come to an end, on Jan. 31, if it came to an end at all. The last half-yearly statement would not be brought out until Feb. 28, which is a month later, and it is quite plain that the plaintiffs must still have had it open to them to do that which the contract allows them to do, namely to probe the accuracy of that final statement by inspecting the books of the company. It is said that apart altogether from construction, the course of conduct or course of business which has always been adopted by the parties is such as to preclude the plaintiffs now from having the inspection which they seek. It is admitted that the plaintiffs never have had, throughout the whole period of the licence, any inspection of the defendant company's books; nor indeed did they ever ask for it. It is said that the effect of their accepting the statements which were submitted half-yearly by the defendant company, accepting the amounts which were payable having regard to those statements, and submitting to a deduction for income tax, and passing the amounts of these cheques through their own books, coupled with the letter of May 25, 1943, amounts when taken together, to something in the nature of a settled account. It is said that each account, each half-yearly transaction, must be deemed to have been closed as between the parties at the time that it was accepted, and that in any event that letter of May, 1943, operates as a settlement of the entire position. Those matters were not to my mind raised by the defendant company in their original pleadings, so they applied to me for leave to amend and that permission was given upon the usual terms. Their pleading on this point is as follows:

H Further or alternatively the defendants submitted to the plaintiffs their record of sales for the half year up to Jan. 31, 1943, the date of expiry of the said licence, and on or about May 5, 1943, the plaintiffs rendered a sales account for £495 14s. to the defendants and on or about May 24, 1943, the defendants duly paid such account by cheque for £495 14s., and the plaintiffs by letter dated May 25, 1943, accepted such cheque in satisfaction and discharge of all claims under cl. 12 (that is to say in respect of inspection) and 13 of the said agreement. By reason of the premises the defendants will submit that the account between the plaintiffs and the defendants was settled. Further or alternatively the defendants rendered to the plaintiffs from time to time from Sept., 1930, to May, 1943, their record of sales for each half year up to July 31 and Jan. 31 respectively and the plaintiffs rendered to the defendants sales accounts (by which each such record of sales was impliedly acknowledged to be correct) and the

plaintiffs deducted income tax from each such sales account and the defendants paid the amount of each such sales account by cheque and the plaintiffs accepted each such cheque in satisfaction and discharge of the amount due in respect of each half year and entered the account in their ledger and made no further claim in respect of each half year. By reason of the premises the defendants will submit that there was in respect of each half year a settled account between the plaintiffs and the defendants and further or alternatively a settled account in respect of the whole period of such agreement up to Jan. 31, 1943, and that the plaintiffs cannot now be heard to say that they are entitled to the relief claimed in the prayer to their statement of claim. A

I find difficulty in seeing how it can be suggested that as each half-year came round and the defendant company submitted to the plaintiffs a mere statement of quantities, leaving it to the plaintiff company to quantify that in terms of cash, and the plaintiffs gave a receipt for the amount which was arrived at by quantifying the figures given by the defendant company, that that in any sense whatever operates either as a waiver by the plaintiffs of the right to inspect these books, or to an agreement that that is the total amount which is due in respect of that half-year by the defendant company to the plaintiffs, or is a settled account in any sense whatever of the word. It is a mere transaction of information given by the defendant company to the plaintiffs, the translation of that information into terms of cash, the deduction from that cash of the appropriate amount of tax, and a receipt given by the plaintiff company to the defendants for the amount so ascertained. It is not possible, taking each transaction by itself, to arrive at the conclusion that the plaintiffs were precluded by their conduct and by the nature of the transaction in which they took part, from saying that they wished at some time thereafter to check up on the whole position and to see that they had in fact been paid all they were entitled to receive. In other words it is impossible to suggest that they had released and finally deprived themselves of the rights which were conferred upon them expressly by cl. 12 of the licence. B C D

It is suggested that the letter of May 25, 1943, winds up the whole matter and is a recognition by the plaintiff company that the sum of £495 14s., which was shown as due from the defendant company to the plaintiffs by their final statement, is in some sense equivalent to a settled account as between the plaintiffs on the one hand and the defendants on the other, and that the plaintiffs cannot now be heard to say that more than £495 14s. was owing to them in respect of that final statement, or that any sums at all were still remaining owing to them in respect of the earlier statements which had been submitted under the agreement. E

Counsel for the defendants referred me to *Hunter v. Belcher* (1) as supporting this contention. In that case :

The plaintiffs, in 1855, engaged the defendant as their traveller, to obtain orders and collect moneys, at a salary, the plaintiffs paying all travelling expenses. After each journey the defendant rendered an account and paid over the balance appearing to be due from him. The travelling expenses were charged in the accounts as so many days' travelling expenses, without giving any particulars. No objection was made to the accounts, and they were entered in the plaintiffs' books. This went on till Apr., 1861, when the defendant gave the plaintiffs 6 months' notice of his intention to leave their service. The plaintiffs, in July, 1861, gave him notice to keep a detailed account of his travelling expenses, but, notwithstanding this, his subsequent accounts were prepared on the same footing as the former ones, and were dealt with in the same way down to Oct., 1861, when he left the plaintiffs' service. The defendant having sent in a claim for salary, the plaintiffs served him with a counter claim, which, however, did not raise any question as to his accounts. Held, that a bill by the plaintiffs against the defendant for an account could not be maintained. *Per* TURNER, L.J. : Where accounts have been rendered, the balances appearing due upon them paid, and the accounts entered in the books of the persons to whom they have been delivered, and a subsequent account has been rendered by those persons, raising no question as to the accounts which have been delivered, those accounts must be treated as settled. *Per* TURNER, L.J. : From the course of dealing between the parties, an agreement that the travelling expenses should be charged in a gross sum without giving particulars, was to be implied, which agreement the plaintiffs could not determine by their notice of July, 1861. F G H

The whole point of that case was that the defendant entered the plaintiffs' employ for the purpose of obtaining orders to be executed by them and collecting moneys due to them from their customers, and in the course of these journeys

he, out of the moneys which he collected from time to time, made remittances to the plaintiffs and payments on their behalf. On his return from each of these journeys the defendant rendered to the cashier of the plaintiffs a detailed account of the moneys which he had thus received and paid, and in each of these accounts the defendant charged his expenses in one gross sum as so many days' expenses according to the number of days he had been engaged on the journey. On each of these accounts being rendered, the defendant paid the balance appearing by it to be due from him, after deducting what for the time being was due to him for his salary, and all the accounts thus rendered were entered by the plaintiffs' cashier in a book called "the journey book." It is apparent from that, that it was in effect an account of mutual debits and credits. TURNER, L.J., having regard to all the circumstances, treated it as a settled account. At p. 202, he said :

A . . . these accounts must, of course, be due, unless they are to be considered as
 B having been settled ; in which case, there being no fraud and no error alleged and proved, they cannot be opened. As to this part of the case, therefore, the question is, whether the accounts ought to be considered as settled, and I am of opinion that they ought to be so considered. Accounts rendered, although not objected to, may not of themselves be entitled to be considered as settled accounts, although, under special circumstances, they may, as I conceive, be entitled to be so considered ; but where, as in the present case, not only have the accounts been rendered, but the balances appearing to be due upon them have been paid, and the accounts rendered have been entered
 C in the books of the persons to whom they were rendered, and not only so, but a subsequent account has been rendered by those persons, which raises no question as to the accounts which have been rendered, I cannot doubt that the accounts so rendered ought to be taken to be settled.

As I understand the theory of a settled account, it is to such a case as that (i.e., a case of mutual debits and credits) that the theory is applicable. Where
 D A owes, or may owe, B money, and B owes, or may owe, A money, and in their accounts they strike a balance and agree that balance, that truly represents the financial result of their transactions. There is mutuality in it, and whereas A may be giving up something or B may be giving up something, for the purpose of settling the matter between them, they expressly or by implication agree to a conventional position which is established by striking a balance, and that results in what is called a settled account. But that has no application to a
 E case such as the present where the whole accounting is to be rendered by one party to the other. In the present case it is the defendant company who are the accounting party, and they have made provision in the licence to keep those accounts and to render statements ; the mere fact that those statements have been received by the plaintiff company without objection over a period of years, or for some considerable period of time, does not seem to me to give rise to the application of any such theory as that which was adopted or applied
 F in *Hunter v. Belcher* (1).

I was referred also, on the question of a possible release by the plaintiffs of a right that they might have, to *Bramston v. Robins* (2) in which the headnote is :

A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land-tax every year for 17 years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts : Held, that he could not distrain for the amount erroneously allowed, though the receipt given every
 G year showed the amount paid and the amount deducted.

BEST, C.J., said, at pp. 14, 15 :

The facts of this case are, that from 1807 to 1818 the tenant pays £9 a year towards the rent, and the landlord allows the remaining 7 on account of a payment made by the tenant for land-tax ; in 1819, and subsequent years, a larger allowance is made on the same account, and it is not till 1822 that the landlord is awakened by the disproportion between the amount of the land-tax and the amount of rent. By that time the premises had come into other hands, no doubt under the usual assurance that all previous demands had been discharged. It has been urged that this distress is no hardship upon the tenant, because he may resort to his assignor for indemnity. But the assignor may be insolvent, bankrupt, or dead, and it would be indeed a hardship if the assignee were compellable to pay. If, however, the law were so, we could afford him no relief ; and it has been urged that payment of part of the rent is no discharge of the whole, to which it is said the landlord has never renounced his claim. But this transaction amounts to a payment of the whole, and for esteeming it so, we have the authority of DALLAS, C.J., and the rest of this court in the case of *Andrew v. Hancock* (3). In that case the tenant had paid the full rent, and had omitted to deduct the property

tax, which he was entitled to deduct; and the court held that he could only deduct it at the time of payment. But it is an established principle, that if money be given or paid (and settlement in account is the same thing) with a full knowledge of all circumstances at the time of the payment, it cannot be recovered by the payer: *Brisbane v. Dacres* (4). For seventeen years this rent was settled in account and considered as paid, so that an action for the amount would have been answered by a plea of payment. If, indeed, the landlord had made this allowance under the idea that it was for the amount of the assessment on the old rent, and without the means of knowing that it was the assessment on the improved rent, it might have been esteemed an allowance by mistake, and made in ignorance, and might perhaps have been recovered: but the landlord must have known, or have had the means of knowing that it was a charge on the improved rent. If he knew, or had the means of knowing all the facts, a mistake as to legal rights would not entitle him to make this claim. This, therefore, was not a partial payment of the rent from time to time, but a clear settlement of the account with full knowledge, or means of knowledge of the facts on the part of the landlord, who is thereby precluded from sustaining the distress he has made.

PARK, J., said, at p. 16:

This was as much a payment as if the tenants had paid down the whole rent, and the landlord had returned the amount of the land tax. The receiver was his agent, and the landlord was bound by the receiver's acts.

BURROUGH, J., said, at p. 16:

This is not the case of a single payment, but of a series of settlements for sixteen or seventeen years. What the landlord has allowed in those settlements he cannot claim again. The demand is most unconscientious.

The point so far as the principle upon which BEST, C.J., proceeded was concerned, was that a person who makes a mistake as to his legal rights cannot get the money back which he has paid out through that mistake; PARK and BURROUGH, JJ., treated the matter simply as a case where the landlord himself had made certain allowances to his tenant and was trying to get them back later on. That does not seem to have very much bearing on the case that I have before me at the present time. Neither the principle of settled account, nor waiver, nor release can succeed in this action to preclude the plaintiffs from pursuing the rights which were expressly reserved to them by cl. 12 of the licence. There is no suggestion that they received any consideration for any release or waiver, nor that the defendant company gave up anything to the plaintiff company as compensation to the plaintiff company for surrendering their rights under the licence, nor that there will be difficulty in the defendant company complying with and performing the obligation which they voluntarily undertook under cl. 12 of that contract.

In conclusion I might mention one point which counsel for the defendants raised: inasmuch as the plaintiffs are asking the court to order the defendants to do something in Scotland, that is a consideration which ought to be taken into account in assisting the court to decide whether to direct an account. This order which the plaintiffs seek is one which presumably will be carried out by the defendants, and, as was observed in *Re Liddell's Settlement Trusts* (5) to which counsel for the plaintiffs referred me, the court acts on the assumption that the orders which it has jurisdiction to make will be properly and fully carried out. I have come to the conclusion that the plaintiffs are not precluded from reopening the accounts on royalties, and that, therefore, they are not precluded from asserting their right of inspection. I am told that the defendant company only have available the relevant books and papers and documents back to the early part of 1942; the others were disposed of by way of salvage or were lost; but I see no reason why a limit should be placed upon the period during which the plaintiffs may have the inspection (although the want of material may prevent them from getting the fruits of the order) except that I do not think they should be given the right to make inspection earlier than for six years before the issue of the writ in this action.

Judgment for the plaintiffs.

Solicitors: *Slaughter & May* (for the plaintiffs); *Neve Beck & Co.* (for the defendants).

[Reported by A. E. BLACK, ESQ., Barrister-at-Law.]

JONES v. COCKCROFT.

[KING'S BENCH DIVISION (Humphreys and Cassels, JJ.), June 7, 8, 1945.]

Intoxicating Liquors—Offences—Supply of liquor on licensed premises after permitted hours—Private friends of licensee supplied by assistant manager in the absence of licensee—Implied authority of assistant manager—Bona fide entertainment—Licensing Act, 1921 (c. 42), ss. 4, 5 (c).

- A A military band was engaged to play at a dance given in a hotel of which the respondent was the licensee. After the conclusion of the dance and during prohibited hours the assistant manager in the absence of the respondent supplied the members of the band with drinks, for which no charge was made nor was the supply of liquor any part of their agreed remuneration. On previous occasions when the same band had played at the hotel
- B it was the usual practice of the respondent, or the assistant manager with the authority of the respondent, to supply members of the band with drinks. An information was preferred against the respondent alleging that he, by his servant or his agent, did supply intoxicating liquor on licensed premises during prohibited hours, contrary to the Licensing Act, 1921, s. 4. Under sect. 5 (c) the prohibition did not apply to "the supply of intoxicating liquor for consumption on licensed premises to any private friends of the holder of the licence *bona fide* entertained by him at his own expense . . ." Being of the opinion that the assistant manager had the implied authority of the respondent to entertain the members of the band with drinks and that such entertainment was *bona fide*, the justices dismissed the information. The question for the court was whether the justices came to a correct determination and decision in point of law :—
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HELD : on the facts of the case, the justices were entitled to come to the conclusion at which they arrived.

- D [EDITORIAL NOTE. Under the Licensing Act, 1921, s. 5 (c) a licensee is permitted to supply intoxicating liquor to private friends out of hours. It is held here that this permission does not extend to the assistant manager. On the particular facts of this case it is held that the assistant manager committed no offence in supplying friends of the licensee, but the decision is not to be taken as indicating that there is any general implied authority to do that which is only legal if done by the licensee himself. It would seem from *Corbet v. Haigh* (1879) 5 C.P.D. 50, that had the members of the band
- E been entertained by the promoter of the dance the licensee would have been liable if he had supplied them after hours as being his, the licensee's, "private friends."

FOR THE LICENSING ACT, 1921, s. 4, see HALSBURY'S STATUTES, Vol. 9, p. 1058.]

- F APPEAL by the plaintiff by way of case stated under the Summary Jurisdiction Acts, 1857 and 1859 from a decision of the justices for the Petty Sessional Division, Colwyn Bay, dated Oct. 18, 1944. The facts are fully set out in the judgment of HUMPHREYS, J.

Lawrence A. Vine for the appellant.

A. Aiken Watson for the respondent.

HUMPHREYS, J. : This is a case stated by a bench of magistrates, who had before them the question whether the licensee of licensed premises within their jurisdiction, had contravened the law in what had happened on one particular evening long after closing hours.

- G The Licensing Act, 1921, s. 4, provides :

Subject to the provisions of this Part of this Act, no person shall, except during permitted hours (a) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed either on or off the premises.

- H To that provision there are certain exceptions which are to be found in sect. 5, which runs as follows :

Nothing in the foregoing provisions of this Part of this Act shall be deemed to prohibit or restrict . . . (c) the supply of intoxicating liquor for consumption on licensed premises to any private friends of the holder of the licence *bona fide* entertained by him at his own expense, or the consumption of intoxicating liquor by persons so supplied.

The short facts of the case are that on the evening in question there was a dance at the Rhos Abbey Hotel, which is also licensed for public music, dancing and singing. There was a dance, and at the close of the entertainment, when the dancers had gone, long after permitted hours had past, the band gave some

assistance in clearing up the place, and then the assistant manager stood them drinks. The police came in, and they appear to have been satisfied that this was a perfectly *bona fide* transaction. It was not one of those colourable transactions in which there was a suggestion that really the men were being allowed to buy drinks after closing hours. The whole matter was perfectly *bona fide* and above board, and the position really was that they were being supplied, because they were on the premises, and quite properly on the premises, helping to clear up. That is what the assistant manager said: he understood that he was acting with the approval of the landlord, but the police thought it necessary for some reason or other, to take proceedings against the landlord, who had not been there on this occasion. A

The justices having heard the facts and evidence of the licensee which they accepted to the full, came to this conclusion:

We are of opinion that the entertainment was a *bona fide* entertainment and that the drinks were not given as a reward for services rendered [that is to say, it really was entertaining friends and not paying in that way for something they had done] and that the assistant manager had the implied authority of the respondent, the holder of the licence, to supply that entertainment at the expense of the hotel. B

They thought in those circumstances that the provisions of sect. 5 applied, and, therefore, dismissed the summons.

The only matter which to my mind can be described as a question of law here, and from one point of view it is a very important question of law, is that which has been suggested by counsel for the appellant, quite properly, and it arises from the words "implied authority." We stopped the argument of counsel for the respondent at the point when he was saying that he was not contending and would not contend for a moment that an assistant manager has any implied authority to give intoxicating liquor after hours to persons on the premises by reason of being assistant manager or manager—it would make no difference which it was—because that seems to me to be the danger and the reason for the apprehension by some persons of the action of the justices in this case. If I had thought the justices had dismissed this summons because they took the view that a manager had the implied authority of the licensee to do that which is clearly only made legal when it is done by the licensee of the premises, I should take a very different view of the case from that which at present appeals to me. C D E

It must be remembered that the Act prohibits any supply of intoxicating liquor after permitted hours, and this prohibition cannot apply to the supply of intoxicating liquor to private friends of the holder of the licence *bona fide* entertained by him—not by his manager or private friends of his manager—at his own expense. I think that what the justices meant by the expression "implied authority" on the part of the licensee was that in the particular circumstances of this case they accepted the statement which was made by the licensee to the police officer that at least on one previous occasion he had himself treated the members of that band after a dance—it was a military band stationed in the neighbourhood and apparently had played at several dances at this hotel—and he thought that they would be regarded as his *bona fide* friends. F

With regard to that, counsel for the appellant has very fairly assisted the court by saying that he does not contend and would not contend in the circumstances of this case, that those persons were not rightly to be regarded as the private friends of the licensee. Therefore, we are absolved from the difficulty, if it was a difficulty, in deciding that question. He thought that they would be regarded as *bona fide* friends of his and he would, had he been there on this occasion, have instructed his manager to give them a drink. It was also proved that the band had been engaged on previous occasions, that on most of those occasions the licensee had been present himself, and had given the same hospitality to the members of the band as his assistant manager had on this occasion, and he had given on a previous occasion to his assistant manager authority to give the band drinks. With regard to this occasion, the licensee said that if he had known—I think that is what is meant—the assistant manager's action in doing so would have been ratified by him. I do not think it is much to the purpose to discuss the question as to whether that is an implied authority or whether it is not an express authority given on a previous occasion as the G H

result of which both parties, the one who gives the authority and the one who receives it, had taken the view that there was a tacit permission to do this thing. It really does not matter; it is a matter of words. It seems to me that it was a fair conclusion at which to arrive by the justices. On the whole of the facts of the case it might be said here that although the landlord is not personally present, yet that supply of intoxicating liquor had been made to private friends of the landlord, and that those persons were *bona fide* entertained by him in the sense that they were *bona fide* entertained by his agent with his authority—

A I do not attach any importance to the words "at his own expense." I do not think the fact that the landlord said here: "As a matter of fact, I shall put down those drinks to the owners of the house afterwards," means that it was not at his own expense. The words in the section "at his own expense" are probably merely to emphasise that he must be the person who pays, not the people who get the drink. You cannot have that sort of colourable entertaining

B which consists of saying: "I will stand you one and then you stand me one." That will not do; it must be *bona fide* entertaining at his own expense.

For those reasons I think on the facts of this case, the justices were entitled to come to the conclusion at which they arrived, and the appeal must be dismissed.

CASSELS, J.: I agree. I think that the decision of this court upon this case is entirely upon the peculiar facts and it is not to be taken as any authority for stating that any servant of a licensee may entertain his friends, at his expense even, after permitted hours, and a licensee will be liable under sect. 4 of the Act if by any servant or agent he supplies during non-permitted hours. The facts in this case are very peculiar. Upon those peculiar facts the court arrives at the decision which has just been announced by HUMPHREYS, J.

Appeal dismissed with costs.

D Solicitors: *Jaques & Co.*, agents for *David Thomas, Williamson & Co.*, Llanrwst (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Porter & Co.*, Conway (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

E HOCKADAY v. GOODENOUGH.

[KING'S BENCH DIVISION (Mackinnon, L.J., Humphreys and Oliver, JJ.),
June 28, 1945.]

Bastardy—Wife of soldier serving overseas—Adultery—Birth of child—Husband not father of child—Statement by husband to third party that he will "try and live it down and go on"—Expression of future intention—No condonation—"Single woman"—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3.

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The appellant's husband went to India in 1941 and has been there ever since. In Dec., 1943, he received a letter from the appellant in which she stated that she was pregnant of a child of which he was not the father. He, thereupon, sought the advice of a third party who interviewed the appellant and then informed him that the appellant would take proceedings against the putative father of the child. By a letter, dated Apr. 17, 1944, the husband replied to the third party saying: "I find it is much easier to forgive than to forget, but as I know it will be best for the children I will try and live it down and go on as if it had not happened . . ." No communication was made to the appellant. The justices dismissed the appellant's complaint against the putative father on the ground that the letter of Apr. 17, 1944, amounted to a condonation of the appellant's adultery and to forgiveness on the part of the husband, and that the appellant was, therefore, not a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3. On appeal, the question for the consideration of the court was whether the justices had come to a correct determination in point of law:—

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HELD: the letter, written to a third party, was only an expression of future intention, and in the absence of evidence that the husband had not only forgiven the appellant but had also reinstated her as his wife, there

was no condonation of the adultery. The appellant was, therefore, a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3.

Jones v. Evans (1) followed.

Henderson v. Henderson (4) applied.

[EDITORIAL NOTE.] This case considers condonation within the meaning of the decision in *Jones v. Evans* (1), where it was held that a married woman who has committed adultery which has not been condoned may issue an affiliation summons. It is held that there must be "reinstatement as a wife," as it is expressed by VISCOUNT SIMON, L.C., in *Henderson v. Henderson* (4), and that a mere expression to a third party of a future intention to try and "live it down" is not such a reinstatement.

AS TO A MARRIED-WOMAN TAKING AFFILIATION PROCEEDINGS, see HALSBURY, Halsham Edn., Vol. 2, pp. 582-586, paras. 802-806; and FOR CASES, see DIGEST, Vol. 3, pp. 387, 388, Nos. 253-269.]

Cases referred to :

* (1) *Jones v. Evans*, [1944] 1 K.B. 582; [1945] 1 All E.R. 19; 114 L.J.K.B. 129; 171 L.T. 138.

(2) *Keats v. Keats and Montezuma* (1859), 1 Sw. & Tr. 334; 27 Digest 336, 3166; 28 L.J.P. & M. 57; 32 L.T.O.S. 321.

(3) *Crocker v. Crocker*, [1921] P. 25; 27 Digest 338, 3178; 90 L.J.P. 136; 124 L.T. 493; *affg.* (1920), 122 L.T. 749.

* (4) *Henderson v. Henderson*, [1944] A.C. 49; [1944] 1 All E.R. 44; 113 L.J.P. 1; 170 L.T. 84.

APPEAL by the complainant by way of case stated from a decision of the justices of the petty sessional division of Trigg in Cornwall, dated Dec. 8, 1944, dismissing a complaint preferred by her against the respondent, one George Goodenough, under the Bastardy Laws Amendment Act, 1872. The facts and arguments are fully set out in the judgment of MACKINNON, L.J.

H. F. Sturge for the appellant.

H. Astell Burt for the respondent.

MACKINNON, L.J. : This is a case stated by justices of the petty sessional division of Trigg in Cornwall. The appellant made an application to the justices under the Bastardy Laws Amendment Act, 1872, s. 3, against the respondent alleging that he was the father of her bastard child and asking for appropriate relief. The opening words of that section entitling a woman to make such an application are : "Any single woman." In fact the appellant was not a single woman in the sense that she was a spinster and unmarried. She had been married some years before to a man named Hockaday and that marriage at the time of her application had not been dissolved. There is a long series of cases which establish that a woman who is in fact married and whose marriage has not been dissolved may be treated as a single woman within the meaning of those words in this section of the Bastardy Laws Amendment Act, 1872. It is not necessary to refer in detail to that series of cases because the effect of them is perhaps sufficiently expressed in the headnote of a case heard in this court last year, *Jones v. Evans* (1). The headnote says, at p. 582 :

The wife of a soldier serving compulsorily overseas, who during his absence has committed adultery, which has not been condoned, is a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, and, therefore, entitled to lay a complaint in bastardy.

The appellant's husband went to India in 1941, and had been there ever since. In those circumstances the only question in this case applying the principle laid down in *Jones v. Evans* (1), arises on the condition expressed in that headnote, a wife "who during his absence has committed adultery which has not been condoned." It is said that the facts of this case are different from those in *Jones v. Evans* (1) in as much as her adultery has been condoned and had been condoned at the date of the hearing before the justices in Dec., 1944.

As regards that the justices have stated the facts. They have stated that the man himself has been in India. They have stated that his wife wrote to him in Dec., 1943, to tell him that she was pregnant of a child of which he could not be the father and thereupon he wrote a letter on Feb. 15, 1944, to Lady Vivian, who is apparently the landlady of the house he lived in, asking her for her assistance. He states in that letter : "I received a letter from my wife on Dec. 3,

1943, in which she stated she was in trouble by another man," and then he goes on to ask her advice as to what he should do in the circumstances. Lady Vivian interviewed the appellant and wrote to the husband in India giving him certain advice, adding that she would see to it that the appellant's application against the respondent should be proceeded with. The whole question turns upon the effect of the husband's reply to that letter of Lady Vivian's dated Apr. 17, 1944. I need not read all of it. He thanks her for the trouble she has taken and the most material passage in it is in these words :

A I find it is much easier to forgive than to forget, but as I know it will be best for the children I will try and live it down and go on as if it had not happened. I do not see but what she cannot behave in the future. Regarding making claim for maintenance I hope it will be possible for her to get it, not from the money point of view but it will learn the man a lesson too . . . I would like to thank you again for the trouble you have taken on my behalf.

B That is a very commendable letter from one who is obviously a very decent fellow.

Those, I think, are all the material facts which the justices have found. The justices, having had *Jones v. Evans* (1) cited to them, came to the conclusion that the action of the husband in sending that letter amounted to a condonation of the appellant's adultery and forgiveness on the part of the husband, and that the appellant was, therefore, not a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, and they propound this question for the court :

C The question upon which the opinion of the said court is desired is whether we, the said justices, being such a court of summary jurisdiction, upon the above statement of facts came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

D The justices having found as a matter of law upon that letter that there was condonation within the meaning of that phrase as used in *Jones v. Evans* (1), the question is whether as a matter of law they were correct. We have had cited to us a number of authorities, beginning with *Keats v. Keats and Montezuma* (2). A more modern and material instance is *Crocker v. Crocker* (3). Finally, we have been referred by counsel for the respondent to *Henderson v. Henderson and Crellin* (4), in which VISCOUNT SIMON, L.C., attempts to define condonation in these words, at p. 52, ([1944] 1 All E.R., at p. 45) :

E The essence of the matter is . . . that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife.

That has in mind the fact that in *Keats v. Keats* (2), and various other cases it has been clearly said that a mere verbal expression of forgiveness is not sufficient. There must be forgiveness coupled with subsequent action, such action being summarised by VISCOUNT SIMON, L.C., as the action of reinstating her in the position of a wife. There are no facts upon which the justices here could conclude that he had not only forgiven her but had reinstated her in the position of his wife. To her, it is admitted, or at least it appears from anything that the justices have found, he has never made any communication of any sort or kind. He has received her letter admitting her unfaithfulness and he has never written to her since, but he has made statements to a third party. He has not said to her : "I have written and forgiven her ; I do forgive her." All he has said to that third party, Lady Vivian, is an expression of an intention and a probable intention in the future in the words : "I find it is much easier to forgive than to forget, but as I know it will be best for the children I will try and live it down and go on," and I think that clearly means "and will try to go on as if it had not happened." That is, I think, only an expression of future intention, an intention not communicated to the wife, "When I come home I will try to live with her and I will try and see if I cannot set her up again as my wife," in the language of VISCOUNT SIMON, L.C., "and reinstate her as my wife." I think there was no evidence on which the justices could find, or were right in finding that the husband had condoned this adultery, and that, therefore, the qualification on the general proposition in *Jones v. Evans* (1) "which has not been condoned," is not established in this case. The justices ought to have gone on and heard the application of the appellant and not dismissed her application upon what in effect was a preliminary point.

G H

I think, therefore, the case should be sent back to them to hear the application. I agree with the suggestion made by counsel for the respondent, that it will then be possible for the respondent, who has not been called upon to say anything, to give any evidence which may supplement the evidence the justices had heard on the first occasion when they dismissed the application.

HUMPHREYS, J. : I agree, and I think the case should go back to the justices with an intimation that their finding in para. 9 of the case, that the facts there stated amounted to a condonation of the appellant's adultery, was wrong in law, and that they should be called upon to hear the defendant.

OLIVER, J. : I agree.

Appeal allowed with costs. Case remitted to the justices.

Solicitors : Hyde, Mahon & Pascall, agents for John Pethybridge & Son, Bodmin (for the appellant) ; Barlow, Lyde & Gilbert, agents for Stephens & Scown, St. Columb (for the respondent).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

LOUGH v. WARD AND ANOTHER.

[KING'S BENCH DIVISION (Cassels, J.), April 30, May 1, 2, 3, 4, 7, 8, 11, 14, 15, 18, 1945]

Infants and Children—Religious society—Girl of sixteen becoming member of society of her own free will—Girl leaving home without parents' consent—Father entitled to services of his children during infancy—Enticement—Harbouring.

On Aug. 4, 1943, the plaintiff's only daughter, then aged sixteen years and seven months, left her father's house and entered a communal establishment known as "The Abbey of Christ the King," of which the defendant and his wife were the heads. Besides being a place of worship and a centre for lectures on religious topics, the abbey also received members who were willing to join one of the three orders, each with a life vow. The first order required vows of obedience, poverty and self-sacrifice, poverty here being the handing over of all property to the trustees of the abbey. Members of the second order added a vow to undertake some definite piece of social and religious work, while the vows of the third order were to pray, attend services, give financial support as circumstances permit and render canonical obedience. The plaintiff's daughter entered the abbey without the consent of her father who had not seen her since Aug., 1943 ; at the abbey she was maintained and clothed at no expense to her parents and although she was free to leave whenever she liked she had no desire to do so. Members of the plaintiff's family were allowed to see the daughter at the abbey only in the presence of the defendant or his wife. The plaintiff brought an action against the defendants claiming damages and an injunction on the ground that the defendants had deprived him of the services of his daughter, an infant, by enticing her to leave her father's home and later harbouring her :—

HELD : a father, as the head of the family, had control over his children, their persons, their education and their conduct until they were over twenty-one or married under that age. On the facts of the case the daughter had rendered services to her father at home, but, by reason of the state of mind induced by the defendants, she was enticed away and harboured in the abbey.

Evans v. Walton (7) applied.

[EDITORIAL NOTE. This is a case for which there is no previous authority exactly in point. The action *per quod servitium amisit* brought by a father in respect of loss of his daughter's services, in reality part of the general law of master and servant, has hitherto arisen as a consequence of seduction. That element is absent here and is replaced by religious inducements in consequence of which the daughter left her father's service. Apart from the question of loss of service, the court discusses the rights of a father in respect of the control and religious education of his infant child and holds that in spite of the child's wishes, her welfare is best served by granting an injunction against the enticers restraining them from continuing to harbour her.

AS TO LOSS OF SERVICE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 249, 250, para. 432 ; and FOR CASES, see DIGEST, Vol. 34, pp. 172-176, Nos. 1344-1396.]

Cases referred to :

- (1) *Smith v. Kaye* (1904), 20 T.L.R. 261 ; 27 Digest 81, 643.
- (2) *Place v. Searle*, [1932] 2 K.B. 497 ; Digest Supp. ; 101 L.J.K.B. 465 ; 147 L.T. 188.
- (3) *Allcard v. Skinner* (1887), 36 Ch.D. 145 ; 21 Digest 351, 1347 ; 56 L.J.Ch. 1052 ; 57 L.T. 61.
- (4) *R. v. Barnardo* (1889), 23 Q.B.D. 305 ; 28 Digest 269, 1212 ; 58 L.J.Q.B. 553 ; 61 L.T. 547.
- A (5) *Besant v. Narayaniah* (1914), 30 T.L.R. ; 28 Digest 258, 1130 ;
- (6) *Thompson v. Ross* (1859), 5 H. & N. 16 ; 34 Digest 172, 1357 ; 29 L.J.Ex. 1 ; 1 L.T. 43.
- *(7) *Evans v. Walton* (1867), L.R. 2 C.P. 615 ; 34 Digest 169, 1315 ; 36 L.J.C.P. 307 17 L.T. 92.
- (8) *The People v. Edge*, (1943) I.R. 115.
- (9) *Hawksworth v. Hawksworth* (1871), 6 Ch. App. 539 ; 28 Digest 279, 1302 ; 40 L.J.Ch. 534 ; 25 L.T. 115.
- B *(10) *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch.D. 317 ; 28 Digest 256, 1118 ; 53 L.J.Ch. 10 ; 50 L.T. 161.
- (11) *Re Thain, Thain v. Taylor*, [1926] Ch. 676 ; Digest Supp. ; 95 L.J.Ch. 292 ; 135 L.T. 99.
- *(12) *R. v. Gyngall*, (1893) 2 Q.B. 232 ; 28 Digest 141, 25 ; 9 T.L.R. 471 ; *sub nom. Re Gyngall*, 62 L.J.Q.B. 559 ; *sub nom. R. v. Gyngall, Re Hausherr (otherwise Austen)*, 69 L.T. 481.

C ACTION by the plaintiff claiming damages and an injunction against the defendants on the ground that, by enticing away and harbouring the plaintiff's daughter, they had deprived him of his daughter's services. The facts are fully set out in the judgment.

N. L. Macaskie, K.C., and *Robert Fortune* for the plaintiff.

E. Ryder Richardson for the defendants.

D

Cur. adv. vult.

CASSELS, J. : On Aug. 4, 1943, the plaintiff's only daughter, Dorothy Bartola Lough, then sixteen years and seven months old, left her father's house and entered the communal establishment of which the defendants are the heads. Since that day the plaintiff has not seen his daughter, except during the trial of this action, which started on Apr. 30, 1945. Her mother and her brother were only allowed to see her in the presence of the defendants, and a request by her friend, subsequently her sister-in-law, for an interview was refused. To her home and her family this girl might almost have been dead. There, as a member of this community, with the exception of a short time spent in a remand home, this daughter of the plaintiff has remained.

F This action is brought by the plaintiff, the father, to recover damages against the defendants, husband and wife, for wrongfully enticing and persuading Dorothy, as I propose hereafter to refer to her, against the plaintiff's will and without his consent to depart from the plaintiff's service, and for receiving and harbouring her, whereby the plaintiff lost her services. The plaintiff also claims an injunction to restrain the defendants from harbouring the girl or causing the plaintiff to be deprived of her services or having any communication with her.

G The defendants admit the age and infancy of the daughter and deny the enticement, persuasion and harbouring, but, by an answer to an interrogatory which was put in in the course of the case for the plaintiff, admit that Dorothy rendered service to her father.

H The case has occupied the attention of the court for ten days and has involved the hearing of evidence relating to a crisis in a working man's family, a determined and self-willed but undoubtedly religious-minded girl, a strange and small body called the Confraternity of the Kingdom of Christ, divided into three orders, the first of which involves complete self-surrender, a layman who once occupied a high position in the business world, who became a priest one day, a bishop the next and an archbishop in three years, a mid-Victorian and semi-detached house which, with the addition of a tithe barn, is called an abbey, and a very small community of canons regular and fully-professed nuns, with postulants and novices, of whom Dorothy is one.

The plaintiff and his wife are plain, ordinary people, who feel a very natural indignation at being deprived, as they think, of their daughter. The plaintiff, as a father, says that his rights have been infringed. He is an electrician in a

gasworks. Early in his working life he was employed in Greece, where he met his wife, and he was married in Athens in 1916. A son was born in 1917. They returned to England in 1925 and took up their residence at 49, Bulwer Road, New Barnet.

Dorothy was born on Jan. 17, 1927. She received her elementary education at the Barnet Grammar School, which she left in Dec., 1940, a month before she reached her fourteenth birthday, having got as far as the lower fourth form, not being one of the brainy kind, as she herself said.

John Sebastian Marlow Ward, the male defendant, is 59 years of age and was educated at Merchant Taylors' School and Cambridge University, where he took an honours degree in history in 1908. He was a schoolmaster for six years in this country. He spent two years in Burma, served as first class clerk in the war department of the customs in 1916 and was for 13 years in the intelligence department, of which he was for some time the head, of the Federation of British Industries, a position which he resigned in 1930, having then been in receipt of a salary of £750. He took an interest in religious problems, and, in his own account of himself, wrote that for years he had studied the rise and fall of civilisation. The other defendant is his second wife, whom he married in 1927. She had been the headmistress of a school.

The defendants claim that in 1928 they had a series of remarkable mystical experiences, warning them of the approach of the end of this age and that before its final collapse Christ would come in judgment to give a new revelation which would serve as the spiritual foundation of the age and civilisation to follow. They lectured and organised services at their home in Golders Green. As a result of instructions received in the mystical state they went to Birchington in Kent and found a mediaeval tithe barn, which they purchased.

In Jan., 1930, the defendants and four or five others formed the Confraternity of the Kingdom of Christ, the defendants becoming the reverend father and reverend mother. These seven persons agreed :

... to live in love and union with our fellow-members as one body corporate unto our lives' end, holding all things in common under the rule of the reverend father and mother.

Hadley Hall, Barnet, was purchased, with its three acres of ground, and the tithe barn was erected and served as the chapel, and the hall was renamed "The Abbey of Christ the King." The Bishop of St. Albans dedicated the chapel, and the community associated itself with the Church of England. The local vicar became the chaplain and administered holy communion. The Abbey became a place of worship and a centre for lectures on religious topics for some of the inhabitants of the neighbourhood. Among those who attended were the plaintiff and his wife, and at some time, either at the age of four years, as the defendants said, or at the age of eight years, as her mother said, Dorothy began to attend the Abbey Sunday School.

It is unnecessary to enter into the trouble which caused the Confraternity in 1935 to sever its connection with the established Church and to join a body known as the Orthodox Catholic Church, of which at that time one John Churchill Sibley was Archbishop. This body was said to have a following in America. Its following in this country was small indeed, and the evidence of any members outside the defendants' sect was scanty. The members of this Confraternity were baptised and confirmed according to the rites of that church, and on Oct. 5, 1935, the male defendant was ordained deacon and priest, and the following day consecrated Bishop in the Abbey. When Archbishop Sibley died in 1938 the Bishop, that is the male defendant, became Archbishop, being elected by what was called the synod, which had practically the same membership as the chapter. The plaintiff and his wife said that they knew nothing of this changeover to the Orthodox Catholic Church, and thought right through until this trouble arose that the Confraternity still remained part and parcel of the Church of England, though a board with the words "Orthodox Catholic Church" was produced which was said to have been displayed ever since 1935.

There are three orders of the Confraternity, each with life vows. The vows of the third order are to pray, attend services, give financial support as circumstances permit and to render canonical obedience. Members of the second order add a vow to undertake some definite piece of social or religious work. The first order requires vows of obedience, poverty and self-sacrifice, and "poverty"

means the handing over of all property to the trustees of the Confraternity, of whom there are four, the defendants being two of them. No one in the first order is allowed to retain any personal possessions, and even his or her name is changed. It is a mixed community, comprising married couples and single persons of both sexes. Its number when it started was six. It is now fourteen, ten women and four men. Everything belongs to the trustees of the Abbey. As a so-called religious and educational charity it is exempt from income tax.

A Members of the Confraternity are also exempt from national service by the National Service Acts. To the trustees is transferred all the property of all the members. Even the male defendant appeared in the witness-box penniless, the very clothes he wore being provided by the trustees. Soon after the writ in this case was issued the defendants remembered a little limited company of which they were directors which published some of the defendant's writings from the Abbey, and they promptly transferred their shares to a member of the second order for £2 10s. The company paid directors' fees amounting to £150 to £160, but these went to the trustees. There is also a museum, to which the public is admitted on payment, and the takings go to the trustees. Services in the Abbey were described by the plaintiff as dramatic and as including a funny sort of ritual which he could not follow. The Archbishop appeared always in red robes and his wife, as the reverend mother superior, was always robed in white with a gold girdle. The women wore brown habits.

C I need say little more about this body. It is undoubtedly small in membership. There are some things about it which appear farcical and at which critics and opponents would be inclined to scoff; but I see no reason to suppose that the defendants and their followers are other than earnest and serious-minded persons believing what they teach and are taught. Some people may think that they are much misguided; but this is a land which tolerates many kinds of religious beliefs. I have to deal with this case and with nothing else.

D Just before she was ten Dorothy was baptised, the reverend father and reverend mother being godfather and godmother. She was also confirmed. The plaintiff and his wife were present at the baptism, but they do not remember being present at the confirmation, though the defendants said that they were. Dorothy was also admitted to the third order as a junior oblate, and Mrs. Lough was present; but she thought it was something like the girl guides and that

E Dorothy was promising merely to pray and to do a good deed every day.

In 1937 Mrs. Lough had an illness which took her to hospital, and Dorothy went to the Abbey to stay for a few weeks, in return for which Mrs. Lough made a donation to the church. During her illness the reverend father and the reverend mother showed great kindness to Mrs. Lough. Early in the war Dorothy stayed at the Abbey for three months. The mother said that that was because they had a good air raid shelter there. Dorothy had schooling in the

F Abbey. Later she returned to the grammar school, leaving, as I have said in Dec., 1940, just before she was 14. The plaintiff and his wife had made up their minds to send Dorothy to a commercial school for business training; but the invasion scare prevented that being done, so in 1941 and 1942 and for a part of 1943 Dorothy was helping her mother at home and in the garden and spending her leisure time at the Abbey, in addition to attending the Sunday school and services there. There is no doubt that she got very much attached to the

G people and the place.

In the spring of 1941 Dorothy became a senior oblate by attending a service and attending monthly services thereafter. At some time early in 1943 her mother noticed a change in Dorothy. There was nothing definite. Dorothy became quiet and did not confide in her mother. Her mother spoke to the reverend father and said that she did not want Dorothy to go into the Abbey

H until she was 21, thinking that by the time she reached that age she would have got out into the world and have understood things, and, further, after 21 her mother would not have any control over her. The reverend father agreed not to approach the girl. He did not deny this conversation, though he placed it as early as 1941. He said that it was an easy promise to make, as neither he nor the reverend mother ever asked anybody to join any of the orders. Mrs. Lough regarded the Abbey as attracting Dorothy because Dorothy wanted to be among young people—at any rate younger people than her mother and father. There were no cousins. Mr. and Mrs. Lough had been too long away from

England to have kept in touch with brothers and sisters. Dorothy said that Mrs. Lough had quarrelled with them. Mrs. Lough denied this. Dorothy went further, and said that her father and mother used to quarrel, and her mother used to threaten suicide if she did not have her own way. She even thought that they might separate. Mrs. Lough vehemently denied all this. I think that Dorothy was not telling the truth when she said these things.

It was in this home that a crisis arose on Aug. 3, 4, 1943. Dorothy had been at the Abbey on Aug. 2, the bank holiday. An announcement had been made on the wireless and in the public newspapers that boys and girls aged 16 and 17 were likely to be called up to work in the factories. Dorothy realised that this was likely to mean a great change for her. If she went to a factory she would be no longer able to go to the Abbey. On the evening of Aug. 3 she asked her mother if she could join the Abbey, because the time had come for her to answer the call of God. She said that she had first made up her mind about that when she had stayed at the Abbey at the beginning of the war. Mrs. Lough, who was engaged on some part-time war work, said that Dorothy's duty was to stay at home and look after her family, and she, Mrs. Lough, would be able to wangle her out of factory work. Mrs. Lough denied the use of such an expression and suggested that it was the reverend father who used it. In fact he had been more emphatic on the point. These girls, when called up, would be "slaves" was his expression. The reverend father and Mrs. Lough attributed to each other this view of the Government's attitude towards young women. Dorothy said that she spent a sleepless night on Aug. 3, praying for guidance. The next morning, after her father had gone to work, she saw her mother, who said that she looked like a wet blanket. Dorothy said that she had to answer the call and to go for a religious life. Dorothy's evidence was:

I felt that something just seemed to break, and I told her that I was not going to work for her any more. I was just going to work for God.

Mrs. Lough did not agree that Dorothy said that she was not going to work for her mother any more. That there was a distressing scene between mother and daughter there can be no doubt. Dorothy had made up her mind to go to the Abbey, Mrs. Lough thought temporarily, but the daughter's idea undoubtedly was to stay there, permanently if possible. According to the daughter's evidence she went upstairs to pack her clothes, but her mother said that she would not want these, and, anyway, they were not hers but only lent. And so with only the clothes in which she stood up the daughter, accompanied by the mother, set off for the Abbey at nine o'clock on the morning of Aug. 4. The Abbey was about 20 minutes' walk away from the Lough home. On the way Dorothy said that she had made up her mind to become a religious sister at the Abbey. According to Mrs. Lough, on the door being opened Dorothy immediately disappeared inside. Of course, Dorothy knew the place well. According to Dorothy, the mother went in first and she followed, but they went to separate rooms. The mother's idea in going to the Abbey was to ask the reverend father and mother to persuade Dorothy to return to her home. Everybody was distraught, so it was said; Dorothy had gone to the Abbey; her father and mother wanted her at home.

Had the reverend father and mother expected Dorothy? They have said that they had not expected her, but I am satisfied that their influence was bearing fruit. They say that they tried to persuade Dorothy to go home with her mother, and Dorothy says the same: but Dorothy remained at the Abbey. In fact, from that morning she never left until a policeman took her to a remand home. Accounts of that morning given by Mrs. Lough, her daughter, and the reverend father and mother differ. It was said that Dorothy knelt before her mother and vowed that she would never return. I cannot accept that. Finally it was arranged that the reverend father and mother should visit the Lough home that evening and see the girl's father, the plaintiff, and act as mediators. During the day persuasion is said to have been tried on Dorothy by the reverend father and mother, without success. About six o'clock that evening the reverend father and mother arrived, without Dorothy, who was said still to be distraught. The plaintiff said that he did not want his daughter to go to the Abbey, that he would not consent, and that if he was asked to sign papers he would sign nothing. The defendants in their evidence said that no reference was made to papers, and that as a matter of fact there are no papers. There

was a difficult situation for everybody. Mrs. Lough went off to write a letter to Dorothy. The letter was unfortunately worded. I need read only one or two passages :

A Dear Girlie, Reverend father has been pleading for you and I am quite willing for you to live at the Abbey if you prefer that life, but I want you to come back just for a few days to talk it over and tell me just what is in your mind . . . If you come back tonight we will make all arrangements and you can then return when you wish and you will be free to come home when you like and I can come and go to see you at all times and all will be well . . . Be a good girl and listen to reason . . . I shall wait patiently for you this evening. Don't disappoint me or you will spoil both our lives. The plaintiff in his evidence said that he read that letter and approved it.

B Was that an unconditional surrender of the plaintiff's daughter to the defendants ? I do not think it was a letter consenting to Dorothy becoming, or even preparing to become, a nun for life, and I do not read it as such. I think the parents were willing that she should reside at the Abbey temporarily if she preferred it, but their view was that she ought to return home and talk it over with her father and mother and listen to reason before doing so. The girl was sixteen years and seven months old, and somewhat foolish and certainly self-willed. The plaintiff and his wife waited on that evening for Dorothy to arrive ; but she did not come. Dorothy said that she did not trust her parents. She thought that once she returned home she would never again be allowed

C to leave. Mrs. Lough, whose feelings towards the defendants are naturally not of the best, declared in her evidence that the defendants used to open Dorothy's letters and to dictate her replies. They denied this. Mrs. Lough, in making this allegation, has nothing to go upon except her own imagination. It is true that Dorothy showed the reverend mother the letters she received and the replies she sent. What advice was given to her, if any, is unknown. The letter from which I have read certain extracts was duly handed to Dorothy

D who read it as a consent ; and so did the defendants.

Dorothy replied by letter on Aug. 5 :

Thank you very much for your letter, and for agreeing to allow me to join the Abbey . . . I have had several long talks with the reverend father and the reverend mother and I have told them I will come along with them on Friday so that we can talk things over.

E The defendants promised to take her along to see her father and mother on Aug. 6, because in a letter of Aug. 5 the reverend mother, the second defendant, said :

I gave Dorothy your letter last evening and had a talk with her, but she simply dug in her heels and dissolved into tears . . . We have worked very hard to build a bridge and I know you won't try to press her to stay, for that might start the whole trouble over again . . . We hope, therefore, we shall all three see you both tomorrow, about six p.m.

F But Mrs. Lough upset that arrangement by two letters. In one, written to her daughter, she said :

You have made life very bitter for me but as you have chosen the Abbey in preference to your home, I hope you will be happy. I will not bother you any more. Goodbye. B. G. Lough. P.S. . . . There is still time if you wish to come back. I would so love to have you but it is for you to decide.

G In a letter to the reverend mother Mrs. Lough said :

She has chosen and must abide by the consequences. It will be time wasted for you to come tomorrow, Friday. I feel you could have persuaded her to return if you had wished.

This surprised Dorothy when she got the letter, and she replied :

I was very surprised at your letter today, because I thought from your previous one that you wanted to see me. As you have changed your mind and won't see me, I can only say what you say, "I won't bother you any more. Goodbye."

H The reverend mother in her reply said :

In view of the way we had been working to persuade Dorothy to come along and talk things over with you and her father—a thing you could not persuade her to do herself—and had actually succeeded in getting her to agree to do so, the last sentence on your card is most unjust. Perhaps in time you will realise the mistake you have made.

Dorothy remained at the Abbey. The plaintiff, her father, wrote her a long, appealing letter, on Aug. 8. It contains the phrase :

Well, Dorothy, my dear, it now rests for you alone to decide your own fate and future.

It concludes with an invitation to her to meet him one evening outside his work and to return home to "clear up this terrible misunderstanding." To that Dorothy replied that she was no longer a baby and had always wanted to enter the Abbey. She had written that the State had now decided the matter for her, but she crossed that out. She invited the father to call and talk it over, but he never went.

What was happening at the Abbey? The defendants and their small band of followers moved quickly. The little community assembled as a chapter on Aug. 6, the letters were read, the incidents were reported, they came to the conclusion that Mrs. Lough had washed her hands of Dorothy, who was now a candidate for postulancy, and it was agreed to accept her. No question of payment arose. Further, as Dorothy had been a member of the third order for six years, it would be unnecessary for Dorothy to wait the six months before becoming a novice according to the rules, and it was decided to receive her as a novice a few days later, and this ceremony accordingly took place on Aug. 19, and Dorothy Bartola Lough duly became Sister Therese, after Saint Therese of Lisieux, and assumed the brown habit. In a period of only fifteen days this young girl, just turned sixteen and a half years, had become a novice and taken the vows of obedience to the defendants before the high altar.

The day at the Abbey begins at 5.15 and ends at 10 at night. Dorothy in her evidence gave the details as far as she was concerned. The time was occupied in prayer, meditation, cleaning, study and classes. She was being trained, so she said, in teaching the reading of Braille to the blind, speaking to the deaf and dumb and visiting the sick, and it was said that she had improved her playing of the piano. She is maintained and clothed at no expense to her parents. She never goes out, but that restriction may be removed, it is said, after the war. Since Aug. 4, 1943, no member of the Lough family has ever seen Dorothy alone at the Abbey. The first effort was made by Mrs. Minnie Elizabeth Lough, now the wife of the plaintiff's son, then Miss Thyss, who called on Sept. 16, and was told somewhat harshly that she could only see Dorothy by appointment, and when the caller protested she was threatened with the police. The next day Mrs. Lough and Miss Thyss called, but they were not allowed to see Dorothy. Mrs. Lough tried the police and made an application to the court at Barnet under the Children and Young Persons Act, 1933, s. 64, for an order to take Dorothy to a place of safety, as she was beyond her mother's control. It was an unfortunate proceeding. Dorothy was arrested and placed in a remand home for ten days. The defendants instructed solicitors and counsel to appear for Dorothy, and the magistrates arrived at the conclusion that they could not interfere. Dorothy did not like the remand home, where, it was said, the other inhabitants were undesirable young persons. Mrs. Lough visited her daughter in the remand home, but it was not a very happy meeting. The Abbey received Dorothy back with great rejoicings.

In Jan., 1944, the plaintiff had influenza. Mrs. Lough again visited the Abbey, taking with her the doctor. She saw Dorothy in the presence of the defendants and spoke of the illness, and appealed to Dorothy to come home to see her father. But the reverend father found out from the doctor that the illness was not serious, and the interview closed after a scene in which Dorothy's veil was torn—by Mrs. Lough according to the reverend father, by the reverend father according to Mrs. Lough. Mrs. Lough was certainly indignant at the time, and called the reverend father a "dirty hypocrite." Dorothy declined to go home, and complained that she had been sent to "that horrible place, the remand home."

Dorothy's brother, Harold, was serving in the Middle East. He had been away from home for four years. He had heard of the trouble and had written to the reverend father, from whom he received a reply setting forth in great detail what had happened, and adding, "Dorothy Lough perished forever in the courthouse at Barnet." Harold came home in Dec., 1944, and at once went to the Abbey to get his sister to come to his wedding with Miss Thyss. He saw her in the presence of the defendants. The interview was short. The answer was a refusal.

That completes the story. Dorothy has never returned to her home since Aug. 4, 1943. She still remains in the Abbey. She is not kept there against her will. She is free to leave whenever she likes, according to the reverend father, and she says that she has no desire to leave. I believe her to be happy where she is. I cannot help thinking that Dorothy and the defendants treated the plaintiff and his wife badly. From being a perfectly good girl at home about her father and mother in this case. Whatever may be the effect of the defendants' religious teaching on Dorothy, they have not succeeded in removing, and I doubt whether they have tried to remove, from her mind a complete indifference to the unhappiness of her parents. They have denied her mother, her brother and her friend reasonable access and placed an efficient protecting guard around her, so that none may see Dorothy alone. They have allowed her to bask in the limelight of publicity which has attached to this case and to pose for her photograph, holding a wooden statuette of her saint, to appear in a newspaper.

Has this unfortunate state arisen through the enticement of the defendants or either of them? What was it that brought about the sudden change in her attitude towards her father and her mother and her home on the night of Aug. 3 and the morning of Aug. 4, 1943? She herself said that she was vowed to a monastic life at the age of fourteen, two years before. Her father and mother knew nothing of this. To whose teaching, to whose influence is this girl's departure from her home due? Whenever she was at the Abbey the reverend father and the reverend mother were there—the two superiors, the two leaders, the two teachers, in gorgeous raiment. This young impressionable girl heard the story of the foundation of the Abbey and the story of the mystical experiences of the defendants. This young girl then has what she describes as the call of God to a religious life. In the early days of Aug., 1943, there came this announcement of the calling-up of girls between sixteen and seventeen. When Mrs. Lough interviewed the reverend father at the Abbey on Aug. 4 he said that these girls would become the slaves of the Government and the scheme would be a *fait accompli* by the time Parliament met. Dorothy would have to go where she was told and stay as long as she was told, and would have no choice whatever. The only way she could escape was by going into the Abbey. There she would be exempt, as inmates were exempt under the defendants' roof, from the national service scheme. Had he talked in the same way to Dorothy?

I am entitled to infer that he did, and that he did use his enticement and persuasion upon this girl, for how otherwise can one account for the change in Dorothy's attitude and her sudden decision in August to become a permanent member of the Abbey, for the restrictions which the defendants placed around her from the moment she arrived, never allowing her out of their sight or out of the Abbey, for the haste with which they rushed her through from postulancy to novitiate without ever saying so much as a word to either of her parents and without waiting for the six months prescribed by the so-called rules to pass?

I have to look at the whole of the evidence in the case. This girl Dorothy has left her father's service and control. Have the defendants persuaded or induced or incited her to leave, or procured her leaving? (See WRIGHT, J., in the summing-up in *Smith v. Kaye* (1), which was cited with approval by SCRUTTON, L.J., in *Place v. Searle* (2), at p. 514: "If the defendants persuaded her to leave, or incited her to leave, or procured her leaving, then they would be liable.") I hold that there was enticement by the defendants in this case. A religious influence is very dangerous and very powerful, and never so dangerous and never so powerful as when it is exercised by superior minds and older minds over an inferior and younger mind.

In *Allcard v. Skinner* (3), LINDLEY, L.J., said, at p. 183:

... the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful. . .

I know that that was a case of a woman of thirty-five who became a postulant, novice and professed sister, taking the vows of poverty and obedience, and who made considerable property over to the superior of a sisterhood. Dorothy had no property to give; but she had her life and her service.

The Confraternity purports to be self-supporting. It obtains its money not only from those who give it but also by conducting certain activities, such as gardening, the museum, publishing, and making children's clothing. Domestic work has to be done. A community of ten women and four men cannot be housed and fed without some domestic work being done. Another pair of working hands would be of use to such a community. Dorothy had been useful to her father at home in the house and in the garden. By this enticement she transferred herself and her services to the defendants for her keep.

There was no consent by the father. An effort was made on behalf of the defendants, and indeed by the reverend father and mother themselves, to establish that the father had consented. Certain passages were selected from letters written by the girl's mother and the plaintiff at the time of the crisis. I do not read unequivocal consent by the plaintiff to the daughter transferring herself and her services for life to the defendants. I read in those letters a real desire by the plaintiff and his wife to have the opportunity, free from the presence of the defendants, of giving parental advice to their daughter, of helping her to see reason by bringing her back into the family fold. Further, supposing there was consent, the parent of a child cannot get rid of his parental right irrevocably by agreement. (See *R. v. Barnardo* (4), per LORD ESHER, M.R., at p. 310). *Besant v. Narayaniak* (5), may also be referred to. In that case LORD MOULTON said, at p. 562 :

... the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust and he cannot, therefore, during his lifetime substitute another person to be guardian in his place.

Has there been a harbouring by the defendants? I find that there has. Dorothy has remained at the Abbey ever since Aug. 4, 1943, with the exception of the period spent in the remand home, not against her own will, for she prefers to remain with the defendants, but certainly against the will of the plaintiff, her father. What is the position of the father in these circumstances? Has he a remedy against the defendants? The test which the law applies is: Has the father lost the services of the daughter by the action of the defendants? In this case, as I have said, the plaintiff has put in an answer of the defendants on oath that Dorothy was rendering service in the plaintiff's household usually rendered by a girl of her age to her parents in a household where no servant is kept. Most of the textbook writers have commented upon this curious position. In SALMOND ON TORTS, 9th Edn., at p. 380, are to be found these words:

All rights of action vested in a parent in respect of his child are vested in him not in his capacity as a parent, but in his capacity as the master of his child, and are, therefore, dependent upon the existence in the particular case of the relation of master and servant. If this relation does not exist, either because the child is too young to give any services, or because he is in the service of some other person, or for any other reason, the father has no remedy for any wrong done to him in respect of his child.

In WINFIELD ON THE LAW OF TORT, 2nd Edn., at p. 256, it says:

Deprivation of child's services. It is a tort to do any act to a child which wrongfully deprives the parent of its services. Our law here displays an unfortunate and vicious historical twist. The ground on which any remedy of this kind ought to be based is outrage or injury to the parent as head of a family. But, in fact, the action *per quod servitium amisit*, which began as a remedy for a master against one who interfered with his servant so as to deprive him of his services, was extended by 1653 to similar interference with a child. The tort is in form, therefore, merely a species of the more general tort of interfering with the relations of master and servant.

In POLLOCK ON TORTS, 14th Edn., at p. 179, the author says:

Next to the sanctity of the person comes that of the personal relations constituting the family. Depriving a husband of the society of his wife, a parent of the companionship and confidence of his children, is not less a personal injury, though a less tangible one, than beating or imprisonment. The same may to some extent be said of the relation of master and servant, which in modern law is created by contract, but is still regarded for some purposes as belonging to the permanent organism of the family, and having the nature of status. It seems natural enough that an action should lie at the suit of the head of a household for enticing away a person who is under his lawful authority, be it wife, child, or servant: there may be difficulty in fixing the boundary where the sphere of domestic relation ends and that of pure contract begins, but that is a difficulty of degree. That the same rule should extend to any wrong done to a wife, child, or servant, and followed as a proximate consequence by loss of

their society or service, is equally to be expected. Then if seduction in its ordinary sense of physical and moral corruption is part of the wrongdoer's conduct, it is quite in accordance with principles admitted in other parts of the law that this should be a recognised ground for awarding exemplary damages . . . There seems, in short, no reason why this class of wrong should not be treated by the common law in a fairly simple and rational manner, and with results generally not much unlike those we actually find, only free from the anomalies and injustice which flow from disguising real analogies under transparent but cumbrous fictions. But as a matter of history (and pretty modern history) the development of law has been strangely halting and one-sided. Starting from the particular case of a hired servant, the authorities have dealt with other relations, not by openly treating them as analogous in principle, but by importing into them the fiction of actual service; with the result that in the class of cases most prominent in modern practice, namely, actions brought by a parent (or person *in loco parentis*) for the seduction of a daughter, the test of the plaintiff's right has come to be, not whether he has been injured as the head of a family, but whether he can make out a constructive "loss of service." The common law provided a remedy by writ or trespass for the actual taking away of a wife, servant, or heir, and perhaps younger child also. An action of trespass also lay for wrongs done to the plaintiff's wife or servant (not to a child as such) whereby he lost the society of the former or the services of the latter. The language of pleading was *per quod consortium, or servitium amisit*. Such a cause of action was quite distinct from that which the husband might acquire in right of the wife, or the servant in his own right.

- A
- B
- C It was argued on behalf of the defendants that, to support an action for harbouring, it must be shown that the contract of service continues. Reference was made to *Thompson v. Ross* (6), where BRAMWELL, B., said, at p. 18 :

In the ordinary case of a person living in a house as a member of the family, it is very reasonable to hold that the relation of master and servant (determinable at will) exists between the parties.

- D
- E
- Dorothy said that, on the morning of Aug. 4, she said to her mother that she was not going to work for her any more; she was just going to work for God. Mrs. Lough did not accept those words, though pressed on behalf of the defendants. What Dorothy said was that she was going down to the Abbey to stay there temporarily. I accept Mrs. Lough's evidence. I do not accept Dorothy's evidence. I do not think that the question of working for her father ever arose on that morning.

- E
- Evans v. Walton* (7) may be usefully referred to, because there the argument based on "determinable at will" did not prevail. WILLES, J., said, at p. 622 :

. . . I feel no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether *de son bon gre* or *sur retainer*, he is equally entitled to her services, and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost.

- F
- MONTAGUE SMITH, J., said in the same case, at p. 623 :

- G
- It appears to me, however, that there is abundant authority for holding that there was an existing relation of master and servant here, by interfering with which the defendant was guilty of an actionable wrong. But for the defendant, the service would have remained uninterrupted. It does not appear that the girl had any intention of quitting her father's roof, until induced by the defendant to do so. It may be that no action will lie against a man for inducing another's servant to come into his service at the expiration of the existing service. At first I was inclined to think that, as the service was determinable at the will of the daughter, when she willingly quitted her father's house the service was at an end. But the facts shew that she was incited by the defendant to leave her home, and was taken out of a continuing service.

- H
- I think that the real question is : Would this girl have left her home if the defendants had not induced her ? I am satisfied that she would not. She left her home as the result of a state of mind induced by the defendants. If she intended a permanent desertion of her home by reason of this inducement, that will only aggravate the loss of service. In an Irish case, *The People v. Edge* (8), BLACK, J., said, at p. 153 :

The fact, if it was a fact, that the lady had no *animus revertendi* would not appear to matter, and if her design—induced by the conspirators—was permanent desertion of her home, that would only aggravate the loss of service.

It would certainly be a curious position if the extent of the liability of the

defendants should have to be reduced by their successful persuasion of the girl. I do not think that the father is without rights as to his children. On the contrary, the law of England is that the father is the head of the family and has control over his children, their persons, their education and their conduct, until they are 21 years of age or marry under that age. It is because he is the father that the law recognises that he has these rights. A father has greater rights with regard to his children during infancy than any guardian or any stranger. Sometimes these questions arise between husband and wife by reason of matrimonial disputes or religious differences. No such question arises here between the plaintiff and his wife. As far as the father's religion is concerned, many cases decide that it is the father who has the right to say in what religion his children shall be brought up. In *Hawksworth v. Hawksworth* (9), MELLISH, L.J., said, at p. 545 :

... I fear that we should be doing much mischief if we were to hold out encouragement to persons to think that if they get hold of a child of tender years they may, by educating it for a longer or shorter period of time in their own religion, secure that the child shall be educated in that religion instead of the religion of the father.

It is also important to observe that these are not *habeas corpus* proceedings. If they were the court would consult the wishes of the child, and, as Dorothy is over 16 years of age and, therefore, has attained what the law calls the age of discretion, the court might not interfere. On the other hand, it might. The fact that a girl at home with her father has reached the age of 16 does not mean that any stranger can come between father and daughter and entice the daughter away, and then say to the parents, "You have no remedy against me, because the girl is sixteen and a half-years old, and I have persuaded her to stop with me." That argument was disposed of by BOWEN, L.J., in *In re Agar-Ellis* (10), where, in reply to counsel, who submitted that the court would allow an infant of sixteen to go where it pleased because the father had not the legal right to the custody and only a right which the court is at liberty to disregard, he said, at p. 321 :

According to your argument a young lady of sixteen who was stopped by her father from going to Gretna Green might bring an action for false imprisonment.

That case is of interest because it concerned the position of a girl of more than sixteen years of age. BRETT, M.R., said in that case, on p. 325 :

However, the petition is brought before the court, and it has been argued on behalf of the mother and daughter that because the daughter is now more than sixteen, the father has no right to the control or custody over her ; that she is emancipated from his control ; and that the court ought so to declare. In support of that argument it was said that the authorities shew that where a girl over sixteen is absent from her father and with other people, the court, upon a *habeas corpus* sued out by the father, will see the girl who is above sixteen and ascertain her view of the position, and if she is content to remain where she is, will not grant to her father upon the *habeas corpus* a return of the child into his custody. And it is said that that shews that the law is that when a girl is over sixteen her father has no longer any control over her. It was said further, that this was shewn to be the law, because the court in the case of a testamentary guardian will, if necessary, interfere with regard to his mode of exercising the control which is given to him by law. Now I cannot accede to the argument thus put forward. It seems to me to be directly contrary to the law of England, which is, that the father has the control over the person, education, and conduct of his children until they are twenty-one years of age. That is the law.

There is one other passage I would cite from the judgment of BOWEN, L.J., at p. 335 :

The court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except it be in those special cases in which the state is called upon, for reasons of urgency, to set aside the parental authority and to intervene for itself. I for one should deeply regret the day, if it ever came, when courts of law or equity thought themselves justified in interfering more than is strictly necessary with the private affairs of the people of this country. Both as regards the conduct of private affairs, and of domestic life, the rule is that courts of law should not interfere except upon occasion. It is far better that people should be left free, and I do not believe that a court of law can bring up a child as successfully as a father, even if the father was exercising his discretion as regards the child in a way which critics might condemn. Now a good deal of this discussion has turned upon the exact limits of parental authority. As far as one can see, some little confusion has

been caused by the use in earlier law books of distinctions by which the law now no longer strictly stands. The strict common law gave to the father the guardianship of his children during the age of nurture and until the age of discretion. The limit was fixed at fourteen years in the case of a boy, and sixteen years in the case of a girl; but beyond this, except in the case of the heir apparent, if one is to take the strict terminology of the older law, the father had no actual guardianship except only in the case of the heir apparent, in which case he was guardian by nature till twenty-one. That was what was called guardianship by nature in strict law. But for a great number of years the term "guardian by nature" has not been confined, so far as the father is concerned, to the case of heirs apparent, but has been used on the contrary to denote that sort of guardianship which the ordinary law of nature entrusts to the father till the age of infancy has completely passed and gone. I do not desire to elaborate the matter more than is necessary.

Then he deals with the history, and adds, on p. 336 :

B It seems to me to follow that if a father can dispose of the custody and tuition of his children by will until the age of twenty-one, it must be because the law recognises, to some extent, that he has himself an authority over the children till that age is reached. To neglect the natural jurisdiction of the father over the child until the age of twenty-one would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.

There is a further short sentence which I might take from p. 337 :

C Now the court must never forget, and will never forget, first of all, the rights of family life, which are sacred.

Incidentally, it is to be remembered that the girl in the case of *Evans v. Walton* (7), to which I have referred, was nineteen years of age and consented to everything that happened. In fact she went away with her male friend twice, the first occasion arising through a fraud on her parents—not on her. The age of discretion argument did not prevail there.

D Then it is said in this case that a 5s. originating summons under the Guardianship of Infants Act, 1886, and 1925, in the Chancery Division would have saved all this trial and would have provided relief if relief should be granted. I do not think that that would have been an appropriate relief for the father against the defendants here. The reverend father and reverend mother are not the guardians of Dorothy, except by self-appointment. The cases under this Act are mostly cases between spouses. No new principle of law is introduced by the first section of the 1925 Act. (See *Re Thain* (11).) In that case WARRINGTON, L.J., said, at p. 690, that the welfare of the child was no doubt the first and paramount consideration, but it is only one amongst several other considerations, the most important of which is that the child should have an opportunity of winning the affection of its parents and be brought for that purpose into intimate relation with the parent.

F Dorothy's wishes have been urged in this case, and in the defence it is pleaded that she was more than sixteen years of age at the material time. She has declared that she wishes to remain with the reverend father and the reverend mother, and if the court says that she is not to she will not go to live with her father and mother. As to her wishes to remain with the reverend father and mother, I think there is every ground for disregarding them. If I have to consider her welfare and to give consideration to that, I am fortified by some G observations in *R. v. Gyngall* (12), where the actual decision was against the parents in respect of a child of fifteen in an institution. LORD ESHER, M.R., said at p. 239 :

I take it that at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct. Certain statutes have been passed, which did limit to some extent the rights of the parent, though not guilty of misconduct that would have disentitled him or her to the custody of the child at common law. Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute.

On p. 248, KAY, L.J., said :

Again, the term "welfare" in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do.

The institution in that case was a convalescent home, and the girl was being trained outside as a pupil teacher, and the mother had an occupation which took her from place to place, and she was never in one place long.

Dorothy, in Aug., 1943, was young, though of the age of discretion. She was enticed away from her father, the plaintiff. I think it would be contrary to her interests that she should remain with the enticers. For that reason it is not mere prejudice to consider for a moment who the enticers are. I think there is some force in the suggestion that they are a couple suffering from a form of megalomania, taking delight in high-sounding titles. They seem to me to be playing at keeping a nunnery and indulging in make-believe, forming their own rules, and extracting vows of obedience from their little band of followers, of whom Dorothy has been persuaded by them to become a very young member. The defendants may be attracted by some other form of religion. What is to become of Dorothy if this little community should fall to pieces one day, as it might if the trustees have no more funds coming in? She would be thrown upon a world of which she knew nothing, with the breach between her and her parents widened beyond all possibility of bridging. Surely it is better that, between now and the age of twenty-one, she should resume her family life and regain that parental affection which is there for the asking. She may remain as devout as she wishes, but she will at least have time for reflection, which seems to be denied to her now.

I have no power in these proceedings, which are not proceedings by way of *habeas corpus* (proceedings by way of *habeas corpus* would not be proceedings against her) to order her to go back into her father's home; but I do earnestly advise her so to do. If the defendants' religious vows permit them to consider the feelings of a real father and a real mother, they will add their advice to mine.

I consider, however, that I have power to deal with the defendants by way of injunction restraining them from continuing to harbour this girl Dorothy. I see nothing impracticable in that. It is said that she is on premises which are not the defendants' premises but which belong to the trustees of the Confraternity. The injunction that I shall grant will be against the defendants personally.

It remains to consider the question of damages. There has been by the defendants a violation of the plaintiffs' rights. As a parent he was entitled as against the defendants, who are strangers, to the continued services of his daughter during her infancy. The power of awarding exemplary damages is not limited to cases where there has been seduction and the parent has lost the services of the daughter during her confinement. To indicate this court's disapproval of the defendants' conduct, I shall award £500 damages. I realise that such award is probably a mere form. The defendants have put it out of their power to possess so sordid a thing as money. Their sense of their duties as citizens is not very high. Nevertheless, I give judgment for that amount, for what it may be worth, and I grant the injunction restraining them from continuing to harbour Dorothy Bartola Lough.

Judgment for plaintiff for £500 damages with costs. Injunction granted with stay of execution pending appeal.

Solicitors: *H. H. Kemp* (for the plaintiff); *F. B. Brook* (for the defendants).
[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

CHAMBERLAIN v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott and Lawrence, L.JJ., and Uthwatt, J.),
May 7, 10, 11, June 18, 1945.]

Income Tax—Sur-tax—Investment company—Whole income of company apportioned to person not a member thereof—Controlling interest in company held by another company of which apportionee in control—Apportionee governing director of both companies—Settlement by apportionee for benefit of wife and children—Power of apportionee to remove any trustee at will and to appoint new trustees—Whether apportionee to be treated as a member of the first mentioned company—Quantum of apportionment—“Apportionment”—Finance Act, 1922 (c. 17), s. 21—Finance Act, 1939 (c. 41), ss. 14, 15 (1), (6), 16.

The Talbot Investment Company, of which the appellant was the governing director with wide powers, was an investment company within the meaning of the Finance Act, 1939, s. 15. The company had a share capital of £400,000 divided into 40,000 preference shares, 120,000 “A” cumulative preference shares and 240,000 ordinary shares, all of £1 each. Each share carried one vote on a poll. The preference shares were redeemable on payment of the capital paid up thereon at any time on one month’s notice at the option of the company. At all material times the issued and paid up capital of Talbot (30,000 preference shares and 80,000 “A” cumulative preference shares, all 1s. paid) were held by Curator, Ltd., as nominees for the trustees of settlements dated Mar. 30, 1938, and Sept. 27, 1938, respectively. 223,500 ordinary shares fully paid were held by Staffa Investment Trust. Talbot paid on Mar. 29, 1940, a dividend of £6,000 net in respect of the 30,000 preference shares and £9,622 15s. 4d. net in respect of the 80,000 “A” preference shares. The Staffa Investment Trust, of which the appellant was also governing director for life with wide powers, was an unlimited company with a share capital. The nominal capital was £100,000 divided into £50,000 preference shares of 10s. each and 7,500 ordinary shares of £10 each. 35,002 preference shares were issued and held by the appellant. The ordinary shares were divided into five classes, “A”, “B”, “C”, “D” and “E” composed respectively of 350, 1,750, 1,750, 1,750 and 1,900 shares. All the “A” ordinary shares were issued and fully paid up and were held by the trustees of the settlement of Mar. 10, 1936. The issued “B”, “C”, “D” and “E” ordinary shares were held by the trustees of four other settlements, each dated Dec. 7, 1936. Each share, on a poll, carried one vote. Staffa was so constituted that the dividends payable to its shareholders could be paid to any particular class of its shareholders to the exclusion of others, subject to the payment of a dividend on the preference shares which belonged to the appellant. Therefore, the appellant as the person who had control of the votes of Staffa, could, when that company had received dividends from Talbot, decide that, subject to the payment of the preferential dividend to himself, the whole of the rest of the income of Staffa should go to the 350 “A” ordinary shares of £10 each which formed the funds of the settlement of Mar. 10, 1936. By this settlement the trustees were directed to hold the trust funds upon trust for the appellant’s wife and any of his children and remoter descendants for the time being in existence. The settlement did not contain any trust for accumulation or power of accumulation. Under the settlement the appellant, who was one of the original trustees, had power to remove any trustee at will and the power of appointing new trustees. On appeal, the questions for the determination of the court were: (i) whether the appellant was, pursuant to the Finance Act, 1939, s. 15, rightly treated as a member of the Talbot Investment company, and (ii) if so, whether in the circumstances objection could be taken to the decision of the commissioners whereby the whole of the income of Talbot was apportioned to the appellant for the relevant years under the power of the commissioners to apportion to him “such part of the income as appears to them to be appropriate”:

HELD: (i) by an exercise of his rights the appellant could in the relevant years before any declaration of dividend was made in respect of any preference shares in Talbot have secured that all such income should be paid

either to him as owner of the outstanding preference shares in Staffa or to the trustees of the settlement of Mar. 10, 1936: Under that settlement the appellant could secure to himself the position of a sole trustee and would then be invested with a discretion as to disposition of the income, in the exercise of which discretion he could have allocated the whole income to his wife. The commissioners were, therefore, entitled in law to treat the appellant as a member of Talbot for the purposes of the Finance Act, 1922, s. 21.

(ii) (a) the words of sect. 15 of the Finance Act, 1939, "such part of the income as appears . . . to be appropriate" ought to be construed as meaning "such part, it may be the whole of the income."

(b) the appellant's ability to dispose of the whole income of Talbot was in existence long before the actual dividends were declared, and the whole income of Talbot had to be apportioned, even though all of it had been distributed by way of dividend. The basis upon which the Finance Act 1921, s. 22, and the Finance Act, 1939, s. 15, proceeded, was the existence of the ability to dispose of the income, and not its exercise. Declarations of dividend were, therefore, not a factor in determining how much of the whole income it was appropriate to apportion to a person who was being treated as a member.

[EDITORIAL NOTE.] This case considers the validity of an apportionment under the Finance Act, 1939, s. 15 of the income of an investment company to a person as being a "member" of the company within the section. The shares in the company were held by another company, the shares in which, in turn, were held either by the alleged "member" or by trustees of a settlement of which he was one. He was governing director of both companies, and by virtue of that position, or by making himself sole trustee of the settlement he could have secured the whole income of the first company for himself or his wife. The complexity of the necessary operations is immaterial, and it is held that he was properly treated as a "member" of the company.

On the question of the quantum of the apportionment, it is held that the whole income of the company was properly apportioned on the member, although in fact dividends had been paid. The existence of the ability to dispose of the whole income, not its exercise, is the test. It was argued that the power of the Special Commissioners to apportion "such part" as appears appropriate imply a fraction only, but it is held that the words should be read as "such part, it may be the whole." This accords with the recent decision of the House of Lords in *Fendoch Investment Trust Co. v. I.R. Comrs.* ([1945] 2 All E.R. 140), where it was said by LORD SIMONDS, at p. 146, that in this matter the discretion of the commissioners should be "unfettered and absolute."

AS TO "MEMBER" OF A COMPANY, see HALSBURY, Hailsham Edn., Vol. 17, pp. 290, 291, para. 576; and FOR CASES, see DIGEST Supp., Income Tax, Nos. 674r-674t.

FOR THE FINANCE ACT, 1939, s. 15, see HALSBURY'S STATUTES, Vol. 32, p. 180.] Cases referred to:

- (1) *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; 43 Digest 877, 3211; 46 L.J.Ch. 556; 36 L.T. 564.
- (2) *Inland Revenue Comrs. v. L.B. (Holdings), Ltd.*, [1944] 1 All E.R. 308; 170 L.T. 217.

APPEALS by the taxpayer and the Talbot Investment Company (in liquidation) from a decision of MACNAGHTEN, J., dated May 11, 1944, dismissing appeals from a decision of the Special Commissioners confirming (i) apportionments whereby the whole income of the Talbot Investment Company for the years ending Apr. 5, 1940 and 1941, was apportioned to the appellant taxpayer pursuant to the Finance Act, 1939, s. 15 and (ii) assessments to sur-tax made upon the appellant taxpayer in consequence of these apportionments. The facts and arguments are fully set out in the judgment of the court, delivered by UTHWATT, J.

Cyril King, K.C., and Norman Armitage for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

UTHWATT, J. (delivering the judgment of the court): The points at issue are (1) whether Chamberlain was, pursuant to sect. 15 of the Finance Act, 1939, rightly treated as a member of the Talbot Investment Company for the purposes of sect. 21 of the Finance Act, 1922, and (2) if this question is answered in the affirmative, whether, in the circumstances, objection can be taken to the decision made by the commissioners under that section whereby there was apportioned to Chamberlain the whole of the income of Talbot for the relevant

years under the power to apportion to him "such part of the income as appears to them to be appropriate."

The material facts are as follows :

The Talbot Investment Company is an unlimited company incorporated in 1938 with a share capital of £400,000 divided into 40,000 preference shares of £1 each, 120,000 "A" cumulative preference shares of £1 each and 240,000 ordinary shares of £1 each. The preference shares carry the right to a preferential dividend of 20 per cent. tax free payable as regards each year out of the profits of that year calculated on the nominal amount of the share : and to preferential repayment in a winding-up, but no further right to share in profits or assets. They were redeemable on payment of the capital paid up thereon at anytime on one month's notice at the option of the company. The "A" cumulative preference shares ranked after the preference shares. They differed from the preference shares only in regard that the dividend was cumulative and was 30 per cent. tax free, and they were subject to the same conditions as to redemption as the preference shares, that is, the capital paid up irrespective of any arrears of dividend. Under the articles (art. 23) there was power to redeem any share held by a member not holding more than 1 per cent. of the issued share capital (art. 52), each share carried one vote on a poll, and (art. 85) dividends were to be declared in general meeting. Chamberlain was at all material times governing director of the company with wide powers.

At the relevant dates the issued and paid up capital of Talbot was :

(a) 30,000 preference shares 1s. paid, held by Curator, Ltd., as nominees for the trustees of a settlement, dated Mar. 30, 1938.

(b) 80,000 "A" cumulative preference shares 1s. paid, held by Curator, Ltd., as nominees for the trustees of a settlement dated Sept. 27, 1938.

(c) 223,500 ordinary shares fully paid held by Staffa Investment Company.

(d) 2 ordinary shares fully paid held by the signatories to the memorandum of association.

Talbot is an investment company within the meaning of the Finance Act, 1939, s. 15. Talbot paid on Mar. 29, 1940, a dividend of £6,000 net in respect of the 30,000 preference shares, and £9,622 15s. 6d. net in respect of the 80,000 "A" preference shares.

The Staffa Investment Trust was an unlimited company with a share capital. The nominal capital was £100,000 divided into 50,000 preference shares of 10s. each and 7,500 ordinary shares of £10 each. The preference shares carried the right to a preferential dividend at the rate of 5 per cent. on the paid up capital and priority in a winding-up. The ordinary shares were divided into five classes, "A," "B," "C," "D" and "E," composed respectively of 350, 1,750, 1,750, 1,750 and 1,900 shares. Each class of ordinary shares was entitled only to such dividend (if any) as the company should from time to time in general meeting determine.

Under the articles (art. 17 as amended) all the shares other than the "A" ordinary shares were redeemable at a sum equal to the capital paid up thereon plus a proportion of a hypothetical dividend (art. 33), each share on a poll carried one vote (art. 40), Chamberlain was governing director for life with wide powers, and, (art. 55), the directors might with the sanction of the company in general meeting declare dividends.

The issued share capital was as follows :

(a) 35,002 preference shares were issued and held by Chamberlain.

(b) All the "A" ordinary shares were issued and fully paid up and were held by the trustees of a settlement of Mar. 10, 1936. The issued "B," "C," "D" and "E" ordinary shares were held by the trustees of four other settlements each dated Dec. 7, 1936.

So much for the two companies that enter into the case. Chamberlain was a married man with four children, and he made certain settlements to which it is necessary to refer. By the settlement dated Mar. 10, 1936, Chamberlain settled £3,500—which was invested in "A" ordinary shares of Staffa—and the trustees were directed to hold the trust funds upon trust until twenty-one years after the death of the last survivor of Chamberlain's wife and four children to pay or apply the income to or for the benefit of :

... all or any one or more to the exclusion of the other or others of the following persons as the trustees shall (in the exercise of their absolute discretion without being

liable for the exercise of such discretion) think fit.

That is to say, his wife and any of his children and remoter descendants for the time being in existence. The settlement did not contain any trust for accumulation or power of accumulation.

Under the settlement Chamberlain had power to remove any trustee at will and the power of appointing new trustees was vested in him. Chamberlain was one of the original trustees of the settlement. On Sept. 22, 1938, he retired from the trusteeship. No other change has been made in the trusteeship. A

The four settlements of Dec. 7, 1936, were also settlements made by Chamberlain and are immaterial for the purposes of this case. The settlements of Mar. 30, 1938, and Sept. 27, 1938, were also made by him. Under neither of these settlements was Chamberlain's wife a possible beneficiary. The income arising under them was subject to discretionary trusts in favour of Chamberlain's children and remoter descendants. Chamberlain was a trustee of all these settlements. B

The first question is whether upon these facts the commissioners were entitled to treat Chamberlain as a member of the company under sect. 15 of the 1939 Act.

That section, so far as relevant for that purpose, provides (subsect. (1)) that where :

... the Special Commissioners are of opinion that any person who is not a member of the company for the purposes of section twenty-one of the Finance Act, 1922, and the enactments relating thereto is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit, they may, if they think fit, treat him as a member of the company for the said purposes. C

And subsect. (3) :

For the purposes of this section, a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is in fact able so to do by any means whatsoever, whether he has any rights at law or in equity in that behalf or not . . . D

It is clear from the language of subsect. (3) that the complexity of the operations necessary to secure application of income or assets for the benefit of an individual in question is immaterial, and it is also clear that in order to give jurisdiction to the commissioners to treat an individual as a member of the company the quantum of the income or assets to which the individual's ability to secure application extends is also immaterial, though for the purpose of the second question that quantum is material. The case for the Crown upon both questions was put as a whole and was rested solely on the possible line of action open to Chamberlain upon the facts as we have stated them. The matter was put in this way. Chamberlain through his shareholding in his own right in Staffa controlled that company. Staffa in its turn through its shareholding in Talbot controlled Talbot. Chamberlain was governing director of both companies. He could secure the passing by either company of any resolution which might lawfully be passed. Chamberlain's control of both companies was, therefore, complete and readily exerciseable. It followed that at all relevant dates Chamberlain's control enabled him lawfully to cause Talbot to redeem all the preference shares of Talbot and the two ordinary shares of Talbot held by the signatories to the memorandum of association at a cost of less than £5,000—a sum which Talbot would have no difficulty in finding. Had that been done Staffa alone would have been interested in the income of Talbot in the relevant years. Such a transaction was obviously one to the financial advantage of Staffa. E

The position as regards Staffa was much the same. All the shares other than the "A" ordinary shares could if Chamberlain so decided be redeemed by the company. But, even if they were not redeemed, Chamberlain could decide what, if any, dividend should be paid in respect of any class of share. It was open to him, if he thought fit, to allocate the whole dividend to the "A" shares which were held by the trustees of the settlement of Mar. 10, 1936, under which his wife was a beneficiary. F

The resulting position is that, by an exercise of his rights, Chamberlain could in the relevant years before any declaration of dividend was made in respect of any preference shares in Talbot have secured that all its income became income of Staffa and that all such income should be paid either to him as owner G

of the outstanding preference shares in Staffa or to the trustees of the settlement of Mar. 10, 1936.

A Turning to the settlement of Mar. 10, 1936, Chamberlain's rights were that he could as a matter of right have removed one of the two trustees and appointed himself a trustee in place of the trustee so removed. He could then have removed his co-trustee and become sole trustee. As sole trustee Chamberlain at this stage is invested with a discretion as to the disposition of the income. He could in the exercise of his discretion have allocated income, and indeed the whole income, to his wife.

By this chain of actions Chamberlain could have secured the whole income of Talbot arising in the relevant years either for himself or his wife. The commissioners, it was argued, therefore, were right in both their decisions. This argument was accepted by MACNAGHTEN, J., and in substance represents his judgment upon the first question.

B So far as this question is concerned, three objections were raised. First it was said that the Trustee Act, 1925, precluded Chamberlain from installing himself in the position of sole trustee. Chamberlain's power to remove the first trustee and appoint himself a trustee was not disputed. But it was said that he could not by reason of the provisions of head (c) of subsect. (1) of sect. 37 of the Trustee Act, 1925, then remove the remaining trustee without appointing another trustee. There is no substance in this argument. The general validity of a power to remove a trustee contained in a trust instrument cannot be doubted, and indeed the validity of such a power is recognised by sect. 36 (2), of the Trustee Act, 1925. An appointment of a new trustee may, under the power given by that section, then be made as if the displaced trustee were dead. But there is nothing in that section or in the general law relating to trusts that requires an appointment of any trustee to be made on the occasion of the removal of a trustee. Sect. 37 (1), as the opening part states, applies on the appointment of a trustee and works out what may be done when such an appointment is being made either pursuant to sect. 36 of the Act or otherwise. In the case supposed no trustee is appointed and sect. 37 has no application at all.

E The second objection taken was that Chamberlain, in the assumed case that he was sole trustee, would be exercising a discretion entrusted to him in a fiduciary capacity and that it was going too far to assume that he would be justified as a trustee in allocating the whole income to his wife. But the Crown's case on the first point requires only that he should be able to allocate some income—not all the income of the trust—to his wife. The reasonableness of an assumption that he might lawfully do this is not open to doubt.

F The third objection taken, as we understood it, was that Chamberlain's ability did not extend to securing that income or assets of Talbot were applied for his wife's benefit but only to securing that funds having their origin in income or assets were so applied. In our opinion this argument has only to be stated to be rejected. Chamberlain's powers in relation to Talbot, Staffa and the trusts were Chamberlain's machine for controlling the destination of Talbot's income.

In our opinion, therefore, the commissioners were entitled in law to treat Chamberlain as a member of the company for the purposes of the Finance Act, 1922, s. 21.

G We now turn to the second question in the case—whether the Special Commissioners erred in law in apportioning the whole income of Talbot to Chamberlain. Two points were taken. It was argued first that as a matter of construction of sect. 15 (2) of the Finance Act, 1939, it was only something less than the whole income that could be apportioned to the person treated as a member of the company; and, second, that, assuming this argument to be incorrect, the apportionment of the whole income of Talbot was wrong in law or showed on its face that the power given to the Special Commissioners had not been properly exercised. The relevant part of the subsection runs as follows:

H The Special Commissioners may apportion to him such part of the income of the company as appears to them to be appropriate and may adjust the apportionment of the remainder of the company's income as they may consider necessary.

No stress was laid on the word "apportion," a word which though embracing fractional division does not import it. Emphasis was, for the purposes of this argument, laid on the use of the word "part" as necessarily implying a fraction only, and the use of the word "remainder" as necessarily implying the existence

of something which remains. This argument involves that while the allocation of all but a minute fraction of the income to the individual treated as a member would be possible, the addition to that fraction of the financially negligible "remainder" made the apportionment invalid—or, in other words, there must be a sham as well as a reality—perhaps a natural argument in this case.

In our view, the language used does not demand the construction suggested and the topic to which the subsection is addressed excludes its acceptance. The words "such part of the income" are in our opinion capable of being read and ought to be read as "such part, it may be the whole" of the income—in the same way as the word "some" in formal logic means "some, it may be all"—and the words "the remainder" as "the remainder if any," and so on. The first argument therefore fails. A

Upon the second point two distinct matters were relied upon. It was said first that the apportionment was wrong in law because on its face it showed that no weight had been attached to the circumstance that dividends had been paid on the preference shares in Talbot. B

As regards this, the critical fact is that Chamberlain's ability to dispose of the whole income was in existence long before these dividends were declared, and the whole income of Talbot had to be apportioned, even though all of it has been distributed by way of dividend. (See the Finance Act, 1939, s. 15.) The basis upon which sect. 22 of the Finance Act, 1921, and sects. 15 and 16 of the Finance Act, 1939, proceed, and the language used in sect. 16 of the latter Act, alike negative the proposition that declarations of dividends made at a time when the ability existed must as such be a factor in determining how much of the whole income it is appropriate to apportion to a person who is being treated as a member. The contrary indeed is the case. The existence of the ability, not its exercise, is the test. C

The second matter relied upon was that the apportionment assumes that Chamberlain could as the supposed trustee properly appoint the whole income in question to his wife and that this fact establishes that the apportionment was wrong. Upon the question of law involved in this argument it is sufficient to observe that an exercise of the discretionary powers given to trustees could only be questioned on the ground of bad faith (*Gisborne v. Gisborne* (1)), and that the settlement provided in terms that the trustees' discretion should be absolute and that the trustees should not be liable to account for the exercise of their discretion. There is nothing to show that bad faith would be involved—still less inherent—in any such transaction. The needs of Chamberlain's children—the only other living objects in addition to his wife of the discretionary trust—were not indeed apparent. They alone were the objects of the discretionary trusts subsisting under the settlements of Mar. 30, 1938, and Sept. 26, 1938, and Chamberlain was one of the trustees of both settlements. No part of the dividends of £9,622 15s. 4d. net and £6,000 net was applied for the purposes of any beneficiary, the former sum indeed being lent without interest to Commercial Securities, Ltd., a company in which Talbot was interested. An assumption that Chamberlain might lawfully have in all the circumstances appointed to his wife the whole of the trust income under the settlement of Mar. 10, 1936, seems on the facts to be justified. D

But assuming that a breach of trust would be involved in an allocation to Chamberlain's wife of the assumed income, the acquiescence of the beneficiaries—which is sufficient for the purposes of sect. 15 (see *Inland Revenue Comrs. v. L.B. (Holdings), Ltd.* (2))—can be reasonably assumed to be certain. Chamberlain was armed at all points. By virtue of his control of Staffa he could determine whether any class of ordinary shares should receive a dividend, and, if so minded, he could cause new ordinary shares to be created and issued, and so divert from the existing ordinary shares any chance of a dividend. No beneficiary could take any interest in the income arising under the settlement of Mar. 10, 1936, or the settlements of Mar. 30, 1938, and Sept. 27, 1938 (of both of which Chamberlain was one of the trustees), except under an exercise of the discretion in his favour. Under the first of these settlements the trustees, and under the other two Chamberlain as settlor, could cut out any beneficiary from all interest under the settlement. Chamberlain had other assets not included in any trust. Testamentary benevolence to his family might be made conditional on ratification of acts done by the trustees. Filial duty might suggest E
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acquiescence in anything Chamberlain did as trustee of the settlement of Mar. 10, 1936; enlightened self-interest would compel it.

It is not necessary for us in this case to consider in what circumstances, if any, other than error in law, it is open to the court to review an apportionment which appeared appropriate to the commissioners, for with MACNAGHTEN, J., we are of the opinion that the apportionment of the whole income to Chamberlain was appropriate.

- A We have dealt with the case on the footing on which it was presented in argument. But it appears to us to be unnecessary to consider the position under the settlement of Mar. 10, 1936; for Chamberlain (whose voting power in Staffa enabled him to pass a special resolution) could readily have increased the capital of Staffa by the creation of new ordinary shares, and secured allotment of those shares to himself and all moneys distributable by Staffa by way of dividend.

The appeals are dismissed with costs.

- B *Appeals dismissed with costs.*

Solicitors: *R. C. Bartlett & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

C COURT LINE, LTD. v. R. THE LAVINGTON COURT.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Stable, J.), **April 23, 24, 25, 26, 27, May 10, 1945.**]

Shipping—Charterparty—Time charter—Hire—Ship torpedoed but not sinking until 14 days later—When hire ceases to be payable—Constructive total loss—Abandonment—Marine Insurance Act, 1906 (c. 41), ss. 60, 61, 62 (1), 63.

- D The motorship Lavington Court was requisitioned by the Government under a time charter in the form T.99A, which was to continue in force, if the charterer wished, for 6 months after the cessation of hostilities. Cl. 25 of the charterparty provided: "If the ship be lost, hire shall be paid up to and inclusive of the day of loss. Should the vessel become a constructive loss such loss shall be deemed to have occurred and the hire under this contract shall cease as from the day of the casualty resulting in such loss." Cl. 13 of the charterparty provided for cesser of hire in certain events, but damage which was a direct consequence of warlike operations was excluded from the suspensory stipulations of the clause. On July 18, 1942, while proceeding in convoy to the Middle East carrying war material, the Lavington Court was struck by a torpedo and sustained damage of various kinds so that she was no longer navigable. The only chance of saving her was by towing, but the convoy could not take her in tow and, in the circumstances, the master of the ship decided to leave her, taking his crew with him in one of the convoy escorts. Owing to war conditions, he was unable to take further steps for the safety of the ship but had to entrust all such matters to the naval authorities. The naval authorities considered salvage possible if tugs were sent at once, and they attempted to save the ship by towing her to a port where she could be repaired. But after being towed over 600 miles, the ship foundered and sank on Aug. 1, probably owing to bad weather. It was provided by cl. 23 of the charterparty that, if the ship were kept covered by a war risk association, the charterer would pay the premium. The ship was so insured, and payment as for a total loss on July 18 had been made by the insurers of the hull. The owners of the Lavington Court claimed hire under the charterparty from July 18 to Aug. 1, 1942, on the ground that there was no total loss of the ship, actual or constructive, before Aug. 1. It was contended by the Crown that hire from July 18 to Aug. 1, was not payable because (i) the events which happened constituted a constructive total loss within cl. 25 of the charterparty; (ii) there was a frustration of the adventure; (iii) there had been a repudiation of the contract in that, the ship being damaged and the crew no longer on board, the owners were unable to perform their part of the contract; (iv) by accepting payment from the insurers of the hull as for a total loss on July 18, the owners were
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precluded from claiming chartered hire from July 18 to Aug. 1. It was contended by the owners that the word "abandonment" in the Marine Insurance Act, 1906, s. 60 (1), could not include abandonment by the master but should be construed as referring only to abandonment by the assured to underwriters :—

HELD : (i) [DU PARCQ, L.J., *dissenting*] the word "abandonment" was used in two different senses in the Marine Insurance Act, 1906, s. 60 (1) ; when used in reference to a ship being abandoned "on account of its actual total loss appearing to be unavoidable," it included abandonment by the master in exercise of his express or implied authority. A

(ii) [STABLE, J., *dissenting*] no constructive total loss on July 18 or 19 had been established under the Marine Insurance Act, 1906, s. 60 (1) or (2), because (a) the action of the master in leaving the ship and taking off his crew was not, in the circumstances of the case, an abandonment within the meaning of sect. 60 (1) ; (b) recovery of the ship on July 18 or 19, although uncertain, could not be said to be "unlikely." (*Bradley v. Newsom* (1) *applied.*) There was, therefore, no constructive total loss at that time within cl. 25 of the charterparty because, if notice of abandonment had been given, the insurer could have rejected it as premature. B

(iii) in view of the terms of the charterparty, the doctrine of frustration did not apply. C

Bank Line, Ltd. v. Capel (4) and *Tamplin S.S. Co. v. Anglo-American Petroleum Products Co.* (5) distinguished. C

(iv) in the circumstances of the case, there had been no repudiation of the contract.

(v) settlement by the owners with the insurers of the hull did not absolve the charterer from the obligation to pay.

Decision of TUCKER, J. ([1944] 2 All E.R. 249) affirmed. D

[**EDITORIAL NOTE.** The charterparty here in question contained a clause by which hire was to cease if the vessel should become a "constructive total loss." This phrase is defined in the Marine Insurance Act, 1906, s. 60, as occurring "when the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable." One of the main difficulties is the application of the rights and liabilities arising under a marine policy to the owner and hirer of a ship. It is held that abandonment must not be construed in the narrow sense of abandonment to underwriters but rather as meaning "given up for lost." It is held on the facts that the master had no intention to abandon his ship in this sense. The master was primarily concerned with saving the lives of the crew and properly entrusted his ship to the naval authorities, who considered salvage possible. E

AS TO LIABILITY FOR HIRE UNDER TIME CHARTER, see HALSBURY, Hailsham Edn., Vol. 30, pp. 308-312, para. 500 ; and FOR CASES, see DIGEST, Vol. 41, pp. 358-362, Nos. 2074-2104.

AS TO CONSTRUCTIVE TOTAL LOSS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 364-366, paras. 522-524 ; and FOR CASES, see DIGEST, Vol. 29, p. 268, No. 2152, and pp. 272-274, Nos. 2202-2220.] F

Cases referred to :

* (1) *Bradley v. Newsom (H.) Sons & Co.*, [1919] A.C. 16 ; 41 Digest 649, 4809 ; 88 L.J.K.B. 35 ; 119 L.T. 239.

(2) *The John and Jane* (1802), 4 Ch. Rob. 216 ; 41 Digest 851, 7152.

* (3) *Rickards v. Forestal Land, Timber and Railways Co., Ltd.* *Robertson v. Middows, Ltd.* *Kahn v. W. H. Howard, Bros. & Co., Ltd.*, [1942] A.C. 50 ; [1941] 3 All E.R. 62 ; 110 L.J.K.B. 593 ; 165 L.T. 257. G

* (4) *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435 ; 12 Digest 391, 3198 ; 88 L.J.K.B. 211 ; 120 L.T. 129.

* (5) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397 ; 12 Digest 390, 3194 ; 85 L.J.K.B. 1389 ; *sub nom. Re F. A. Tamplin S.S. Co., Ltd. and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315. H

(6) *Manchester Ship Canal Co. v. Horlock*, [1914] 2 Ch. 199 ; 41 Digest 169, 100 ; 83 L.J.K.B. 637 ; 111 L.T. 260.

(7) *Shepherd v. Henderson* (1881), 7 App. Cas. 49 ; 29 Digest 286, 2333.

(8) *Polurrian S.S. Co., Ltd. v. Young*, [1915] 1 K.B. 922 ; 29 Digest 273, 2213 ; 84 L.J.K.B. 1025 ; 112 L.T. 1053.

(9) *Robertson v. Petros M. Nomikos, Ltd.*, [1939] A.C. 371 ; [1939] 2 All E.R. 723 ; Digest Supp. ; 108 L.J.K.B. 433 ; 160 L.T. 542.

APPEAL by the Crown from a decision of TUCKER, J., dated Aug. 3, 1944, and

reported [1944] 2 All E.R. 249, where the facts are fully stated.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and Patrick A. Devlin for the Crown.

Sir Robert Aske, K.C., and Owen L. Bateson for the owners.

Cur. adv. vult.

- A SCOTT, L.J. : This appeal concerns a petition of right by the respondents, as suppliants, against the Crown for chartered hire of the *Lavington Court*, requisitioned by His Majesty's Government on May 18, 1940, upon the terms (as subsequently agreed) of the common form of Government time charter known as T.99A. The amount in issue is agreed at £1,257 ls. for a certain number of days which elapsed between July 18 and Aug. 1, 1942. On the former date the *Lavington Court* was struck by an enemy torpedo, and on the latter date she foundered suddenly when in tow. The question for decision is whether under the terms of the time charter freight was payable or not.
- B The suppliants make no claim as from the date of her foundering. TUCKER, J., in a considered judgment held that the suppliants were entitled to recover. No question of figures arises.

The Solicitor-General contends that the decision below was wrong for three main reasons : (i) that the events which happened constituted a constructive total loss within cl. 25 of the charterparty, which is in these terms :

- C If the ship be lost, hire shall be paid up to and inclusive of the day of loss, or if missing, up to and inclusive of the day last spoken. Should the vessel become a constructive total loss such loss shall be deemed to have occurred and the hire under this contract shall cease as from the day of the casualty resulting in such loss.
- (ii) frustration of the adventure ; (iii) repudiation of the contract, in that the ship being damaged and the crew being no longer on board, the suppliants were unable to perform their part—a fundamental part—of the contract.
- D He did not argue, but did not abandon, a contention that there was an actual total loss of the ship on July 18.

The appeal thus involves two aspects : (i) the interpretation of the contract, and (ii) the right appreciation of the facts upon the evidence before the judge. On the latter question we are in as good a position to appreciate the evidence and draw inferences from the facts there disclosed, as he was ; for the evidence was all written and none of it oral, the parties having agreed so to try the case, the court being left to draw its own inferences. We, of course, pay high respect to the considered judgment of the judge after a very careful trial, but it is our duty to exercise our own judgment on the re-hearing under the Judicature Act.

- E Before touching upon the evidence, it is convenient to say one thing further about the charterparty. It contained in cl. 13 a very special and detailed provision about total or partial cesser of hire "in the event of any . . . loss of time from deficiency of master, officers, crew or stores, or breakdown of machinery or damage from any other cause whatsoever" ; but this provision was expressed as having no application "in the case of damage which is a direct consequence of hostilities or warlike operation." The effect of this exception from the suspensory stipulations of the clause is that hire, so far as that clause is concerned, was to run on and be payable in spite of the loss of time for the charterer when that loss was due to damage caused by enemy action as in the present case.
- G The torpedo deprived the charterer of all benefit under the clause ; he continued bound to pay hire notwithstanding the peace-time exemptions of the clause. The only other provision I need mention is cl. 23, which incorporated certain provisions of a war-risk insurance to this extent only, that if the ship were entered in and kept covered by a war risk association the charterer would pay the premiums. The ship was so insured by the West of England Mutual War Risk Association, and one submission of the Solicitor-General in the
- H answer and plea was that by reason of a payment by that association for a total loss the suppliants were precluded from claiming chartered hire from July 18 to the date when the ship foundered. In my opinion, that clause has no relevance and the contention no substance. If there was a constructive total loss, the claim is barred by cl. 25, but the real question in the appeal is whether there was a constructive total loss, and I postpone discussing the defences of frustration and repudiation until I have dealt with that issue.

Constructive total loss is defined in the Marine Insurance Act, 1906, s. 60. Subsect. (1) is, in my opinion, the only one that is directly relevant, although

subject. (2) (i) has to be considered, both because reliance was, in the alternative, placed on it by the Solicitor-General, and because it throws light on the construction of subject. (1); indeed, sects. 57, 61, 62 and 63 also throw light on the meaning of sect. 60 (1). The material words of sect. 60 are :

(1) . . . there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable . . .
 (2) In particular, there is a constructive total loss (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship . . .

At this point I will refer to only one of the legal contentions before us, that of counsel for the respondents, namely, that in all the sections about constructive total loss the verb "abandon" and its substantive "abandonment" should, wherever used, be construed in one and the same sense, *i.e.*, as referring to abandonment by the assured to underwriters. I think this contention wrong. Sect. 60 (1) deals with events which take place before any abandonment to underwriters, and before any passing of the insured property to them. Neither can happen until a constructive total loss as defined by sect. 60 has first occurred; its occurrence is a condition precedent to any abandonment and passing of property to underwriters.

It is necessary to state the effect of the evidence in considerable detail because the final conclusion of fact upon which our decision on the issue of constructive total loss depends must be an inference drawn from the whole of the facts upon a consideration of all the circumstances. The *Lavington Court* was a steel motor ship of 5,372 tons gross, built in 1940. On July 18, 1942, she was sailing in a very large convoy under naval escort, laden with a full cargo of 6,000 tons of war material, including military rolling stock in her tween decks, on a voyage from the United Kingdom to the Middle East *via* Cape Town, drawing 19ft. 6ins. forward and 21ft. 6ins. aft. About 11.30 p.m. on that day, in an approximate position of 42°38 N. and 28°28 W., another ship in the convoy, on her starboard bow, no doubt by reason of a torpedo, blew up in a sheet of flame and disintegrated. Some eight minutes later she herself was torpedoed in the way of the after-peak, and wholly deprived of both driving and steering power. The crew's quarters aft were destroyed, and many members of the crew killed or injured. The weather conditions were not bad, being moderate wind and swell. The master at once had a wireless message sent out (which was duly received by the naval authorities in the convoy and elsewhere) saying she had been torpedoed. She then started to sheer to port and fall astern of the convoy. After sending officers round to investigate, but no replies coming up from the engine-room although the electric lighting was still on, the master shortly before midnight ordered the crew into the two lifeboats (about 20 persons in each) he taking charge of one and the chief officer of the other, with the intention of hauling off, waiting by till daylight, and then, if possible, reboarding the ship. He took this action because, as he said in a statement in evidence, the ship appeared to him to be going down by the stern. About midnight (as stated in the record of the commander), H.M. sloop *Wellington*, one of the escort vessels, arrived, and in answer to an S.O.S. signal by torch took on board those in the master's boat. On account of enemy submarines in the neighbourhood she could not wait either to make fast their boat, or to find and pick up the other boat, but promised to return later. On boarding the sloop, the master of the *Lavington Court* (as he stated in his disposition, made after repatriation at South Shields on Sept. 21, 1942) informed Lieut.-Commander Segrave, the commander of the sloop, that "in his opinion the *Lavington Court* would not sink for a considerable time." About 3.0 a.m., according to the master, the sloop returned, fortunately found the chief officer's boat, took those in it on board and made it fast astern. On hearing shouts from the *Lavington Court* the sloop also by a small searchlight detected four men on her deck; they were informed that they would be taken off at daybreak. The vessel was by then heavily down by the stern. At daybreak, the sloop having stood by in the meantime, the master, three deck officers, the chief engineer and three others then returned to the ship in the chief officer's boat, although it had only three oars left in it. They found the four members of the crew still alive, though injured; and also made as thorough an examination, as was then possible, of the vessel. Six members of the crew were missing, three bodies being found,

and the other three I think were presumed drowned, as two had already, when the boats first left the ship, been picked up out of the water. The stern portion of the vessel was hanging down at an angle of 35°, the ship having broken across at the fore-side of the tonnage hatchway in No. 5 hold. In that hold the water was up to within a few inches of the top of the 9in. fore coaming of the hatchway, which I assume to have been not far aft of the No. 4 hold after bulkhead. The ship was built with a free run of 'tween decks fore and aft, with no cross partitions, and there were motor lorries stowed on the top of the hatches. The sounding rod had been lost in the explosion, and it was not possible to ascertain the depth of water in No. 4 hold; but it was then thought that some water was heard flowing in. The engine-room lay immediately on the fore-side of the fore bulkhead of No. 4 hold, but the watertight door at the fore end of the tunnel was known to be closed and tight. The electric lights had by then gone out, but the chief engineer went down and investigated with a torch, and found some water entering the engine-room but the engine-room showed no sign of flooding. Otherwise things were normal. The holds forward of the engine-room were all sound. The engine-room and pumps seemed to be in perfect working order.

So much for the state of the ship. The other side of the picture is the imminent danger in that neighbourhood from enemy submarines, which then seemed to be very grave. The convoy had got some 28 miles ahead; the Wellington was under a present duty to return for its protection and could not possibly stand by the Lavington Court; and in daylight the immobile ship would be at the mercy of any U-boat that spotted her. The need of the Wellington to get back to her usual duties was urgent, and the master and his officers had not enough time to make a more thorough investigation. The lives of the officers and crew were rightly the master's primary concern. In those difficult circumstances, he decided that the whole of the ship's company should stay on the Wellington. I think it a fair inference from the written evidence as a whole, that he took this decision in the firm belief (which was in fact well-founded) that the naval authorities were sure to take all practicable steps to locate and pick up the Lavington Court, and to do their best to tow her to a port where she could be repaired. His deposition and his statement taken together are not identical in their tenor, but I think they justify an inference by us that after the daylight investigation on July 19 his then considered opinion was hopeful, provided always that the weather remained favourable—and it was the best season of the year for good North Atlantic weather—and that if only tugs could get hold of her there was a fair chance of saving her: although he undoubtedly realised that if bad weather came on her chance of surviving a long tow would be poor. What he in fact expected, however, in the way of weather, is immaterial; he was not a prophet. It was good at the time and in the event continued good till the last 24 hours of the tow. The really important facts, in my opinion, are (i) that his primary concern was for the safety of the crew, and (ii) that his only practicable course was to entrust the safety of the ship to the care of the naval authorities acting in the joint interest of the Government, and of the owners to whom, as master, he was responsible. I say this for the following reasons: I incline to think that in T.99A there is an implied term, difficult to express, but more or less to the effect, that during war, when the ship is sailing in convoy under the protection of naval escort, the charterer will do everything reasonably possible to protect the ship, her cargo and her crew—subject of course to his doing the same for other ships in the convoy, and to the unfettered discretion of the commander of the convoy as to the priority of his duties. But even if the duty of the charterer was not contractual, I am of opinion that the master, in such circumstances as existed on July 19, was entitled to treat the commander of the Wellington, and indeed the whole of the naval authorities apprised of the situation in which the Lavington Court found herself, as the supreme authority in control of and under a public duty to take all practicable measures for the safety of every ship belonging to the convoy, and of every ship's crew, as well as of the charterer's cargo. In that capacity the naval commander of the convoy, acting in co-operation with and under the orders of his superiors, would necessarily have a duty towards each individual merchant vessel; and conversely, the master of each such vessel would be entitled to leave decisions to the naval commander and his subordinate officers such as the commander

of the Wellington. Whether that would constitute an agency of necessity is a theoretical irrelevancy. The relevant point is that the master of the Lavington Court in asking for and accepting the guidance and control of the naval authorities could not be taking on behalf of his owners any such independent action as is predicated by "abandonment" in sect. 60. And the court must give due weight to that consideration.

The conclusions which I have just expressed affect the comparative hopefulness of the position both objectively and subjectively as regards the possibility of saving the ship at the time when the master and his officers finally left her on the morning of July 19; and they are corroborated by Lieut.-Commander Segrave's message sent off by him that morning and received by F.O.C. North Atlantic, at 10.25 a.m. He there says: "Consider salvage possible if tugs sent at once." His view of the position was acted on at once by the naval authorities, as appears from the series of telegrams which follow on the same date, showing that action was taken upon the basis of his message. I think we should draw the inference that the whole position was discussed between Lieut.-Commander Segrave and the master of the Lavington Court and, if so, it seems to me to confirm my understanding of the master's mind at the time. We have only the very bare and condensed written evidence of the master, but I feel sure that had his evidence been given orally such conversation would have been proved. The history of the prompt action taken by all the naval authorities from first to last in endeavouring to save not only military cargo of high importance, but a comparatively new merchant ship of great national value at a time when our losses of merchant ships was appalling, show how well justified the master was in relying upon their help to do everything possible. This reliance is an important fact, material to our decision. The master was not a lawyer and was not acting with a view to satisfying any particular legal doctrine, whether of constructive total loss, or of salvage law, or rescission of contract, or agency of necessity between the naval escort of the convoy and the owners of the Lavington Court. He was taking action primarily to save the lives of the crew, or rather to avoid exposing them to unnecessary risk: but in the second place to do the best thing for his owners by entrusting the ship to the naval authorities.

I will now deal with the questions of law. The first is whether the ship was abandoned on account of her actual loss "appearing to be unavoidable," so as to give a right to the charterer to claim cesser of hire under cl. 25 on the footing of a constructive total loss. The clause does not of course mean that there must be constructive total loss actually recoverable under the policy referred to in cl. 23 in the sense of a claim put forward against the war risk association; the condition will be satisfied if the events are such as would substantiate such a claim if made under any normal policy of marine insurance. It follows that the clause might come into operation even if the owner had no insurance on hull and was taking the risk himself. In other words, it is a hypothetical test with a practical application; and that test necessarily predicates such facts as would constitute a good claim within sect. 60 (1) of the Act, *viz.*, (i) an abandonment, and (ii) that abandonment made for the first of the two reasons there mentioned, *viz.*, that her actual loss appeared unavoidable. The word "abandon," as was said in *Bradley v. Newsom* (1), has in the English legal use several different meanings. It is used in three different senses in the very group of sections which deal with constructive total loss. Indeed, it is used in two different senses in sect. 60 (1). When the ship is spoken of as abandoned because of "its actual . . . loss appearing unavoidable," the word is used in nearly the same sense as when, according to the law of salvage, the ship is left by master and crew in such a way as to make it a derelict, which condition confers on salvors a certain, but not complete, exclusiveness of possession, and a higher measure of compensation for salvage services. But to constitute the ship a derelict, it must have been left (a) with that intention (*animo derelinquendi*): See *The John and Jane* (2); (b) with no intention of returning to her; and (c) with no hope of recovering her. Obviously that sense of the word is frequently inappropriate to the second case to which subsect. (1) applies, *viz.*, because it could not be preserved from total loss (*i.e.*, an economic test) "without an expenditure greater than her value when the expenditure had been incurred." Another distinction between those two alternative grounds in

subsect. (1) for claiming a constructive total loss is that, in the latter case, the financial estimate is one which normally would be made by the owner; whereas the forecast of the probability of actual total loss would, at any rate a century ago, nearly always have to be made by the master on the spot; and even in these days of easy and quick wireless communication, the decision would very often devolve on the master. The making of the financial estimate is, of course, merely an exercise of business judgment and discretion. The abandonment

- A which follows after it may be expressed in a letter and not in boats as in the first alternative; or be a mere mental decision by the owner that he will exercise the option which sect. 61 allows him. There is a somewhat similar contrast between the two alternatives of sect. 60 (2) (i) (a) and (b). In sect. 61 the word "abandonment" seems to import an act on the part of the assured, but in truth it amounts usually to nothing more than his making up his mind to give notice of abandonment to the insurer under sect. 62 (1), at the peril of losing his right of election under sect. 61. The legal consequences of a notice of abandonment if accepted by, or established as valid against the insurer is to pass the property to the underwriter as an abandonment to him under sect. 61. A valid "abandonment" in sect. 63 necessarily means an abandonment by the assured to the insurer and passes the property to him. It cannot be the same act as is contemplated by sect. 60 (1) where the act is done in consequence of an actual total loss appearing unavoidable. That abandonment, C for example, by the master and crew leaving the ship with the intention of never returning, etc., may lead up to and justify a subsequent abandonment to the insurer; but the two are wholly different acts, and distinct in kind. For these reasons I cannot agree with the contentions of counsel for the respondents (i) that wherever it is used in the group of sections the word always has the same meaning, namely, an abandonment by the assured to the insurer with a resultant D passing of property; and (ii) that it must always be by the assured, the owner, and cannot ever be by the master. The first type of "abandonment" referred to in sect. 60 (1) may and very often must be by the master in exercise of his authority express or implied, but usually pursuant to his general powers of agency for his owner.

- The facts of the present case fall, in my opinion, within the principles laid down in the House of Lords in *Bradley v. Newsom, Sons & Co.* (1). For the E reasons already indicated in my narrative of the facts, I do not think the master left, after the daylight examination on July 19, *animo derelinquendi*, i.e., of leaving the ship for good and all: or *sine animo revertendi*, in the sense of intending that neither he, nor the naval authorities, nor his owner should return to the ship: or *sine spe recuperandi*, in the sense of abandoning all hope of his owner recovering the ship. And that is the time when the outlook has to be appraised, and appraised on the basis of the then known facts: see per F LORD PORTER in *Rickards v. Forestal Land, Timber & Railways Co.* (3), at p. 110 ([1941] 3 All E.R., at p. 97):

However, one must not judge by the result, but from the probabilities as they would have appeared to a reasonable assured at the moment when he knew of his loss and could have given notice of abandonment—had notice been required.

- He may have had his private meteorological opinion that continuing fine G weather could not be counted on for a long tow, but I am convinced that he was by no means without hope. Had salvors come along they would have been entitled to take possession, but their right of possession would have been only their maritime lien as salvors upon an unnamed ship. The position seems to me to have been the same legally as if, by arrangement with the naval authorities the master had been allowed to send his own S.O.S. to the salvage tugs at Gibraltar. I cannot see that he ever gave up possession of the ship, except H in the barest physical sense, and that was by enemy compulsion and involuntarily. I concede without hesitation the contention of the Solicitor-General that the master had general authority, as master, to "abandon" in the sense of sect. 60 (1) if, in his discretion, he had thought it right and the circumstances had warranted it; but, in my view, he did not think they did. I, therefore, conclude that there was no abandonment. But even if his action had been sufficient to constitute abandonment *per se*, it would not have satisfied subsect. (1), because I cannot draw the necessary further inference that he thought "a total loss unavoidable." It did not so appear to him any more than to

Lieut.-Commander Segrave, who at once sent the wireless telegram, actually received at 10.25 a.m., asking for tugs. The above considerations also, for two reasons, dispose of subsect. (2): (i) the owner was never "deprived of possession" within the meaning of that subsection; and (ii) even if that view be wrong, the second statutory condition was not fulfilled, for although it was "uncertain" it was not "unlikely" that the owner would recover possession. Even looking at the prospect at the time when Lieut. Commander Segrave's telegram for tugs was being despatched, recovery could not be said to be "unlikely"; for no insurer would have accepted a notice of abandonment at that stage; he would have said "wait and see," and in six days his refusal would have been justified by the success of the tugs in getting hold of her. There could not be a position, within the charterparty, equivalent to a constructive total loss at a time when, if notice of abandonment had been given, the insurer could properly have rejected it as premature.

The various alternative defences of the Crown, argued by the Solicitor-General, were in their nature real alternatives to the constructive total loss defence. The first is "frustration," i.e., that the events which, *ex hypothesi*, did not constitute a constructive total loss, caused complete frustration of the whole charterparty. To that issue I first apply LORD SUMNER's test in *The Bank Line, Ltd. v. Capel* (4), at pp. 454, 455; and I add the special term of the time charter before us (which had run for two years already) that if the charterer wished, it would continue in force for six months from the cessation of hostilities, a very different type of charter from that in the *Bank Line* case (3), and less susceptible of the implied term of frustration than even the Tamplin charterparty (see *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co.* (5)). In addition, the charterer in this charterparty had an absolute option to say, without reasons given at any time, that he did not require the ship any more. Lastly, cl. 13 and 25, although they do not of themselves exclude an implied term about frustration, contain so many provisions about cesser of hire that they carry some weight in the balance on the issue of frustration. I do not think that term can be implied in the circumstances of this case.

The next contention is that of repudiation, namely, that as soon as the ship ceased to be an effective cargo-carrier, by reason of the war damage and the impossibility of risking the lives of the ship's company by keeping them on board, there was a repudiation by the owner of his contract. This aspect also is fully dealt with in *Bradley v. Newsom, Sons & Co.* (1), at pp. 32, 35 *per* VISCOUNT HALDANE, and at pp. 51-55 *per* LORD WRENBURY. In my view there was no repudiation of the contract by the master, but only the operation of an external peril; and there was certainly no acceptance of the repudiation, if any, by the charterer; and, indeed, if there was repudiation, the charterer, through the naval authorities, elected not to rescind.

The final contention is really the same as the last under a different name, viz., the abandonment of the contract. To that I repeat my last paragraph and, as DU PARCQ, L.J., suggested during the argument, I adopt the successful argument of Mr. McKinnon, K.C., as he then was, in *Bradley v. Newsom, Sons & Co.* (1), at pp. 17, 18. Finally, I would point out that the vessel was in fact towed over 600 miles, and in another four days would, with a continuance of good weather—quite possible in early August—probably have been brought successfully into a repairing port of the United Kingdom. It was only the bad weather of the last day which caused her to sink. Subsequent discussions with the insurers are all irrelevant.

I agree with the admirable judgment of TUCKER, J. The appeal is dismissed with costs.

DU PARCQ, L.J.: The only question arising in this appeal about which I have felt any doubt is that which depends on the correct application to the facts of the case of cl. 25 of the charterparty. Did the Lavington Court become a constructive total loss on July 19, 1942? The phrase "constructive total loss" belongs, as was said in *Manchester Ship Canal Co. v. Horlock* (6), at p. 208, to the language of marine insurance, and can have no meaning as applied to a ship, except in connection with marine insurance. It has long been in vogue, and has the merit of brevity and at least seeming simplicity. In 1881, LORD BLACKBURN was not sure of its complete accuracy (see *Shepherd v. Henderson* (7), at p. 70), but it has long been well-established and all doubt as to its precise

meaning must be silenced by the fact that the legislature has now defined it for us. It may, however, still be doubted whether it was altogether a happy thought to include it in a charterparty, where it has to be read and construed in what is, strictly speaking, an alien context.

- A In my opinion, TUCKER, J., approached the problem in the right way. The definition of "constructive total loss" is to be found in the Marine Insurance Act, 1906, s. 60. Sects. 61, 62 and 63 give no assistance for the present purpose except in so far as they throw light on the meaning of sect. 60. It is, in my opinion, legitimate, and may be useful, to test the judge's solution of the problem by looking at the facts as if the dispute has been between owners and underwriters. Suppose that the weather had held and that the Lavington Court had been towed, as she then well might have been, to a British port. Assume further, that it had then been found that the cost of repairing the damage would not have exceeded the value of the ship when repaired. Suppose, finally,
- B (and, although this last hypothesis is against every probability in existing circumstances, there have been times, as underwriters are sadly aware, when it might have been valid) that it had suited the owners better to have the insured value of their ship than the ship itself. We then have a case in which the owners might possibly have alleged against the underwriters that the ship was a "constructive total loss" when the master and crew left her, and have given notice of abandonment. Would this have been a valid abandonment within sect. 63?
- C That depends on the true answer to the question propounded in this case, but there may be some advantage in restating it in relation to the hypothetical circumstances which I have set out, since in this way the fact that we must talk the language of marine insurance is emphasised. It cannot, I think, be a matter of complaint that I have assumed the safe arrival of the ship in a British port. If, in the events that happened, she was a constructive total loss on
- D July 19, she would equally have been a constructive total loss on that date if subsequently she had been towed into harbour in her damaged condition. It appears to me that, in the case which I have supposed, the underwriters would have been on strong ground if they had disputed the claim of their assured.
- E The word "abandoned" in sect. 60 cannot, in my opinion, be given one sense in relation to the first, and another in relation to the second limb of subsection. (1). The same word is sometimes used more than once in a section, with different meanings, but I cannot believe that the same word, used once, can be intended to mean more than one thing. I agree with TUCKER, J., that the word "abandon" must refer to something done by the shipowner or his agent with his authority, and I would add that the master may often be an agent of necessity. I understand "abandon" to mean "give up for lost," and when I say give up for lost I mean that the owners are renouncing all their rights in the ship except the right to recover insurance. This meaning fits both limbs of the subsection.
- F Of course the master may, in this sense, abandon the ship on behalf of the owners, but in order to prove that he has done so, it is not enough to show that he and the crew left the ship temporarily to her fate, or that, having left her, he had grave doubt whether she would be recovered or ultimately saved. It must, I think, be made clear that he so acted as to show an intention to renounce all the owners' (his principals') rights in the ship, their right to property as well as to possession. Taking this view of the section, I do not see my way to differ
- G from the opinion of TUCKER, J., that there was no abandonment on July 18 or 19. Even if there had been an abandonment, I think (to continue my hypothetical illustration) that the underwriters might have urged with force that the evidence was insufficient to show that on July 19 the actual total loss of the ship appeared to be unavoidable, and that it was on that account that she was abandoned. It would not, in my opinion, have been reasonable to assume
- H that the efforts of the Royal Navy to find the ship would be unavailing, and if she were once found there was at least a reasonable prospect that she might be safely towed to a British port. It is very difficult to decide in any given case what was probable on a particular date in the past; and the task is not rendered more easy by the fact that we know what did in fact happen. If the question be what is possible, the fact that an event happened undoubtedly proves that event to have been possible, but the same fact does not prove the event to have been probable. The forecasts of the wisest and best-informed of men are often falsified by events, yet what they honestly foretell must be deemed to be probable.

It is, not, in my opinion, legitimate to attach any more importance to the fact that the ship eventually became a total loss than would have been attributable to the fact that she had survived if, given favourable weather, she had been towed to safety. The question of fact is no doubt a difficult one. I am by no means satisfied that the judge's answer to it was wrong.

I must add a few words as to the first part of sect. 60 (2) (i). That part of the section seems to be intended to deal with a case in which the ship is lost in the sense that, though she is still in being, she has been taken out of the possession of the assured, such a case, for instance, as that of *Pollurian S.S. Co. v. Young* (8). I doubt whether it is appropriate to the present case. If it is to be applied to it, I am not prepared to say that the judge ought to have held that it was at any time "unlikely" that the owners would recover the ship down to the moment when she sank and became a total loss. The question is one of fact and essentially one which a jury might have been called upon to answer. When weighing the probabilities they would have been entitled, in an action fought between assured and underwriters, to take into consideration all those facts which were known to, or reasonably ascertainable by, the parties at the date of the alleged constructive total loss. In my judgment, a decision in favour of underwriters on this issue would have been reasonable and, on the whole right.

I agree with my Lord that this appeal should be dismissed.

STABLE, J.: In this case the suppliants claim the sum of £1,257 ls. the net amount of chartered hire of the M.S. Lavington Court for the period from July 18 to Aug. 1, 1942. The Crown resists the claim on the primary ground that on July 18 or 19 the Lavington Court became an actual or constructive total loss. If this is successfully established that is an end to the matter, as cl. 25 of the charterparty provides:

If the ship be lost, hire shall be paid up to and inclusive of the day of loss, or, if missing, up to and inclusive of the day last spoken. Should the vessel become a constructive total loss such loss shall be deemed to have occurred and the hire under this contract shall cease as from the day of the casualty resulting in such loss.

If, alternatively, a total loss is not established prior to Aug. 1 when the ship sank, it is contended that the liability to pay hire ceased on July 18 or 19, for one or more of three reasons, *viz.*, (i) that the casualty that the ship suffered shortly before midnight on July 18, and the consequent action of the master and crew, was a partial loss of the ship which frustrated any further performance of the contract; (ii) that the abandonment of the ship by the master and the crew was a repudiation by the owners of the contract; and (iii) that by accepting payment from the underwriters as for a total loss on July 18, the owners, on the supposition that, but for this settlement with underwriters they would have been entitled to receive hire to Aug. 1, released the Crown from this obligation.

The Marine Insurance Act, 1906, s. 56, provides that any loss other than a total loss is a partial loss. Sect. 57 defines an actual total loss. Sect. 60, the section with which this case is principally concerned, defines a constructive total loss. I was attracted by the submission that when this vessel was struck by the torpedo and left by the master, officers and crew to her fate, whatever that fate might be, inasmuch as without the intervention of any fresh cause such as a second torpedo attack or abnormally heavy weather she foundered on Aug. 1, the proper inference to draw from the facts was that she was an actual total loss as from July 19. The Solicitor-General, however, without abandoning the point, preferred to stand on the footing of a constructive total loss, and I am content to deal with the matter on that basis.

A constructive total loss is a conception peculiar to marine insurance, and one of the difficulties in deciding this case arises from having to take definitions and conceptions regulating the rights and obligations as between an assurer and an assured and transposing them to a charterparty, where the rights and obligations are those of owner and hirer of the ship. Sect. 60 (1) is in these terms:

Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

It was contended by the suppliants that "abandonment" must be construed in the narrow technical sense of abandoned to underwriters, and it was stressed that if the words "on account of its actual loss appearing to be unavoidable" are omitted, abandonment in relation to the remainder of the subsection must mean abandonment to underwriters and no more. Notwithstanding the force of the argument that an Act of Parliament is the last place in which one would expect to find that freak of syntax which I was taught to recognise as an anacoluthon—a legitimate device in literature when it is sought to arouse emotion or surprise—I cannot accede to it. I feel constrained to give the wider or possibly double meaning to the words "reasonably abandoned" with the result that "reasonably abandoned on account of its actual total loss appearing to be unavoidable" is, in my judgment, directed to the act, that is to say, the actual abandonment of the ship by the responsible persons in whose charge she is.

A In my judgment, abandonment in the present context was complete when the master finally and irrevocably left the ship irrespective of whether he intended or contemplated or even knew the legal consequences of his act as between his owners, underwriters, charterers or salvors. I am fortified in this conclusion by a comparison between sects. 60 and 61 of the Marine Insurance Act, 1906.

B The latter section confers on an assured a right of election where there has in fact been a constructive total loss antecedent in time to the moment when the right is exercised. One of the courses open to the shipowner in these circumstances is to abandon the subject-matter insured to the insurer, an act of abandonment which must be later in time and different in quality from the abandonment contemplated in sect. 60. I cannot think that the parties to the present contract contemplated that their respective rights and obligations would depend on how a choice of remedies by the shipowner as against his underwriters was exercised. The cessation of hire depends, in my judgment, on the happening

C of the event which entitles the shipowner to exercise his choice irrespective of how he chooses or, indeed, of whether the ship was insured at all (see *Robertson v. Nomikos, Ltd.* (9), per LORD WRIGHT, at p. 381 ([1939] 2 All E.R., at p. 727). This was the construction which, as I think rightly, commended itself to TUCKER, J. Reading the words "reasonably abandoned" in that sense, before there is a constructive total loss under this charterparty three conditions have to be satisfied: (i) the ship must be abandoned, (ii) the abandonment must be reasonable, and (iii) the reason for the abandonment must be that her actual total loss appeared to be unavoidable. In my judgment, the test of whether there has been an abandonment in fact is the test laid down in cases where the rights of salvors are concerned, namely, there must be an abandonment *animus derelinquendi sine animo revertendi et sine spe recuperandi*. The time when the test must be applied is the time when the decision to leave the ship is taken and acted on (see *Bradley v. Newsom, Sons & Co.* (1), per LORD FINLAY, L.C., at p. 25).

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Applying that definition of abandonment to the facts of the present case, I entertain no doubt that the master and crew abandoned the ship either shortly before or after midnight of July 18, when, having taken to the boats and been picked up by one of the escort vessels, they were transferred to other ships in the convoy and carried to Freetown, a port in Sierra Leone on the west coast of Africa. It has not been, and indeed could not be contended, that the decision taken and acted on was not reasonable. The action of the master, in my judgment, negatives the existence of any *animus revertendi*. It remains to consider whether the evidence indicates a *spes recuperandi*. Since the word "abandonment" in the section may have to be applied in connection with any species of property or interest capable of being the subject-matter of a marine insurance, and as in the present case we are considering the section solely in relation

G to a ship, I purposely avoid the attempt to give any exhaustive definition of the meaning of the words *spes recuperandi*, which might prove wholly inapplicable, or even misleading, in a case where the subject-matter was something other than a ship. In a sense some fragment of hope may remain in any set of circumstances until the final catastrophe is complete. It is never easy, even if it is possible, to express the varying shades of a condition of mind in words, but in the present context I think "*spes recuperandi*" is more than a bare hope that something may turn up, a condition of mind hardly distinguishable from wishful thinking, and requires something in the nature of an intention present in the mind of the

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person concerned—in this case the master of the ship—in certain events to take some action himself or by his agents deputed by him for that purpose to recover actual possession of the ship for his owners.

There remains, however, the third condition necessary to establish a constructive total loss under this branch of the section, namely, that the reason for abandoning the ship was that “its actual total loss” appeared “to be unavoidable.” Whether the test to be applied is objective or subjective—*i.e.*, whether the question is: “Was the total loss of the ship unavoidable in fact?” or “Did the total loss of the ship on the factual position, as it then appeared to the persons concerned, seem to be unavoidable?”—in either case, in my judgment, the condition is satisfied. The word “unavoidable” is undoubtedly a strong word, and it may be said in one sense that nothing is unavoidable until it has actually happened. In my judgment, in considering the meaning of avoidability in relation to some future event, one cannot assign such an absolute meaning to the word as “inevitable” in the sense of something which must in the course of nature happen. To attempt to give a definition of the word applicable in all circumstances is likely to do more harm than good. It is sufficient to say that I think the word connotes a very high degree of probability, with the additional element that there is no course of action, project or plan, present at the time or place in the mind of the person concerned which offers any reasonable possibility of averting the anticipated event. I venture to think there is some affinity between avoidability and the *spes recuperandi* referred to in the salvage cases. In the event, the total loss of the ship was not avoided, and no fresh cause (unless it be the slight but perfectly normal deterioration in the weather conditions) supervened to influence the final catastrophe. Nothing was done which precipitated the foundering of the vessel nor was anything which skill and courage could attempt omitted which might have averted it.

In my judgment, it was not and could not have been avoided. It was “unavoidable.” If the true test is subjective, in my judgment, having regard to all the then existing perils not excluding the very real possibility that this derelict ship might have been the object of a second U-boat attack, if a U-boat commander thought she was worth a second torpedo, the apparent situation of this vessel was no more favourable than her actual situation proved to be, and this is not, in my judgment, negated by the fact that after a search lasting for a full week the derelict ship was located and taken in tow and a determined effort made to get her into a British port. As between an owner and an underwriter, once the safety of the crew has been assured, the problem is largely one of money, but, having regard to the then existing tonnage situation and the urgent need of munitions, more particularly in the African theatre of war, considerations of money can hardly have come into the picture, and the action taken by the naval authorities in attempting to achieve the impossible does not in my judgment, give any real indication of the probabilities or otherwise of success. That the existing circumstances provided cogent reasons for leaving the ship derelict I have no doubt, but they do not, in my judgment, alter the nature or consequences of the decision that was taken and acted on.

Hitherto I have only dealt with the Marine Insurance Act, 1906, s. 60 (1). There is sect. 60 (2) (i) to be considered, which provides:

In particular, there is a constructive total loss (i) Where the assured is deprived of the possession of his ship or goods by a peril against, and (a) it is unlikely that he can recover the ship or goods, as the case may be . . .

This subsection is not a mere elaboration of the preceding subsection but is, if I may use the expression, entitled to stand on its own legs: See *Rickards v. Forestal Land, etc., Co., Ltd.* (3), per LORD WRIGHT, at p. 84 ([1941] 3 All E.R., at p. 79). The subsection has in contemplation the position of an assured in relation to his underwriters. In the present case, where no underwriting interest is involved, it is immaterial whether the ship was insured or not, with the result that the words “by a peril insured against” can, for the present purpose, be omitted or read as “by a peril capable of being insured against.” In order to substantiate a constructive total loss under this subsection the Crown must establish that the shipowner was deprived of the possession of his ship and that it was at the time of such deprivation unlikely that he could recover it. I entertain no doubt that the shipowner was deprived of the possession of his ship. It is unnecessary to recapitulate the facts further than to say that

from July 19 to July 26, when she was found by one of the naval craft sent to search for her, she was adrift on the Atlantic without even a vessel standing by. The Crown must further establish that, at the time when the owner was deprived of possession, it was unlikely that he would recover her. The word used is "unlikely," not "uncertain," and seems to connote a degree of probability, somewhere between mere uncertainty on the one hand and inevitability on the other. (See *Polurrian S.S. Co. v. Young* (8), at pp. 937, 938.)

- A In arriving at a conclusion on this point there are, in my judgment, broadly speaking, two elements which have to be considered, namely, the factual position as it existed at the material time and the future contingencies which might lie between that moment of time and the issue of the event, whatever the issue might prove to be. As regards the factual position, among the matters to be considered were the season of the year, the distance to the nearest U.K. or Allied port, and last, and perhaps most material of all, the then existing condition of the ship.
- B In coming to a conclusion as to her then condition, the court is entitled and, indeed, bound to consider any evidence either existing at the time or becoming available later which throws any light on it. As regards the future contingencies, the court is not entitled to come to a conclusion as to what was as at a certain date likely to happen in the future by waiting for the event and then seeing *ex post facto* what had happened. As regards the actual condition of the ship on July 19, we have the evidence of the master and the engineer who saw her at that time. The commander of H.M.S. Wellington did not go on board. We have also the fact that on Aug. 1, when in tow, the vessel suddenly foundered. This fact is not, in my judgment, admissible evidence as to the likelihood existing on July 19 of her foundering at some future date. It is often the things that seem most unlikely that do happen. It is, however, admissible evidence as to her actual condition on the earlier date, which is one of the factors on which the then likelihood of her survival depended, and that fact was none the less a then existing fact, albeit that the means of ascertaining the fact were not then wholly available to the master. The fact that the vessel sank on Aug. 1 is, in my judgment, evidence, not necessarily proof, that she was a doomed vessel beyond any possibility of recovery on July 19. The weight of the evidence is a wholly distinct question to that of its admissibility. It has to be regarded in the light of all the surrounding circumstances. For
- E example, if the search of the naval vessels had proved fruitless and all that was known was that the vessel had disappeared, as that might have been the result of a second submarine attack and not of the wound sustained on July 18, no strong inference could be drawn as to the gravity of the earlier casualty. Again, if it were known, and not merely conjectured, that there had been a second submarine attack which had sent the vessel to the bottom, no inference as to her earlier condition could be drawn, and her ultimate loss would have no evidential value whatever in relation to the antecedent event. Or, again, if she had encountered abnormally heavy weather, the evidential value of her loss would be correspondingly lessened. Having regard to the knowledge that there was no second submarine attack on the ship when she was derelict and unattended and that she did not encounter weather which, though there was some deterioration, could be described as abnormal or in any way severe, the fact and the circumstances of her sinking on Aug. 1 have, in my judgment,
- G a considerable bearing on her condition on July 18, 19. Turning to the future contingencies as they appeared as on the last mentioned date, the first that has to be considered is the likelihood or otherwise of the naval authorities instituting a search with a view to salvage. That decision must have been governed, among other factors, by the number of tugs or other craft available and the conflicting claims on their services. The naval officer in command of H.M.S. Wellington
- H recorded his views as follows :

In spite of master's opinion regarding ship's chances of surviving a long tow her cargo was so valuable that I considered it worth while for tugs to be sent to get her in, there being a fifty-fifty chance of her still being afloat when they arrived unless weather deteriorated.

This was not a very optimistic bulletin. The weather factor was unpredictable. There was the further factor that her slow rate of progress would render her peculiarly susceptible to submarine or other enemy attention.

Taking into account all the factors, of which I have enumerated some, I

have come to the conclusion that the condition and situation of the Lavington Court on July 19 was such as to render her arrival at a port of safety, which alone could enable her owners to recover her possession, in the highest degree improbable. This is, I think, in substance, the only point on which I differ from the conclusions and reasoning of TUCKER, J., and the other members of this court, but it is a crucial one. If this view of the facts and the law is correct, it becomes unnecessary to consider in any detail the other grounds of defence advanced by the Crown, which all rested on the supposition that on July 18, 19, the Lavington Court was a partial and not a total loss either actual or constructive. As regards the applicability of the doctrine of frustration, I express no opinion. That must always depend on the facts of each particular case. On the view I have formed of the facts of this case the question does not arise, and I prefer not to express any view of the law based on a factual basis which is unreal and consequently uncertain. A

As regards the question of repudiation of the contract, I agree with the conclusion and reasoning of TUCKER, J. I find it difficult to see how the action of the master in abandoning the ship under the then existing circumstances, an act done in the exercise of a clear and paramount duty, can be described as a repudiation of the contract. On the final point taken by the Crown that the settlement by the owners with the underwriters absolved the Crown from the obligation to pay, here again I agree with the conclusion and reasoning of TUCKER, J. Indeed, if it were necessary, I venture to think further grounds could be adduced to demolish the arguments advanced in support of what, in my judgment, was a wholly untenable proposition. B C

On the one crucial point, finding myself, as I do, in a minority of one, I naturally advance the view I have endeavoured shortly to expound with considerable misgiving, but, having formed a definite opinion, I feel it my duty to express it.

SCOTT, L.J.: The appeal will, therefore, be dismissed with costs. D

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor, Ministry of War Transport Branch* (for the Crown); *Holman, Fenwick & Willan* (for the respondents).

[Reported by C. ST.J. NICHOLSON, Esq., *Barrister-at-Law.*] E

NOTE.

Re RALPH GEORGE CARLTON *AND Re* THE NATURALIZATION ACT, 1870. F

[COURT OF APPEAL (Lord Greene, M.R., du Parc and Morton, L.J.J.),
July 9, 1945.]

An appeal by the applicant from the decision of COHEN, J., dated Mar. 28, 1945, and reported in [1945] 1 All E.R. 559, was dismissed, LORD GREENE, M.R., holding that the words "during infancy" in the Naturalization Act, 1870, s. 10 (5), are redundant. All the members of the court refused to express an opinion upon the effect to be given to cross-headings in a statute. G

The appellant appeared in person.

Charles E. Harman, K.C., and *H. O. Danckwerts* for the Crown.
Solicitor: *Treasury Solicitor* (for the Crown). H

R. v. NEWMARKET ASSESSMENT COMMITTEE, *Ex parte*
ALLEN NEWPORT, LTD.

[KING'S BENCH DIVISION (MacKinnon, L.J., Humphreys and Oliver, JJ.),
June 28, 29, 1945.]

*Rates and Rating—Valuation list—Industrial property not previously rated—
“Proposal” for gross assessment agreed between owners and the rating authority
—Assessment committee fixing valuation in excess of “proposal” in the
absence of owners—Proceedings of assessment irregular—Application for order
of certiorari—Committee bound to act judicially—Rating and Valuation Act,
1925 (c. 90), ss. 27, 37.*

The owners of a ballast pit, which had not been previously rated, were served with a notice by the rating and valuation officer that the rating authority were proposing to insert the figure of £2,500 in their valuation list as the annual value of the property. They consented to this proposal subject to the property being de-rated as an industrial hereditament. They were informed that it would not be necessary for them to be present at the meeting of the assessment committee. At that meeting the county valuation officer objected to the figure proposed by the rating authority, and, after deliberating, the assessment committee decided to increase the figure to £4,500. The owners applied for an order of *certiorari* on the ground that the decision of the assessment committee was invalid :—

HELD : the proceedings at the meeting of the assessment committee were irregular ; when the county valuation officer objected to the proposal of the rating authority, the meeting should have been adjourned in order that the owners might be given an opportunity of being present and heard. The owners were entitled, therefore, to an order of *certiorari* to quash the decision of the committee.

[EDITORIAL NOTE. No special point of rating law is involved in this decision, which rests upon the general principle that a tribunal must hear all parties entitled to be heard and act only upon evidence given in the presence of those parties. It is held that the decision of an assessment committee increasing a valuation is invalid, since it was made on the proposal of the county valuation officer and in the absence of the ratepayer, who had agreed to a different figure, and relying on the agreement, had not attended the hearing.]

AS TO POWERS OF ASSESSMENT COMMITTEE, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-489, paras. 913, 914 ; and FOR CASES, see DIGEST, Vol. 38, pp. 582, 583, Nos. 1159-1169.]

APPLICATION by the owners of a ballast pit, Allen Newport, Ltd., for an order of *certiorari* to quash the decision of the Newmarket Assessment Committee. The facts are fully set out in the judgment of MacKINNON, L.J.

G. D. Squibb for the applicants.

Colin H. Pearson for the respondents.

MacKINNON, L.J. : This is a motion for an order of *certiorari* to quash a decision of the Newmarket Assessment Committee dated Mar. 9, 1945, that the valuation list in the parish of Icklingham, in the Mildenhall rural district, “be amended by inserting therein certain premises described as a ballast pit,” at the annual value of £18,000.

The short facts about the matter are these. This ballast pit apparently had not been working till shortly before June, 1944. On June 13, 1944, the rating and valuation officer of the Mildenhall Rural District Council wrote to the owners of the ballast pit asking them about the ballast pit, and for particulars as to their interest in it and their income from it. Some particulars evidently were supplied by the applicants, whereupon, on June 20, 1944, the rating and valuation officer served notice of a proposal to include in the valuation list this ballast pit, stating that it was a new assessment, and proposing its insertion in the list at an annual value of £2,500. That having been served upon the applicants, on June 23 they wrote, through their solicitors, saying that the assessment was excessive and unfair because it had not been treated as an industrial hereditament, but objecting to the figure of £2,500 only upon that ground, and saying :

But if you will be good enough to write to us that you consent to it being treated as an

industrial hereditament, it will not necessitate our presence before the assessment committee.

On June 24, the rating and valuation officer replied to that :

I consent on behalf of the rating authority to this being treated as an industrial hereditament, and will inform the assessment committee that you have made formal application for this.

It was, therefore, in effect agreed by the rating and valuation officer and the applicants that he should make, in the absence of the applicants, an application that the pit be inserted at a nominal figure of £2,500 to be reduced under the De-rating Act to the appropriate figure.

Then on July 13, 1944, the assessment committee held their meeting at which, among other matters, this proposal was considered by them. Pursuant to the arrangement that had been made by these letters of June 23, 24, the applicants were not present. At that meeting on July 13, a representative of the county valuation committee attended, and he intervened and said :

This is all very well, but, in my view, and in the view of my committee, this figure of £2,500 is ridiculously low ; it ought to be £25,000.

Presumably he argued that, or gave evidence to that effect, possibly not on oath, but, at any rate, brought considerations to the attention of the assessment committee upon his contention that this figure of £2,500 ought to be very much increased. The assessment committee listened to him and entertained his contention to such an extent that, on July 18, five days later, they caused a notice to be served upon the applicants saying in effect that they had held a meeting on July 13, and had provisionally determined the proposal—that is the proposal to insert the ballast pit at £2,500—but going on to add : “ The valuation proposed to be inserted is as follows, £2,500.” Then :

The valuation to be inserted in the list as provisionally determined by the committee is as follows : N.A.V., £18,000 rateable, £4,500 (industrial). Notice is further given that unless you inform me within 14 days from the date of this notice of your intention to object to the valuation as provisionally determined by the said committee, the said valuation will be confirmed at a meeting to be held on Sept. 14, next.

The applicants having received that document, on July 28, 1944, their solicitors served this notice on the assessment committee :

We hereby give you notice of our intention to object to the valuation of N.A.V., £18,000, rateable, £4,500 (industrial) provisionally determined by you . . . And we further give you notice that the ground of our objection is that you have no jurisdiction to determine a valuation in respect of the said premises higher than the valuation set out in the proposal dated June 20, 1944, namely, net annual value, £2,500, with the corresponding rateable value £625 (industrial).

On Nov. 9, the further meeting indicated in the notice to the applicants as being proposed took place, and the applicants appeared there. We do not know what happened, but I gather that when they appeared there they relied only upon the technical objection that had been intimated in their solicitors' letter of July 28, namely, that the assessment committee had no jurisdiction to insert a higher valuation than the basis of £2,500 contained in the proposal.

That meeting of Nov. 9 was further adjourned until Mar. 18, 1945. On Mar. 9, the clerk to the committee served a notice on the solicitors for the applicants to this effect :

Notice is hereby given . . . that the assessment committee did on Mar. 8, 1945, determine a proposal made by the rating authority . . . and their decision is as follows : That the following entries be inserted in the said valuation list in respect of the said premises : ballast pit, N.A.V., £18,000, rateable, £4,500. And notice is further given that the said valuation list has been amended in accordance with this decision.

On Mar. 19, 1945, the applicants applied to this court for leave to move for an order of *certiorari* to quash that decision as invalid. In the statement accompanying the application for that leave, the grounds on which relief is sought are expressed as being these :

(i) That the said decision was given in purported determination of a proposal that the said premises be inserted in the said list with the net annual value of £2,500 made by the rating authority for the said rural district and dated June 20, 1944. (ii) That the said assessment committee in determining the said proposal had no jurisdiction to insert the said premises in the said list with a net annual value greater than £2,500.

I do not think it is necessary to determine the abstract question whether, in the curious circumstances of this case, the assessment committee had any jurisdiction to fix a valuation higher than that specified in the proposal if, in other respects, the proceedings had been carried on with all proper regard to the complicated machinery set out under the Rating and Valuation Act, 1925. We have had a somewhat exhausting, and one might almost say maddening, examination of the extraordinarily obscure provisions of the various sections of this Act, including a consideration of the powers of the county valuation committee under sect. 27, and the duties of the assessment committee in relation to the current valuation list under sect. 37. As I say, I do not think it necessary to determine the question whether, if, for instance, the county valuation committee had given notice of objection to the proposal for an assessment of £2,500, and in that objection had proposed a substitution of £18,000 or £25,000, or whatever the figure was, the assessment committee would have had any power to entertain that application, as in effect it would be an application to increase the figure in the proposal and make it a larger figure. I say that I think it is unnecessary to determine that question because it seems to me that there is another ground upon which counsel for the applicants is right in saying that he is entitled to an order to quash this determination.

That ground is this. It is propounded by counsel for the applicants, and is not disputed by counsel for the respondents, that, in performing their functions under sect. 37, it is elementary that the assessment committee must act judicially, hear all parties who are entitled to be heard, and act only upon evidence given in the presence of those parties after giving them an opportunity of cross-examining the witnesses opposed to them and adducing any evidence of their own. The provisional determination of the committee sent to the applicants in the document of July 18, was the result of a so-called hearing by the assessment committee on July 13, at which the applicants were not present, and as to which they were invited to be absent by the rating officer of the Mildenhall Rural District Council, upon the ground that they were agreed to this proposal, and, therefore, need not attend. But at that meeting on July 13, the assessment committee must have heard, at any rate, the contention, and, indeed, the evidence put before them by the representative of the county valuation committee. It may have been evidence not given in oath, but it was in fact a contention as to facts which could only properly be brought before the committee by witnesses giving evidence about figures and values, and so forth.

That provisional determination is announced to the applicants as being one which will be confirmed at the next meeting, unless they give notice within 14 days that they propose to come and re-open the matter and contest it again. When they did come to the adjourned hearing on Nov. 9, it is true that they took objection purely on the point as to jurisdiction. But I think they are not thereby deprived of the right to say here and now that these proceedings were irregular on the part of the assessment committee, and that the proper procedure would have been, directly they were apprised on July 13 that the county valuation committee wanted in fact to put in a counter-proposal, to have adjourned the whole thing and give notice to the applicants that there was this, what I may call, counter or alternative proposal, and they should have adjourned the hearing of the whole matter until a future date. If that procedure had been carried out, it is possible that no objection could have been taken to the committee having arrived finally at the same conclusion at which they did in this case. But, in my view, by reason of that irregularity in the proceedings which I have indicated, the applicants are entitled to succeed in the motion which is now before us to quash this order of the assessment committee. I, therefore, think that this application should be granted.

H HUMPHREYS, J. : I am of the same opinion. The application here is for an order of *certiorari* to quash a decision of the assessment committee dated Mar. 9, 1945. But that decision in fact was a mere recognition of a decision which had been come to on July 13, of the previous year.

The point has been made by counsel for the respondents that that decision was what is called a provisional decision, or a decision come to provisionally. I do not understand that language at all. The assessment committee is bound to act judicially. They sat on an occasion when they knew, by reason of correspondence which had passed between them and the applicants, the rated occupiers

of the hereditament in question, that they could not be present and that they were in fact not present. Then they considered something of which the applicants knew nothing whatever and had no notice, and they did something on that. I do not think that they can be heard to say "We only provisionally decided something." They decided, and decided upon evidence which they had heard in the absence of the most interested party, that they would insert the hereditament in the list at a valuation of £18,000, and they wrote and said so. To my mind it is nothing to the point that they wrote to him saying: "If you like to come here on some subsequent day and satisfy us that we were wrong, we will hear you." They had sat and determined it. I think they had no more right to do that than a court of jurisdiction has to say to a person: "I have decided this case, but if you can satisfy me that my decision is wrong, I will hear you." That is not the way in which persons are permitted to act who are bound to act judicially. I think the application here ought to succeed. I would put it myself upon the third of the grounds stated in the statement in support of the application, namely: "That the said decision is bad in law."

OLIVER, J.: I agree.

Order granted with costs.

Solicitors: *Blyth, Dutton & Co.*, agents for *W. J. & J. G. Taylor*, Newmarket (for the applicants); *Field, Roscoe & Co.*, agents for *Ennions*, Newmarket (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

BAINDAIL (otherwise LAWSON) v. BAINDAIL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), July 5, 1945.]

Divorce—Nullity—Petitioner going through a form of marriage with respondent who was already lawfully married in India according to Hindu law—Hindu law permitting polygamy—Hindu marriage recognised as valid in English law—English ceremony of marriage a nullity.

The petitioner, an Englishwoman, went through a ceremony of marriage with the respondent on May 5, 1939, at a London register office, the respondent being described in the marriage certificate as a bachelor. On May 1, 1928, the respondent had lawfully married a Hindu woman according to Hindu rites at Muthra United Provinces, India, and his Hindu wife was alive at the time of the respondent's marriage with the petitioner. It was also established that the respondent's Hindu marriage was valid according to Hindu law and, as such, would be recognised by the courts of British India. The petitioner sought the dissolution of her marriage with the respondent on the ground of nullity:—

HELD: although the Hindu marriage was potentially polygamous in character, it was to be recognised as valid in English law. Since that marriage was subsisting at the time the respondent went through a ceremony of marriage with the petitioner in England, the latter ceremony was, according to English law, a bigamous marriage. The petitioner, therefore, was entitled to a decree *nisi*.

Srini Vasan v. Srini Vasan (1) followed.

[EDITORIAL NOTE. This case again considers the degree of recognition to be accorded by the courts of this country to polygamous or potentially polygamous marriages. An attempt was made by counsel for the respondent to distinguish *Srini Vasan's* case (1), on the ground that there the husband, at the time of his Hindu marriage, was domiciled in British India, but the court refuses to regard the question of domicile, holding that a marriage in India between Hindus, wherever domiciled, is to be recognised as valid. The subsequent English ceremony was, therefore bigamous and a nullity decree is granted.

AS TO MARRIAGES RECOGNISED BY ENGLISH LAW, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-285, para. 340; and FOR CASES, see DIGEST, Vol. 11, pp. 413-515, Nos. 800-811.]

Case referred to :

**(1) Srimi Vasan (otherwise Clayton) v. Srimi Vasan, [1945] 2 All E.R. 21.*

A PETITION for nullity on the ground that at the time when the petitioner went through a form of ceremony of marriage with the respondent, he was already lawfully married to a Hindu woman according to Hindu law. The facts are fully set out in the judgment.

P. C. Duncan for the petitioner.

F. M. Landau for the respondent.

B BARNARD, J.: In this case the petitioner is Kathleen Joyce Baidail, otherwise Kathleen Joyce Lawson, and she is praying this court for a decree that the marriage celebrated between herself and Nawal Kishore Baidail be declared null and void.

I think it is necessary in this case to refer just for a moment to the pleadings. Para. 1 of the petition sets out the ceremony of marriage between the petitioner and the respondent, which took place on May 5, 1939, at the register office in the district of Holborn. In the marriage certificate the petitioner is described as a spinster and the respondent is described as a bachelor.

C Para. 3 of the petition alleges :

That on or about May 1, 1928, the respondent was lawfully married to a daughter of one Ramchandra according to Hindu rites at Muthra United Provinces India and the said marriage has never been dissolved or annulled but is still subsisting.

Para. 4 of the petition alleges :

D That at the time when the petitioner went through the said form or ceremony of marriage with the respondent the respondent's said wife the said daughter of the said Ramchandra was and is still alive.

The respondent has filed an answer to that petition, in which he says :

... he admits that he went through a form of marriage with a daughter of one Ramchandra as alleged by the petitioner in paragraph 3 of her said petition but that said alleged marriage was and is polygamous by the customs and laws of the Hindu race.

E And he asks the court to dismiss the petition.

It is to be noted that, although the respondent in his answer admits the ceremony of marriage in India, he does not (at any rate in his pleading) admit that the woman with whom he went through the ceremony of marriage in India was and is still alive. I have heard the evidence in this case and I am quite satisfied, from the evidence I have had put before me, that the respondent did go through a ceremony of marriage on or about May 1, 1928, with a Hindu woman, that that marriage was according to Hindu rites and usages, and that that marriage would be regarded as a valid marriage by the courts of British India. In fact, counsel for the respondent quite frankly admitted that. But although it is not in so many words admitted that the Hindu woman with whom the respondent went through that ceremony of marriage was alive at the time he went through the ceremony of marriage in England with the petitioner, I am quite satisfied that that was so—and it has not been argued otherwise by the respondent's counsel—because, shortly after the marriage, which turned out a failure, there was a child of the marriage born on Feb. 22, 1940, a girl named Sheila, and after a time the petitioner and the respondent parted and there were proceedings eventually, in a London Police Court, with regard to the custody of or access to the child. In the course of those proceedings the respondent gave evidence on oath and he admitted that he left India in 1935 with the intention of settling in England; he admitted describing himself as a bachelor when he married the petitioner; he admitted that he was in fact already married in India; he stated that he had married a woman in India by whom he had had a son, and that that woman was alive in India when he married the petitioner.

H Apart from the evidence of the petitioner and the evidence of the assistant clerk to the West London Police Court, who produced his notes of the case between the petitioner and the respondent concerning the child, I have had

the advantage of hearing the evidence of two expert witnesses on the law of British India : Mr. Joseph Nissim, who is well known to this court and was called on behalf of the petitioner, and Sir Alfred William Ewart Wort, who is an ex-judge of the High Court of Justice in British India and was called on behalf of the respondent.

Before the petitioner and the respondent parted, and when they were obviously on bad terms, she saw the respondent turning out a trunk, and he, quite openly, showed her an invitation to his Hindu marriage ; and that invitation has been produced in evidence before me. It is in Hindustani, but I have had a translation of it and Mr. Nissim saw it and told me quite clearly that any ceremony performed according to the terms of that invitation would be a valid Hindu marriage and, being a valid Hindu marriage as between Hindus, would be recognised as a valid marriage in the courts of British India.

Quite shortly, those are the facts, and those facts really are on all fours with the facts in the case of *Srini Vasan v. Srini Vasan* (1), which came before me early this year. Counsel for the respondent has endeavoured to persuade me that I was wrong in that case and that I ought not to follow my own judgment. I think I ought perhaps to say that, at one stage at any rate, he sought to distinguish the two cases. He said that in the case of *Srini Vasan* (1) the husband respondent was at all times domiciled in British India, but that in the case now before me the husband was, at any rate at the time he went through the ceremony of marriage with the petitioner in May, 1939, and now is, domiciled in England ; and the petitioner has stated in her petition that both she and the respondent are domiciled in England. But I am really very doubtful as to whether the respondent is domiciled in England and, if I had to decide that matter, I think I should certainly have adjourned this case for further material. It is obvious that his domicile of origin was British India, and it needs a good deal of evidence to displace a domicile of origin. But I do not think it is of the slightest materiality whether the respondent is domiciled in British India or in England. The simple question which I have to decide is whether, when the petitioner and the respondent went through this ceremony of marriage on May 5, 1939, the respondent was at that time lawfully married ; and the question comes back to the same question which I had to decide in the case of *Srini Vasan* (1), which is, Can English law afford any recognition, for the purposes of this case, of the respondent's prior Hindu marriage ?

That Hindu marriage was a polygamous marriage, although there is no evidence before me that the respondent had more than one Hindu wife. I do not propose to go into the law again, or to go over my reasons again. I rely on the judgment which I gave in *Srini Vasan v. Srini Vasan* (1), and I propose to follow that judgment. That being so, I must recognise this Hindu marriage which the respondent contracted on May 1, 1928, and, as I have already stated, I am satisfied that that marriage was subsisting at the time he went through the ceremony of marriage with the petitioner on May 5, 1939. Therefore the marriage on May 5, 1939, was, according to English law, a bigamous marriage, and the petitioner in the present case is entitled to a decree *nisi* of nullity.

Decree nisi with costs.

Solicitors : *Haslewood, Hare & Co.*, agents for *W. H. Hadfield*, Farnham, Surrey (for the petitioner) ; *Hy. S. L. Polak & Co.* (for the respondent).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. COOK.

[HOUSE OF LORDS (Viscount Maugham, Lord Thankerton, Lord Russell of Killowen, Lord Porter and Lord Simonds), **May 7, 8, 10, July 30, 1945.**]

Income Tax—Annuity—Bequest of annuity—“free of all deductions including income tax”—Annuitant’s total income below taxable limit—Annuity paid by trustees in full out of income brought into charge to tax—Claim by annuitant for repayment of tax—Income Tax Act, 1918 (c. 40), All Schedules Rules, rr. 19, 21.

The respondent was entitled, under the will of the testatrix who died on Sept. 24, 1937, to an annuity at the rate of £100 per annum, payable at Whitsunday and Martinmas, which annuity was declared to be payable “free of all deductions including income tax and Government duty.”

Accordingly, at each term of Whitsunday and Martinmas since the death of the testatrix the trustees paid the sum of £50 to the respondent in respect of the annuity, and, when making payments, gave her a certificate showing the gross amount of the payment, the amount of tax deducted thereon and the net payment made. The respondent had during these years no other income. The annuity was paid wholly out of income that had already been brought into charge to tax, and included in the sum brought into charge for the year ending Apr. 5, 1940, was a gross sum of £153 16s. 11d. of which £100 was paid to the annuitant and £53 16s. 11d., being income tax on the gross sum at the standard rate in force (7s. in the £) was accounted for to the Inland Revenue. For the year in question, the respondent had no income beyond the annuity. The figure at which exemption from payment of income tax was fixed was then £125. On Jan. 2, 1940, the respondent lodged with the Inspector of Taxes a claim for the repayment of income tax to the amount of £47 11s. 4d., which sum was made up as follows: (a) a personal allowance of tax at the full standard rate of 7s. on £100, plus (b) an allowance of two-thirds of tax at the standard rate of £53 16s. 11d. The respondent having made the claim for repayment, the Inspector of Taxes learned that the respondent in fact intended to hand over the returned tax to the trustees and, accordingly, retain for her own use the sum of £100 only. He then refused to allow the respondent’s claim for £47 11s. 4d. It was contended on behalf of the appellants (i) that, since the total of the respondent’s annuity for the year in question was £100; the additional benefit under the trust disposition and settlement to receive that annuity free of all deductions including income tax did not have any pecuniary value in that her total income was below the exemption limit, and that, as it was the admitted intention of the respondent to pass on the recovered tax to the trustees to be used for other purposes, that tax could not properly be treated as an addition to the respondent’s annuity; (ii) alternatively, that if the respondent’s income for the year in question was £100, the respondent could only claim repayment, if repayment could be claimed at all, of tax at the standard rate on the sum of £100:—

HELD (LORD RUSSELL OF KILLOWEN and LORD SIMONDS dissenting): on the true construction of the will, the trustees were bound to leave in the hands of the respondent a clear sum of £100 without any deduction. The trustees were further bound under the relevant statutory provisions, to account to the Revenue for income tax at the current rate on such a gross sum as would leave £100 net. This gross amount represented the respondent’s income for the purposes of her claim for repayment of tax, since payment at the source was merely machinery for tax-collection, which did not alter the right of the parties. The respondent was, therefore, entitled to the repayment which she had claimed.

Hunter’s Trustees v. Mitchell (1) applied.

Re Jones, Jones v. Jones (5) distinguished.

[**EDITORIAL NOTE.** When a taxpayer’s source of income is liable to deduction at source under r. 19 or r. 21 of the All Schedules Rules, two stages are involved (1) deduction at the source at the standard rate, which is provisional only, and (2) adjustment under sect. 29 of the 1918 Act. Rr. 19 and 21 are concerned with the machinery of collection only, and the person making the deduction is not concerned with the

details of the income of the payee or of his ultimate rights vis-à-vis the Revenue. Where, therefore, a bequest is made of an annuity "free of all deductions including income tax" the annuitant is entitled to the full amount of the annuity and the deduction required under r. 19 is provided for out of the trust estate, but this deduction amounts to a clear overpayment to the Revenue if the annuitant, having no income except the annuity, was not liable to tax at all. This overpayment can only be recovered by the annuitant, since the deduction was made, as a matter of machinery, on her behalf, and the sum when recovered is returnable to the trustee for the benefit of the trust estate, either upon a basis of equity, or because of the principle of construction laid down in *Re Pettit* (2).

AS TO EFFECT OF DIRECTION TO PAY ANNUITY WITHOUT DEDUCTION, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386-388; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to :

- * (1) *Hunter's Trustees v. Mitchell*, [1930] S.C. 978; Digest Supp.
- * (2) *Re Pettit, Le Fevre v. Pettit*, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491.
- * (3) *Re MacLennan, Few v. Byrne*, [1939] Ch. 750; [1939] 3 All E.R. 81; Digest Supp.; 108 L.J.Ch. 364; 160 L.T. 612.
- (4) *Rowan's Trustees v. Richmond*, [1940] S.C. 30.
- * (5) *Re Jones, Jones v. Jones*, [1933] Ch. 842; Digest Supp.; 102 L.J.Ch. 303; 149 L.T. 417.
- (6) *Richmond's Trustees v. Richmond*, [1935] S.C. 585; Digest Supp.
- (7) *North British Ry. Co. v. Inland Revenue*, [1923] S.C. [H.L.] 27.
- * (8) *Re Tatham, National Bank, Ltd. and Matthews v. Mackenzie and Others*, [1945] Ch. 34; [1945] 1 All E.R. 29; 114 L.J.Ch. 9; 172 L.T. 14.
- * (9) *Re Hooper, Phillips v. Steel*, [1944] Ch. 471; [1944] 1 All E.R. 227; 113 L.J.Ch. 89; 170 L.T. 90.

APPEAL by the Crown from an interlocutor pronounced by the First Division of the Court of Sessions as the Court of Exchequer in Scotland, dated Mar. 22, 1944 ([1944] S.C. 286), in a case stated under the Income Tax Act, 1918, s. 149. The appeal arose out of a claim by the respondent for repayment of income tax for the year ended Apr. 5, 1940. The facts and arguments are fully set out in the opinions of VISCOUNT MAUGHAM, LORD THANKERTON and LORD SIMONDS.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), The Lord Advocate (J. S. C. Reid, K.C.), Reginald P. Hills and J. F. G. Thomson for the appellants.

J. F. Strachan, K.C., and J. A. Crawford for the respondent.

The House took time to consider its opinion.

VISCOUNT MAUGHAM (read by LORD THANKERTON): My Lords, this appeal arises out of a claim by the respondent for repayment of income tax for the year ended Apr. 5, 1940. The Inspector of Taxes objected to the claim made by the respondent. The respondent appealed to the Commissioners for the General Purposes of the Income Tax for the Division of Edinburgh against the said objection, and the General Commissioners by a majority allowed the appeal.

The Inland Revenue Commissioners appealed to the Court of Session as the Court of Exchequer in Scotland against the determination of the General Commissioners allowing the respondent's claim, and their Lordships of the First Division unanimously dismissed the appeal.

The facts are fully stated in the case for the opinion of the Court of Session, and it is not necessary to repeat them at length. I may perhaps summarise them by saying that the respondent is entitled under the will of her aunt, Mrs. Margaret Jessie Forrest, who died on Sept. 24, 1937, to an annuity at the rate of £100 per annum, payable at Whitsunday and Martinmas after the death of her aunt, which annuity was declared to be payable "free of all deductions including income tax and Government duty." Accordingly, at each term of Whitsunday and Martinmas since the death of the testatrix the trustees have paid the sum of £50 to the respondent in respect of the annuity, and, when making payments, the trustees have given to the respondent a certificate, which is set out in the case. She had during these years no other income. The annuity was paid wholly out of income that had already been brought into charge to tax, and included in the sum brought into charge for the year in question was a gross sum of £153 16s. 11d., of which £100 was paid to the annuitant and £53 16s. 11d., being income tax on the gross sum at the standard rate in force (7s. in the £)

was accounted for to the Inland Revenue. The respondent, as it turned out, had no income beyond the annuity for the year ended Apr. 5, 1940, and the figure at which exemption from payment of income tax was fixed was £125.

On Jan. 2, 1940, the respondent lodged with the Inspector of Taxes a claim for the repayment of income tax for the year to Apr. 5, 1940. That claim showed the respondent's total income from all sources as follows :

A	Source of income.	Amount of income before deduction of tax.	Amount of Income Tax deducted.
	Annuity of £100 per annum free of tax from Mrs. M. J. Forrest's Trust.	£153 16 11	£53 16 11
B	(a) a personal allowance of tax at the full standard rate of 7s. on £100		£35 0 0
	(b) an allowance of two-thirds of tax at the standard rate of £53 16s. 11d.		12 11 4
			£47 11 4

C These allowances had nowhere been taken into account. It is this claim by the respondent which was objected to by the Inland Revenue and which forms the only subject of the appeal before your Lordships. It is to be noted that the trustees of the will are not parties and that questions as between them and the respondent are not directly before the court. It is, however, the fact that for the years prior to the year ended Apr. 5, 1940, repayment of income tax was allowed in accordance with the claims of the respondent. On Jan. 2, 1940, when the respondent lodged her claim for repayment for the year ending Apr. 5, 1940, the Inspector of Taxes learned that the respondent in fact handed over the returned tax to the trustees and accordingly retained for her own use only the net sum of £100. He refused to allow her claim for £47 11s. 4d.

D

E My Lords, it is not surprising that the Inland Revenue authorities have found it difficult to state the precise grounds on which they rely in contesting the respondent's claim. Abandoning the arguments they put forward before the commissioners, the two main contentions which they supported (as amended) in the Court of Sessions are thus stated by the LORD PRESIDENT (NORMAND) ([1944] S.C., at p. 292) :

F Either the respondent, being entitled to an annuity of £100 plus income tax, if any, due by her in respect thereof, and being exempted from all liability to income tax, is not entitled to any repayment ; or the proper method of dealing with her annuity and income tax, so far as the trustees were concerned, was that they should have tendered to her two sums amounting together to £65 per annum, in equal parts at Whitsunday and Martinmas, and a certificate showing that £35 had been paid by way of income tax in respect of the annuity so as to enable the respondent to recover £35.

G The appellants, however, have now made an *ex gratia* offer to repay, not the sum of £47 16s. 11d., but the sum of £35. They submitted in their case that some confusion had been introduced into the appeal by this offer, and I am tempted to agree with this view. Their explanation of the offer is as follows :

H The appellants are prepared to make this *ex gratia* payment because the whole of the trust income having borne tax, the total available for distribution among the beneficiaries was diminished thereby. If the trustees had followed the procedure laid down in r. 19 of the Income Tax Act, 1918, they would have paid the respondent, not £100 in cash but £65 in cash and given her a certificate of deduction of tax for £35. This latter sum she could have recovered from the appellants, and she would then have had £100 in her hands. The trustees did not follow this procedure, but the appellants are prepared to treat the case as one in which that procedure had been followed and to repay her £35 on the assumption that she would hand it over to the trustees to replace the excess of £35 formerly paid by them to her.

This, it will be noted, implicitly reasserts the proposition that the Income Tax Acts make it illegal to pay an annuitant the amount of the annuity payable free from income tax at the dates specified in the will, which in my opinion

would be an unhappy conclusion. I will explain later why I think it is incorrect.

I cannot deal with the above contentions of the Inland Revenue in better language than that used by the LORD PRESIDENT (NORMAND). He said ([1944] S.C., at p. 293):

I think that the first duty which lay upon the trustees, who were not embarrassed by an insufficiency of funds, was to obey the express instructions of the will and to pay directly to the respondent £50 at Whitsunday and £50 at Martinmas, £100 per annum in all. It would have been contrary to the terms of the will, and a breach of trust, if they had paid only £65 and had accompanied that payment with a certificate that £35 had been paid by way of tax. Moreover, I think that such a proceeding would have been contrary to the provisions of the Income Tax Acts, and that it would have been without legal warrant. That disposes of one of the alternative contentions of the Crown before the commissioners, although that alternative was not the one supported before us by the counsel for the Inland Revenue.

I will give reasons for agreeing with this view. In the form of the *ex gratia* offer the alternative in question seems still to be supported; but for the reason given by the LORD PRESIDENT the course suggested in the offer seems to me to be inadmissible.

The first alternative, however, has been further amended and is now framed in these terms:

(i) The appellants contend that the total of the respondent's annuity for the year in question was £100: that the additional benefit under the trust disposition and settlement to receive that annuity free of all deductions including income tax did not have any pecuniary value in that her total income was below the exemption limit of £125 fixed by the Finance Act, 1935, s. 19, and that as she admitted she intended to pass on the recovered tax to the trustees to be used for other trust purposes that tax could not properly be treated as an addition to her annuity of £100.

(ii) If the respondent's income for the year in question was £100 the appellants maintain (a) that she cannot claim any repayment at all, or (b) that in any event she can only claim repayment of tax at the standard rate on the sum of £100.

When the appeal came before your Lordships the Lord Advocate on behalf of the Inland Revenue made a fresh and final offer or statement which took counsel for the respondent by surprise. As I understood the Lord Advocate, he said that the Inland Revenue were prepared to admit a claim by the residuary legatees under the will for a return of the difference between £53 16s. 11d. and the sum of £35 which had been offered to the respondent. The effect, as I understand it, would be, if both offers were accepted, that the Inland Revenue would gain nothing at the end of the day except perhaps some small amounts for interest. I think, whatever view your Lordships may take of these tempting offers, we are left in our judicial capacity with the task of deciding the legal rights of the subject in a case depending on a number of rather obscure sections and rules of the Income Tax Acts. One thing, however, is in my opinion clear and that is that the duty of the trustees was to comply with the directions contained in the will according to their true interpretation, unless indeed there was some illegality involved in them.

My Lords, the first thing then to determine in this case is the true construction of the clause in the will. In the interests of brevity I shall confine myself to the respondent's annuity. It is described as an annuity at the rate of £100 per annum for her life, payable in two terms in the year, Whitsunday and Martinmas; it is to be alimentary and capable of anticipation, and "shall be payable free from all deductions including income tax and Government duty." Gifts by will of annuities free from income tax have been common in both Scotland and England for many years, and have given rise to a large number of reported decisions. At an early stage there was a little hesitation in dealing with them, for it was and is apparent that a named annual sum cannot literally be given free from income tax, since the annuitant must normally pay income tax on his or her income, and what is sometimes called a benevolent construction had to be applied if the plain intention of the will was to be carried out. That intention could be achieved by the simple means of holding that the testator must have intended to give, in addition to the fixed annuity, such a sum as would enable the trustees in each year to discharge the income tax on the total amount of the fixed annuity and the additional sum and to pay the balance

which in the normal case would be the exact amount of the stated annuity to the annuitant. Unless there is something special in the language of the will, which prevented that construction being adopted, that became the recognised construction in cases of gifts of annuities of fixed amounts free of income tax both in England and Scotland. In *Hunter's Trustees v. Mitchell* (1), LORD SANDS observed as follows, at p. 982:

A . . . when under a will an annuity is payable free of income tax the amount of the tax is taken to be an additional gift, and is included in the income of the annuitant when, for Revenue purposes, a return of total income is necessary. Further, the income from this source is not the annuity plus the tax upon it, but the amount of the annuity plus such sum that, when the tax is levied upon the total amount, the net amount left will be the amount of the annuity.

B This is a perfectly correct statement of what has long been the settled rule of construction in a case which presents no special features capable of leading to the conclusion that the application of the rule would involve a departure from the true intention of the testator. The rule where it is properly applied is in my opinion a fair and just one. It carries out the intention of the testator. It has been applied in very numerous cases, and it is far too late to challenge it to-day. It is clear that it applies in the present case. I will only add that under the rule what is treated as being given to the annuitant is given, to use the language of that eminent judge the late LORD FLEMING ([1944] S.C., at p. 295), in two annual constituents. The one is the annuity of £100, the other is "just an addition to the gift of £100" to enable the trustees to comply with the direction to pay that annuity free from income tax and it "became in law part of her income."

C No difficulty usually arose in the early days when income tax was at a very low rate in applying the rule, for questions as to abatement, exemption and so forth seem to have been easily settled, and supertax with all its problems had not been invented. Without going into details as regards these matters it is easy to see that they make it impossible to ascertain at the beginning of any year what further income an annuitant may receive during that year and what abatements and deductions he might become entitled to. For instance, he may earn or lose other income. He may marry. A child may be born to him, or may die. All these events may happen during the year. Nor have trustees either a duty or a right to make inquiries on these matters. The legislature had anticipated these possibilities and had provided by the All Schedules Rules, r. 19 (1), as amended by the Finance Act, 1927, s. 29 (amongst other things) that no assessment should be made upon an annuitant under a deed or will, but that the person liable to make such payment (e.g., the trustees) should be entitled on making such payment to deduct or retain thereout a sum representing the amount of the tax on the annuity at the standard rate for the year in which the annuity payable became due.

F In the present case the standard rate, 7s. in the £ on £153 16s. 11d., is equal to £53 16s. 11d., and the trustees had, therefore, to disburse the sum of £153 16s. 11d. in order to be able to pay £53 16s. 11d. to the Inland Revenue as representing the tax at the standard rate on £153 16s. 11d., and to be entitled and liable to pay the annuity to which the respondent was entitled.

G It is, I think, immaterial whether the disbursement of £53 16s. 11d. was made directly or indirectly by previous deduction to the Inland Revenue. To make the position clear it may be desirable to point out that the amount of the annual benefits given on the true construction of the will to the annuitant was £100 plus the sum which might ultimately prove to be payable by her for income tax for that year so as to leave £100 for her personal behoof. In other words the annuity given to her was an amount equal to £100 plus an amount, say £x varying from year to year and liable to exemptions and abatements. The £x is none the less a constituent of her income because it may vary from year to year and (if payable) has to be paid in discharge of her income tax. The fact that the value of £x is unascertainable until after the end of the year when the deductions for abatements and exemptions, if any, will be ascertained does not occasion any practical difficulty. The trustees have only to follow the provision of the All Schedules Rules, r. 19, the effect of which I have already mentioned. They had, therefore, to make a provisional calculation on the basis of the standard rate for the year in question on £100 + £x, so that £x is equal to the tax at that

rate on £100+£x. A simple equation may be necessary. In the year in question £x was found to be £53 16s. 11d., and £153 16s. 11d. was, therefore, the ascertained total annual benefit of the respondent on the basis of tax at 7s. in the £. The £53 16s. 11d. was paid to the Inland Revenue under the rule, but with a probable or possible right to a claim for exemption or abatement at the end of the year. The sum was exigible by the Revenue not because the tax which would become due by the respondent for income tax for the year in question on £100 was or would necessarily be £53 16s. 11d.; but because it was the arbitrary or hypothetical amount fixed by r. 19 and chargeable against the trustees by the terms of that rule on the total sum of £153 16s. 11d.

My Lords, I think it is clear that the sum of £53 16s. 11d. was an amount of income tax deducted for and on behalf of the respondent as being a sum representing (at 7s. in the £) the amount of the tax on both the constituents of her annuity. She it is who makes and who alone could make the claim I have mentioned for the return of tax, £35 for a personal allowance of tax on £100, and £12 11s. 4d. for an allowance of two-thirds of tax on £53 16s. 11d., both at 7s. in the £. The total is £47 11s. 4d. The sum of £53 11s. 6d. was deducted at the source and it must be dealt with as if it had been paid by the respondent herself. She contends that the amount of the excess over her true liability for the year was £47 11s. 4d. It may be noted that there is a plausible argument for the respondent as the result of which her claim might have been for the total sum of £53 16s. 11d.; but your Lordships are only concerned with a claim for the smaller sum of £47 11s. 4d. and that is all I propose to deal with.

My Lords, I am of opinion, for the reasons above stated, that the Inland Revenue must fail in their contention as to the true construction of the gift to the respondent contained in the will. They must also fail in the contention that no income tax was paid by or on behalf of the respondent and that, therefore, she cannot under the Income Tax Act, 1918, s. 29 (as amended), claim any repayment. With regard to this contention I take the same view as LORD THANKERTON takes in his judgment, which I have had the advantage of reading, and I could not improve upon his language. There remains, however, an argument not, I think, advanced in the Court of Session based on the circumstance that the respondent does not intend to retain under the will more in any year than the net sum which the will intended her to have and that she accordingly proposes to hand over to the trustees the sum of £47 11s. 4d., if and when she recovers it under her claim.

It is not in dispute by the Inland Revenue that payment at the source is merely the machinery by which income tax is collected and the rights of the parties are not thereby altered. In my opinion the same proposition is true in regard to the deduction by trustees of income tax under r. 19 at the standard rate for the year in which an annuity such as we are now discussing becomes due. That sum merely represents the amount of the tax at what in many cases is only an arbitrary figure. The rule clearly is not designed to affect or diminish the rights of the poorest class of taxpayers to abatement or exemption. Nor, I think, do counsel for the Inland Revenue now contend for such a result.

Looking at the matter broadly, I have been unable to see how the Inland Revenue are concerned with the fact that the respondent does not intend to retain for her own benefit the amount of her claim. They could scarcely have so contended if that claim had been assigned together with the fixed amount of the annuity (if assignable) to a third party. It is plain that the respondent is the right person to make the claim under the Income Tax Act, 1918, s. 29; it is, I repeat, a personal claim, but I can see nothing in the section to prevent her from handing over the amount received to a third party.

It is true that according to the well-known decision of LORD ROMER (as ROMER, J.) in the similar case of *Re Pettit* (2) she will be bound to hand over the amount of any sum recovered by her from the Inland Revenue to the trustees for the ultimate benefit of the residuary legatees. The Inland Revenue had there allowed the claim for abatement which they here seek to question, and they have until recently continued that practice. That case has been often followed. To mention only some to them it was approved by the English Court of Appeal in *Re MacLennan* (3), by LORD SANDS and LORD FLEMING in *Hunter's Trustees v. Mitchell* (1), and by the LORD PRESIDENT in *Rowan's Trustees v. Richmond* (4), at p. 42. It seems to me to be a complete fallacy to say that the annual benefit

given by the will is accordingly the fixed sum of £100 described as "the annuity"; for if that were true she would have to submit to a deduction of 7s. in the £ on that sum for her supposed income tax and would only receive £65 in the year, with a right in certain events to reclaim £35 at a later date. Those, as pointed out above, are not her rights under the will. The curious thing is that it does not seem to matter to the Inland Revenue whether the respondent hands over the £47 7s. 11d. to the trustees because of her ideas of honesty and fair dealing, or because of the principle of construction laid down in *Re Pettit* (2). In either case she will not retain the sum in question. I am unable to detect any logical ground on which the Inland Revenue can refuse to allow her claim to recover what is proved to be an overpayment on her behalf of income tax for the year ending Apr. 5, 1940. As I see it the argument is based on the view that because of the nature of the gift and of events in the year in question the respondent has only been given an annuity of £100; but this is incorrect. She was given as I have endeavoured to explain the chance of receiving and retaining subject to income tax the sum of £153 16s. 11d.⁴ Whatever income accrued to her she would be left with £100 net payable to her by the trustees in accordance with the will.

I should add that the provisions of the Finance Act, 1941, s. 25, seem to indicate that the procedure adopted by the trustees in the present case is precisely that contemplated by Parliament in normal cases of payment by trustees of stated annual sums of income free from tax.

Re Jones (5) has been referred to. There the bequest was given as :

... an annuity as after deduction of income tax therefrom at the current rate for the time being would amount to the clear yearly sum of £350.

Eve, J., distinguishing the case of *Re Pettit* (2) held that the annuitant was entitled to such sum as after deduction of tax thereon at the standard rate would leave £350 and was not bound to pay over to the trustees the tax recovered by her. Taking his view that "current rate" meant the same thing as "standard rate" it is not difficult to see that the gift in *Re Pettit* (2) was a very different one. The decision does not affect the present case.

It must be noted that the trustees could not themselves apply for a deduction or abatement and the argument that the respondent could not do so either seems to me logically to lead to the result that in such a case the Inland Revenue become entitled (apart from *ex gratia* concessions) to receive and retain considerably more than the income tax really due from the annuity given tax free and the persons entitled as residuary legatees. The Lord Advocate seems to shrink from this view. So do I; but my conclusion is no more than that the old practice in force for some years before and after the decision of *Re Pettit* (2) was a legal and a correct practice, and that the Inland Revenue have no concern with the question as to how the sum repaid to the respondent by way of deduction or abatement is applied.

My Lords, I agree with the unanimous decision of the First Division and with the reasons given by their Lordships, and I move that the appeal should be dismissed with costs.

LORD THANKERTON : My Lords, this appeal arises out of a claim by the respondent for repayment of income tax for the year ended Apr. 5, 1940. The question relates to the provisions made in favour of the respondent by the trust disposition and settlement of her aunt, Mrs. Margaret Jessie Forrest, who died on Sept. 24, 1937. By the third purpose of her said will, the testatrix directed her trustees :

... out of the free annual income derived from the heritable subjects which shall belong to me at the time of my death to pay to my nephew Harold Hope Cook presently a patient at New Saughton Hall, Polton, Midlothian, an annuity or yearly sum at the rate of one hundred and fifty pounds per annum for the remainder of his life after my decease and to my niece Miss Minnie Cook, residing at seven Annandale Street, Edinburgh, an annuity or yearly sum at the rate of one hundred pounds per annum for the remainder of her life after my decease both of which annuities shall be payable at two terms in the year Whitsunday and Martinmas beginning at the first of these terms after my death with the proportion for the period from my death to that term and so forth thereafter at the said two terms : declaring that the said annuities (one) shall be purely alimentary and not capable of anticipation or subject to the debts or deeds of the said Harold Hope Cook and Miss Minnie Cook or liable to the diligence of their

respective creditors and (two) shall be payable free of all deductions including income tax and government duty

Since the death of the testatrix, her trustees have paid to the respondent £50 half-yearly, and, when making such payment gave to the respondent each year a certificate appropriate to the standard rate of tax current at the time, in a form similar to the certificate granted for the year here in question, which was in the following terms :

I hereby certify that Miss Minnie Cook, of 41, Colinton Mains Grove, Oxfangs, Edinburgh, is a beneficiary of the trust known as Mrs. J. M. Forrest's Trust to the extent of £100 and that the following particulars are correct.

Information regarding this trust has been or will be furnished to H.M. Inspector of Taxes, 1st Edinburgh District.

Signature of Trustee (or authorised Agent for the Trust) { Cooper & Brodie
Date—Jan. 3, 1940. { Address :—
10, Castle Street, Edinburgh.

Income for the year ended Apr. 5, 1940.		
Gross Amount on which tax has been suffered by the beneficiary	Amount of Income Tax suffered thereon by the beneficiary	Amount of the net payment made to or for the benefit of the beneficiary
£153 16s. 11d.	£53 16s. 11d.	£100

Prior to the year here in question the respondent had made claims for repayment of the income tax shewn by the certificates to have been deducted and retained by the trustees, and she received payment in accordance with these claims, and she handed the amount of the repayment to the trustees.

It should be made clear that the payments by the trustees to the respondent were made wholly out of income of the trust which had already been brought into charge to tax, and that in each of these years, including that ending Apr. 5, 1940, the respondent had no other source of income outside the provisions of her aunt's will. In the year ending Apr. 5, 1940, the standard rate of tax was seven shillings in the pound.

On Jan. 2, 1940, the respondent lodged with the Inspector of Taxes a claim for the repayment of Income Tax for the year to Apr. 5, 1940, in which her total income from all sources was stated as follows :

Source of income.	Amount of income before deduction of tax	Amount of income tax deducted
Annuity of £100 per annum free of tax from Mrs. M. J. Forrest's Trust	£153 16s. 11d.	£53 16s. 11d.

The repayment claim form showed that there were no charges on the respondent's income and repayment of £47 11s. 4d. of tax was claimed. The said sum was made up as follows :

	£	s.	d.
(a) a personal allowance of tax at the full standard rate of 7s. on £100	35	0	0
(b) an allowance of two-thirds of tax at the standard rate on £53 16s. 11d.	12	11	4
	£47	11	4

Along with the claim the respondent lodged the certificate already referred to.

The Inspector of Taxes objected to the respondent's claim. The respondent appealed to the General Commissioners, who, by a majority, allowed the appeal and, at the request of the present appellants, stated a case for the opinion of the Court of Session, under the Income Tax Act, 1918, s. 149, in which the question of law was stated to be whether the decision of the majority of the commissioners was right. The case was heard by the First Division of the Court of Session, who unanimously answered the question in the affirmative and affirmed the decision of the majority of the commissioners. The Crown now appeal against that decision.

The first question arises on construction of the direction in the will for payment to the respondent out of the free annual income of the heritage held by the trustees :

. . . of an annuity or yearly sum at the rate of one hundred pounds per annum . . . payable free of all deductions including income tax and Government duty.

I do not think that the alimentary restrictions imposed on the annuity affect the decision. We are here concerned with income tax only; no question of sur-tax arises. In my opinion the meaning of such a bequest is clearly established in the law of Scotland and I have no reason to think that the law of England is different. It is well expressed by LORD SANDS in *Hunter's Trustees v. Mitchell* (1), at p. 982. LORD SANDS says:

A Income tax is a tax upon the income of the person who enjoys the income. In whatever manner it may be collected, its ultimate incidence is upon the income of this person. So rigid is this principle that, when under a will an annuity is payable free of income tax, the amount of the tax is taken to be an additional gift, and is included in the income of the annuitant when, for revenue purposes, a return of total income is necessary. Further, the income from this source is not the annuity plus the tax upon it, but the amount of the annuity plus such sum that, when the tax is levied upon the total amount, the net amount will be the amount of the annuity.

B In other words, the duty of the trustees is to provide by means of the additional gift a sum to meet the annuitant's liability for income tax and leave her £100 annuity in her hands unaffected by tax. It is well to remember that, in the case of a taxpayer's source of income which is subjected to deduction at the source either under r. 19 or r. 21 of the All Schedules Rules, there are usually two stages in the taxpayer's liability to income tax, namely, first, the taxpayer

C has to suffer deduction at the source at the standard rate, which is provisional and subject to adjustment at the second stage, when the taxpayer claims and obtains relief by repayment under sect. 29 of the Act. The duty of the trustees in a case such as the present is to provide for the liability of the annuitant to tax under the first stage, and it is difficult to see why they are not to get the benefit of the later adjustment to which the provisional discharge of the taxpayers' liability is subject. The additional gift in such a case, either in whole

D—as in the present case—or in part, serves to meet a temporary tax liability, and, when the tax liability is ultimately ascertained, its service is terminated, and it should be *pro tanto* returned to the trust estate. This case is in marked contrast to the bequest of such an annuity as after deducting income tax at the current rate (which was held to mean the standard rate) for the time being would amount to the clear yearly sum of £350; *Re Jones* (5). Such a deduction is not affected by the ultimate tax liability of the annuitant, as ascertained under

E the second stage.

F That being the proper construction of the bequest, the next question is as to how the bequest works out in a question with the Revenue. This may well be exemplified in this case by an assumption that there was no statutory machinery for collection at the source. The annuitant would then be directly assessed on her total income, and there can be no doubt that her total income would be found to be £100, and she would be exempt from any liability to tax, with the result that the additional gift would become unnecessary in the particular year.

G But there was in this case statutory provision for deduction at the source, and, as the trust income had already been brought into charge, the All Schedules Rules, r. 19, as amended by the Finance Act, 1927, s. 39 (1), ensured deduction at the source, and entitled the trustees, on making payment of the annuity or other annual payment:

... to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction as if that sum had been actually paid.

H The standard rate of tax in the year to Apr. 5, 1940, was seven shillings in the pound, and the Crown maintains that the duty of the trustees under this rule, if they made the deduction, was to pay the respondent £65 in cash, and to give her a certificate of deduction of tax showing that £35 had been paid as income tax and that the respondent was bound to accept payment in that form. I agree with the judges of the First Division in their rejection of this contention, and their reasons for so doing.

In the first place, I am of opinion that the trustees, in order to carry out the provisions of the will, were bound to exercise the right conferred by the

rule and make the deduction. Secondly, it is established beyond doubt, that the provisions for deduction at the source are nothing more, under the Income Tax Acts, than the machinery by which the Revenue collects the tax from the person ultimately liable to pay. The authorities are referred to by LORD FLEMING in *Richmond's Trustees v. Richmond* (6), at p. 596. I may say that I prefer LORD FLEMING's dissenting opinion as to the right of the trustees to share in the repayments obtained by the annuitant to the opinions of the majority. Further, it must be remembered that any sum payable under the additional bequest forms part of the total income of the annuitant and is thus subject to tax. A

Under r. 19 the trustees had no choice but had to apply the standard rate to the £100 annuity, and this necessarily involved a calculation of what sum paid under the additional bequest would cover tax at the standard rate on that amount as well as the £100. No one disputes that £153 16s. 11d. formed a correct calculation on this basis. The trustees had no call, under this rule, even if they otherwise had a right, to ask the respondent to provide them with particulars as to what her total income was, or as to what personal allowances she might be entitled. But the deduction did involve a payment by the trustees, on her behalf, out of the additional bequest, which beneficially belonged to her, of £53, being in discharge of the respondent's personal liability for tax. ROMER, J., in the case of *Re Pettit* (2), already referred to, in relation to a tax free annuity of £1,000, puts the matter so clearly as to the stage which I have reached that I venture to quote a passage, at p. 769, viz.: B C

It would, however, be impossible for the trustees to ascertain what rate of tax was ultimately payable in respect of the annuitant's income, and in any case they would under the provisions of the Income Tax Acts, be bound, in the first instance, to treat that income as liable to the ordinary rate. In the year 1918-19, for instance, when the ordinary rate of income tax was 6s. in the £ the trustees would have had in the first instance to set aside £1,428 11s. 5d., and to pay £428 11s. 5d. to the Revenue and the balance to the annuitant. But this sum might in the end prove too little or too much. If the annuitant were liable to pay super-tax it would be too little and the proper proportion of her super-tax referable to her annuity would, when ascertained, have to be paid to her by the trustees and would so go to reduce the income payable to the residuary legatees. It might on the other hand turn out that the circumstances of the annuitant were such that she was not liable in respect of her income to the full rate of income tax, that, in my opinion, being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case the sum so set aside and the £428 11s. 5d. paid in the first instance to the Revenue would be too much, and if, in consequence of this, the annuitant is repaid the excess by the Special Commissioners, I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have. If the annuitant were to retain the excess she would have in the end have received out of the estate more than 20s. in the £ on the £1,000 given to her by the will. D E F

This passage was approved by LORD SANDS in *Hunter's Trustees v. Mitchell* (1), at p. 983.

The Crown were not parties in that case, and they take exception to it only in so far as the language of ROMER, J., may be held to be inconsistent with a contention which they have submitted for the first time in this House, and which depends on the proper construction of the Income Tax Act, 1918, s. 29 (as amended by sect. 32 and the Third Schedule to the Finance Act, 1920), which provides: G

(1) If it is proved to the satisfaction of the General Commissioners that any person whose claim for allowance or deduction or relief has been allowed, has paid any tax, by deduction or otherwise, the General Commissioners may, in the form prescribed, certify the facts proved before them to the Special Commissioners.

(2) The certificate of the General Commissioners shall state the particulars of the different sources of income in respect of which tax has been paid, the relief to which the claimant is entitled, the amount repayable in respect thereof, and the name and place of the abode of the claimant. H

(3) On receipt of the certificate, the Special Commissioners shall issue an order for repayment.

The contention of the Crown is that the claim for repayment is personal to the claimant, and that the words "has paid any tax by deduction or otherwise" import that no claim is valid except on the footing that on receipt of the repay-

ment it belongs to the claimant, who is entitled to keep it; that, in the present case, it is the trustees who are out of pocket, and that the claimant would be bound to account to the trustees for any repayment recovered by her; and that, accordingly, the respondent's claim for repayment does not fall within the purview of the section.

My Lords, in my opinion this contention is untenable, both as regards the narrow construction sought to be put on the section and the proper view of the facts in the present case. The words "paid by deduction" must refer to payment at the source by someone other than the claimant, but someone who thereby has paid the claimant's tax on the claimant's behalf; and that it constitutes payment by the claimant of her tax appears to me to be made clear by the closing words of r. 19 (1):

... and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid.

As I have already stated, on the basis of r. 19, the amount of the additional bequest was £53 16s. 11d., which belonged to the respondent, and that amount was applied on her behalf by the trustees in payment of £53 16s. 11d. of tax. As it turns out now, that calculation was in error as regards the liability of the respondent to income tax to the amount of £53 16s. 11d., which the respondent has paid by deduction within the meaning of sect. 29, and it does not seem to me to be any concern of the Crown as to whether the respondent is to account to the trustees for it or not.

Finally, I am unable to see any reason for any reduction of the £53 16s. 11d. to £47 11s. 4d. The amount overpaid was £53 16s. 11d. in respect of the respondent's personal liability to income tax. So far as she is concerned the Crown have no possible ground for claiming any tax out of the £53 16s. 11d. Whether, after its return to the trustees, and its distribution to, say, the residuary legatees, it is liable to any tax, is not *hujus loci*. Whether the respondent can amend her claim so as to claim the £53 16s. 11d. is not for this House to decide; we can only deal with the claim as presented to us in the stated case, and, in that view, I am of opinion that the appeal should be dismissed, and that the decision of the First Division should be affirmed. In accordance with the arrangement mentioned by the Lord Advocate, the respondent will be entitled to her costs of the appeal as between solicitor and client.

LORD RUSSELL OF KILLOWEN: My Lords, this appeal raises a question to which I find it difficult to give an answer which satisfies me in every particular. The difficulty arises from the impossibility of making the provisions of the will fit into the provisions of the Income Tax Act, but the problem must be approached in my opinion from the point of view that the trustees of the will do in each year strictly carry out the trusts imposed upon them by the testator.

At the outset my personal difficulty is increased by the fact that, unaided by authority, I would have imagined that the testator meant Miss Cook to receive an annuity of £100 per annum, and that residue was to bear the burden of and recoup her the amount of any tax which she might have to pay in respect of an annuity of £100. It has, however, been settled by authority (too late, it is said, for challenge) that the true meaning of such a provision is such that it bequeaths an annuity not of £100 but of such a sum as after deduction of tax will produce in each year the net sum of £100. In other words it is not a bequest of an annuity of £x the tax on which has to be borne by residue, but a bequest of an annuity of £y the tax on which is treated as borne by the annuitant by deduction, although in truth the burden of paying the annual sum of £x tax free to the annuitant falls upon residue. The amount of the annuity given may, therefore, vary from year to year according as the amount of tax payable by the annuitant increases or diminishes; and such an increase or diminution may be caused by one or other of several factors, as for instance an alteration in the standard rate of tax, or an alteration in the annuitant's rights (by personal or other allowances) to exemption from tax. For, be it observed, the freedom from tax in the case of such a gift as the present is not, as in the very special case of *Re Jones* (5), freedom from tax at the standard rate as a fixed deduction for the purpose of ascertaining the amount of the net annual payment, but freedom from the tax which would otherwise be payable by the particular annuitant.

What are the facts relevant to the particular year here in question, for the only matter for our determination is whether Miss Cook is entitled to recover repayment of tax for the year ending Apr. 5, 1940? The facts are as follows: (i) the trustees out of the income of the estate, which had already borne tax by deduction, paid to Miss Cook, at the times specified in the will, two sums of £50 each; (ii) they made no deduction in respect of tax under the All Schedules Rules, r. 19, because the terms of the will prohibited any such deduction; (iii) the two sums of £50 constituted the sole income of Miss Cook; and (iv) she was, therefore, not liable to pay income tax at all.

Those are the facts of this case, and on a consideration of them I am unable to see how any overpayment of tax has taken place or how any claim by the annuitant to repayment can arise. She has received exactly what the will gave her, *viz.*, £100 and has paid no tax. The residue has suffered the reduction of the estate's taxed income contemplated by the will and caused by the direction to pay the £100. The Revenue has received all the tax to which it is entitled.

My Lords, I am painfully conscious that the solution which I have indicated, commends itself to none of your Lordships; but, notwithstanding the uneasiness to which that fact gives rise, I prefer it to a solution which causes the trustees to depart from the directions given to them by the testatrix, and to a solution which is based on a two-fold fiction, *viz.*, that the income of Miss Minnie Cook during the year in question was £153 16s. 11d., and that the trustees had disbursed a sum of £153 16s. 11d. out of which they paid to the Revenue income tax at the standard rate.

I would allow the appeal.

LORD PORTER: My Lords, in this case I have had an opportunity of reading the opinions of VISCOUNT MAUGHAM and LORD THANKERTON and agree that the judgment of the First Division of the Court of Session should be affirmed.

I should not trouble your Lordships with my own views were it not that the provisions of the various Finance Acts applicable are neither clear nor coherent and in a matter where some violence to language must take place whatever view be taken, I think it desirable to state shortly the reasons why I have arrived at the conclusion stated.

I need not repeat the facts and may, therefore, express my reasoning at once. Like VISCOUNT MAUGHAM I think that the first question is to determine the meaning of the will. I do not think that any of your Lordships have any doubt as to this: the trustees are under an obligation to pay the annuitant £50 at Whitsunday and £50 at Martinmas in each year and the right to payment is to accrue on the first appointed date immediately following the death of the testatrix, subject to a reduction in the first payment so that it shall bear the same proportion to £50 as the period between the death and the date of the first payment bears to the full half-year. Whatever recovery of tax she may or may not obtain later, at that moment the annuitant is entitled to the named sum given by the will. No question of a broken period arises in the present case so that the named sum is on each date £50 and for the year £100. The trustees are not entitled—and indeed it has not been maintained that they are—to pay a reduced sum leaving the annuitant to make up the testator's bounty by claiming repayment of relief from the Income Tax authorities. In order to fulfil their obligations the trustees are entitled under the All Schedules Rules, r. 19, or obliged under r. 21 to deduct tax at the current rate from such a sum as will leave £100 net. The gross sum so arrived at is £153 16s. 11d., so that £53 16s. 11d. has to be paid to meet an immediate liability for tax, though that sum may ultimately be found not to be due by the annuitant in whole or in part. In these circumstances the question arises whether she can claim repayment from the income tax authorities of any sum and, if she can, what that sum should be.

Four suggestions have been mooted as to what this sum should be:

(i) It was originally said by the Crown that the claim was one personal to an annuitant in the sense that her claim was confined to any diminution of income which she suffered by reason of the deduction of tax: that in the present case as the annuity was tax-free, no loss of income had occurred, and, therefore, no claim for repayment was possible. It is true that the appellants tempered the harshness of this contention by offering an *ex gratia* payment of £35, but they maintained that strictly no repayment was exigible.

My Lords, such a result would not, I imagine, commend itself to any tribunal as a fair solution of the difficulty, but in a matter which is purely a question of statutory enactment one must look at the provisions of the various Finance Acts which deal with the matter in order to ascertain if the argument is sound.

The right to repayment is now dealt with in sects. 9, 10 and 16 of the Income Tax Act, 1918, read with sects. 40 and 41 of the Finance Act, 1927, which contains certain modifications of the 1918 Act, but does not affect the question at issue. Sects. 9, 10 and 16 of the 1918 Act so far as material read as follows :

A (9) An individual, who claims and proves in the manner prescribed by this Act, that his total income . . . does not exceed the amounts in the six sections next following, shall be entitled to such relief as is mentioned in those sections.

(10) Where the income does not exceed one hundred and thirty pounds [at the material date £100] the claimant shall be entitled to exemption from income tax.

B (16) Except as otherwise provided any exemption, abatement or relief under the preceding provisions of this Part of this Act shall be given either by discharge or reduction of the assessment, or by repayment of the excess which has been paid . . .

I see nothing in these provisions or indeed in any of the provisions for relief or repayment of income tax which would prohibit a subject from claiming repayment of tax paid in respect of the income to which he is entitled, though the sum repaid may on receipt be payable to some other person. Indeed the provisions of the Finance Act, 1941 s. 25 (4), seem to show a recognition, at a later date it is true, that a claim for repayment may be made on behalf of a person other than the claimant, and ultimately the Crown was prepared to acknowledge a right on the claimant to receive a sum which, though less than that which the annuitant put forward, would enure to the benefit of the trust. It would in my view be unfortunate if a concession even to this extent was not justified since otherwise the Revenue could retain tax in respect of a sum which normally would be free of tax.

D (ii) The main argument on behalf of the commissioners however was that the annuitant's gross income was £100 and her net income therefore £65. The necessity which the trustees were under of providing two sums of £50 at stated dates, both long before a return of tax could be claimed much less recovered, they explained by contending that the trustees must be taken to have advanced the amount of this tax at the date of each payment, and to be entitled to recover it from the annuitant as repayment of a loan when she recovered it from the tax authorities. This, to my mind, is a more attractive argument than that originally advanced, but I do not think it accords with the facts.

E In the numerous cases involving the question as to the right of trustees to recover from a cestui que trust a sum which he in his turn has recovered from the Revenue authorities such an argument has never been put forward. It is true that in none of those cases was the Crown interested, but it would have been an effective argument on behalf of trustees seeking to recover if it had been sound. The fact is that the £100 is paid under the provisions of the will and without regard to whether the lady has the right to or will recover anything from the Crown. There is no loan in fact of the whole or any part of the tax chargeable on the sum paid nor do I see any necessity for an implication that a loan has been advanced.

F (iii) and (iv) The actual claim lodged with the Inspector of Taxes alleged that the annuitant's gross income was £153 16s. 11d., and her net income, therefore, £100, but she claimed relief only to the extent of £47 11s. 4d., which was the correct figure if her gross income was really £153 16s. 11d.

G I do not, however, accept this view ; the distinction between gross and net seems to me to have no application to a case where income is given free of tax. Her income is £100 but in providing that sum the trustees may take into account tax deducted at the source and must take into account untaxed income which comes into their hands and out of which the annuity is to be paid. In order to meet their obligations and to pay the £100 they, therefore, required in the existing circumstances a sum of £153 16s. 11d., of which £53 16s. 11d. had already been deducted in tax. In handing over the £100 they were passing on the exact sum which they themselves had received but one in respect of which the tax had already been deducted.

H Even if the trustees had received untaxed income and deducted tax as they must have done under r. 21, theirs would have been the hand which paid the tax but they would have paid it not for themselves but for her, and it appears

to me to make no difference whether the tax is deducted at the source or withheld by the trustees. In each case £53 16s. 11d. must be paid to the revenue authorities in order that the lady may receive her annuity at the dates demanded by the will.

It was her tax, paid to enable her to receive the £100 at the appropriate time. The form of certificate given by the trustees appears to me to represent the true state of affairs: the gross amount on which tax has been suffered by the beneficiary is £153 16s. 11d.: the amount of income tax suffered thereon by the beneficiary is £53 16s. 11d. and the amount of net payment actually made to be for the benefit of the beneficiary is £100. If then the amount of tax suffered by the beneficiary is £53 16s. 11d., and she owes no tax I see no reason why she should not recover the whole sum. The alternative suggestion, that the repayment of £47 11s. 4d. only can be recovered depends upon the truth of the suggestion that the annuitant's gross income is £153 16s. 11d. That in my view is not so. Her income is £100 and the terms "gross" or "net" are not expressions appropriate to that income. It is true that in order that she may receive £100 at the proper time tax to the amount of £53 16s. 11d. has to be set aside. That sum is, as I think, paid on her behalf and is, therefore, recoverable by her. But it is not hers to keep, it must be handed over to the trustees.

In the present case however it is immaterial whether the sum to be recovered is £53 16s. 11d., or £47 11s. 4d. At least the lesser sum can be claimed and no more is sought.

I agree that the appeal should be dismissed.

LORD SIMONDS: My Lords, this appeal raises a question of real difficulty. It is an appeal against an interlocutor pronounced by the First Division of the Court of Sessions as the Court of Exchequer in Scotland in a case stated under the Income Tax Act, 1918, s. 149. The facts can be shortly stated.

Mrs. Margaret Jessie Forrest, who died on Sept. 24, 1937, by the third purpose of her trust disposition and settlement directed her trustees out of the free annual income derived from the heritable subjects which should belong to her at the time of her death (*inter alia*) to pay to her niece Miss Minnie Cook an annuity or yearly sum at the annual rate of £100 per annum for the remainder of her life, such annuity to be payable at two terms in the year, Whitsunday and Martinmas, beginning at the first of these terms after her death with the proportion for the period from her death to that term and so forth thereafter at the said two terms and the testatrix declared that the said annuity should be purely alimentary and not capable of anticipation or subject to the debts or deeds of the annuitant or liable to the diligence of her creditors and should be payable free of all deductions, including income tax and Government duty.

The terms of this bequest are of a deceptive simplicity: the gift of an annuity free of income tax does not upon the face of it suggest any question of difficulty in regard either to interpretation or to the rights *inter se* of the Revenue, the annuitant and the residuary legatees. Yet your Lordships have upon one point at least been left in no doubt, namely that such a bequest in fact raises questions of which there is no easy solution.

The controversy with which your Lordships are immediately concerned is between the Crown and the annuitant and arises out of an objection made by the Inspector of Taxes to a claim made by the annuitant for repayment of income tax for the year ended Apr. 5, 1940.

At each term of Whitsunday and Martinmas after the death of the testatrix the trustees acting under her trust disposition and settlement paid to the annuitant the sum of £50 in respect of the annuity for the preceding half-year. These sums were paid wholly out of income that had already been brought into charge to tax: that is to say, at the then prevailing rate of tax every £100 in the hands of the trustees represented a gross sum of £153 16s. 11d. from which tax amounting to £53 16s. 11d. had been deducted. The trustees by their solicitor accordingly gave to the annuitant a certificate whereby it was certified that she was:

... a beneficiary of the trust known as Mrs. Forrest's Trust to the extent of £100 and that the following particulars are correct.

The particulars purported to show in respect of the annuitant's income for the year ended Apr. 5, 1940, (i) that the gross amount on which tax had been suffered

by the beneficiary was £153 16s. 11d.; (ii) that the amount of income tax suffered thereon by the beneficiary was £53 16s. 11d.; and (iii) that the amount of the net payment actually made to or for the benefit of the beneficiary was £100.

Upon the footing of this certificate the annuitant who had no other income than her annuity lodged her claim for repayment of income tax for the year to Apr. 5, 1940. She claimed, (i) that the source of her income was "Annuity of £100 per annum free of tax from Mrs. M. J. Forrest's Trust"; (ii) that the amount of income before deduction of tax was £153 16s. 11d.; and (iii) that the amount of income tax deducted was £53 16s. 11d., and claimed repayment of £47 11s. 4d., made up of (a) a personal allowance of tax at the full standard rate of 7s. on £100 = £35, and (b) an allowance of two thirds of tax at the standard rate on £53 16s. 11d. = £12 11s. 4d.

It appeared that the annuitant was prepared and intended if she was repaid this sum of £47 11s. 4d. to hand it over to the trustees for behoof of whom it might concern. She recognised that her right was to get £100 and no more from the bounty of the testatrix. This course she had followed in previous years in which her claim for repayment had been allowed.

The Inspector of Taxes objected to the claim. He was prepared to concede as a matter of grace, if not of right, the repayment of £35, *i.e.*, 7s. in the £ upon £100 upon the footing that the trustees might, if they had thought fit, have paid to the annuitant £65 and given her a certificate of deduction of tax amounting to £35, upon which she could have obtained repayment. This the annuitant would not accept and so the matter came before the Commissioners for the General Purposes of the Income Tax for the Division of Edinburgh upon an appeal by the annuitant against the objection made by the Inspector of Taxes to her claim for repayment of tax. The commissioners by a majority allowed her appeal and at the request of the Inspector of Taxes stated a case for the opinion of the Court of Session, in which the question of law for the opinion of the court was expressed to be, whether the decision of the majority of the commissioners was right. The Court of Session has unanimously held that the decision was right, that is to say, that the claim for repayment of £47 11s. 4d. was valid. Hence the appeal to this House.

My Lords, I think that the first stage in the consideration of this question must be to interpret the will of the testatrix. Shorn of the incidental provisions in regard to mode of payment, what is meant by an annuity of £100 free of income tax? It can mean one of two things, either (a) an annuity of such a sum as after deduction of tax at the standard rate for the time being in force will leave £100, or (b) an annuity of such a sum as after all necessary adjustments in respect of the allowances and reliefs personal to the annuitant have been made will leave her with £100 no more and no less. Between these two meanings a choice must be made and I do not think that the choice is assisted or should be guided by the fact that the testatrix has given directions in regard to payment which are more easily reconcilable with the one result or the other. The substance of the bequest lies in the words "an annuity at the rate of £100 per annum . . . free of all deductions including income tax . . ." and, giving these words the best consideration that I can, I am clearly of opinion that they import no more than that the annuitant, be her circumstances what they may, is to receive £100 no more and no less: that is the sum that is to remain in her pocket after tax has been provided for. If she is a payer of sur-tax, then there must be provision for sur-tax: if she is below the level of taxation there will be neither sur-tax nor income tax. This would be very plain if the assessment to tax was made directly upon her. The question would be, what is her income; the answer, £100: the next question, what tax is payable by her, and the answer, none. No one can fail to be aware of the complications that are introduced by the machinery of tax collection. But they do not in my opinion lead to a conclusion which is so manifestly incorrect as the statement that an annuity of £100 free of income tax is the same thing as an annuity of such an amount as after deduction of tax at the standard rate will leave £100. I say "manifestly incorrect," for in the present case it leads, and necessarily leads, to the further statement by the annuitant that her income is £153 16s. 11d., I see no justification for such a statement. It is indisputable as a mathematical proposition that £153 16s. 11d. is the sum which after deduction of tax at 7s. will produce £100; it is, therefore, true that every £100 of tax-paid income in

the hands of the trustees represents a gross income of £153 16s. 11d. But it does not follow that the annuitant's income is £153 16s. 11d. We know that if her income is £100 she pays no tax. Why then should an income of £100 free of tax in her case be stated to be £153 16s. 11d. ?

In coming to this conclusion I do not in any way dissent from the proposition of law stated by LORD SANDS in *Hunter's Trustees v. Mitchell* (1), at p. 982 :

Income tax is a tax upon the income of the person who enjoys the income. In whatever manner it may be collected, its ultimate incidence is upon the income of this person. So rigid is this principle that when under a will an annuity is payable free of income tax, the amount of the tax is taken to be an additional gift and is included in the income of the annuitant when for revenue purposes a return of total income is necessary.

This has been accepted in England as in Scotland as an accurate statement of the law : see also *North British Ry. Co. v. Inland Revenue* (7). But it leaves entirely open the question what upon the true interpretation of a particular will is the amount of the tax which is the subject of the additional bequest. It may be either the hypothetical standard rate of tax or the actual tax which the particular beneficiary has to bear and the actual tax may be by virtue of allowance and relief less than the standard rate or by virtue of the addition of sur-tax may be something more than the standard rate.

It is, I think, upon this point that the issue really turns. The LORD PRESIDENT (NORMAND) (from whose opinion I very reluctantly differ) says, at p. 293, that :

... for the purpose of grossing the income, income tax must be taken at the standard rate of tax.

If it were so, I should find his conclusions difficult to resist. But holding as I do that the meaning and effect of the will is that the annuitant is to have her annuity free of the tax which she, her total income being what it is, would pay in respect of it, not free of the tax which she would have to pay if her total income was something quite different, I cannot accept the view that for the purpose of grossing the income the tax must be taken at the standard rate. Here I find myself in complete agreement with the judgment of ROMER, J., in *Re Pettit* (2), as expounded by LORD GREENE, M.R., in *Re Maclellan* (3), at p. 758 ([1939] 3 All E.R., at p. 88) :

He treats the direction in the will [i.e., a direction to pay an annuity free of income tax] as a direction to the trustees to ascertain what is the gross sum which will give the net annuity specified, a clear sum of £1,000. He points out that, in calculating that gross sum, it would lead to an inaccurate result if the trustees merely calculated it by reference to the deduction which it was permissible for them to make, without reference to the recoveries which the annuitant might obtain. He says that the true calculation which the trustees ought to make is to ascertain a sum which, after taking not merely the initial deduction but also the matter of the relief into account, will produce the net sum specified. If I may say so with respect, that reasoning appears to me to be as satisfying as any reasoning can be.

It may further be observed that, as was pointed out by EVERSHERD, J., in *Re Tatham* (8), at p. 38 ([1945] 1 All E.R., at p. 30), ROMER, J., was not deterred from coming to this conclusion by the fact that the testator had directed that the annuity should be paid in equal quarterly payments.

This, then, my Lords, upon the true construction of the will is the measure of the bounty of the testatrix. Somehow, in conformity with the provisions of the law of income tax, she is to receive £100 no more and no less. But it is at this point that the difficulty arises. In *Re Hooper* (9), UTHWATT, J., justly observes, at p. 172 ([1944] 1 All E.R., at p. 228) :

Testators frequently provide that an annuity of an amount specified by them is to be free of income tax or is to be paid without deduction of income tax. These words do not fit in at all comfortably with the provisions of the Income Tax Acts, for it is beyond the competence of testators to free an annuity from income tax. The income tax withheld on payment of an instalment of an annuity is not a deduction from the annuity ; and, where part of the annuity is not payable out of profits and gains brought into charge, the withholding of the income tax appropriate to that part is obligatory on the payer.

The judge proceeds to point out that the intention disclosed by such phrases, or phrases of similar import disclosing an intention to relieve the annuitant of the burden of income tax, is nevertheless carried out by an appropriate increase

in the amount specified for the annuity, the increase being such as to enable the annuitant to receive the specified amount after the tax incident to the increased annuity in the hands of the annuitant has been satisfied in manner required by the Act. The question then is, how the intention of the testatrix is to be carried out. How are the trustees to provide the beneficiary (a) with an annuity of £100 and (b) with such further sum as will leave her that sum after her liability to tax has been satisfied? And, further, how are they to do this conformably with r. 19 or r. 21 (as the case may be) of the All Schedules Rules of the Income Tax Act? My Lords, it appears to me to be quite clear that this result is satisfactorily achieved, so far as the substance of the gift is concerned, by paying to the annuitant £65 in cash and giving to her a certificate which enables her to recover £35 from the Revenue. But it is said that the form of the gift is in this way disregarded, for the testatrix has prescribed payment at two terms in the year and presumably in two equal parts. What then?

B Is the substance of the gift to be disregarded in order that form may be observed? The testatrix has made a bequest which is in form irreconcilable with the statutory machinery for the collection of tax. I see no reason why, in order to observe form, the fiction should be adopted that her income is £153 16s. 11d., or, in other words, that the bequest to her is of an annuity of that amount.

I am led to the same conclusion by a consideration of the provision for repayment of tax contained in the Income Tax Act, 1918, s. 29 (as amended by s. 32 and the Third Schedule to the Finance Act, 1920). That section provides:

(1) If it is proved to the satisfaction of the General Commissioners that any person whose claim for allowance or deduction or relief has been allowed, has paid any tax, by deduction or otherwise, the General Commissioners may in the form prescribed certify the facts proved before them to the Special Commissioners. (2) The certificate of the General Commissioners shall state the particulars of the different sources of income in respect of which tax has been paid, the relief to which the claimant is entitled, the amount repayable in respect thereof and the name and place of the abode of the claimant. (3) On receipt of the certificate the Special Commissioners shall issue an order for repayment.

This section appears to me to look at nothing but the position of the individual taxpayer. What is his total income? From what sources is it derived? Upon that basis to what allowance or relief is he entitled? These questions and the answers that must be given to them are not consistent with the solution of the present case by which admittedly the repaid tax is not to be retained by the claimant. I must respectfully dissent from the proposition which has found favour with the Court of Sessions, that this is a matter irrelevant to the issue. On the contrary, the question being what is the income of the annuitant for the purpose of determining the allowances and reliefs to which she is entitled I think it very germane to ask whether the sums, that are repaid to her, belong to her in her own right. And, if I find that they belong not to her but to another then I take leave to doubt the major premise, namely the amount of her income upon which her claim to repayment was based. So here the annuitant claims relief and repayment upon the basis of a total income of £153 16s. 11d. But, having obtained repayment of £47 odd, she hands that sum over to the trustees and she does so for no other reason than that, since her total income is not £153 16s. 11d. she is not entitled to retain it. But if her total income is not £153 16s. 11d. (a conclusion to which on the construction of the will I had already come) she is not entitled to relief and repayment upon the footing that it was.

My Lords, I was much impressed by other considerations advanced by the Lord Advocate. It is, I think, material to ask what is the character of this £47 of repaid tax when it has reached the hands of the trustees. In the hands of the annuitant it is a sum which has been repaid to her upon the footing that it was a tax paid by her by deduction or otherwise. In the hands of the trustees how is it to be regarded? As part of the trust income, presumably. But I do not know whether it is income upon which tax has been paid or is income which is still liable to tax under some case of some schedule. It is not conclusive that such an apparently insoluble problem arises, but my doubts about the correctness of the decision under appeal are strengthened.

Yet another difficulty presses on me. I do not understand why only £47 11s. 4d., not £53 16s. 11d., is repayable upon the basis of the respondent's argument. If her total income was in fact £153 16s. 11d., then she would be entitled

to £47 11s. 4d., and no more. But I do not understand that it is contended at the Bar that her total income was in fact £153 16s. 11d. On the contrary the argument is that, as the Crown has received £53 16s. 11d. by way of tax in respect of every £100 of income left in the hands of the trustees, therefore it has received £53 16s. 11d. in respect of the £100 paid by the trustees to the annuitant. If so, since *ex hypothesis* the annuitant pays no tax, the whole of the £53 16s. 11d. should be repaid. But it is sufficiently obvious that no such claim could validly be made either by the annuitant or anyone else under the Finance Act, 1918, s. 29. Again I am forced to doubt the soundness of the foundation of the claim. A

The respondents relied in this House (though the point appears not to have been raised in the Court of Sessions) upon the Finance Act, 1941, s. 25, which, they say, shows that the procedure adopted by the trustees in this case is the procedure which Parliament contemplated for every case of payment of a stated sum free of income tax. I am unable to accept this argument. It is as tenable B
a view that this section is dealing only with the case where the annuitant does in fact bear tax at the standard rate. If the section does cover the case of the respondent's annuity and she is entitled to an annuity only of £68 19s. 3d. free of tax I must admit that for my part I do not see what advantage she derives from it. I do not think that this section absolves your Lordships from the duty of construing the will and reconciling its provisions, so far as they can be reconciled, with the machinery of the income tax law. C

It has been urged in favour of the claim, that the trustees have no means of finding out what the position of the annuitant is in regard to reliefs and allowances, that they cannot compel her to tell them, and, therefore, that they can do no other than pay her the full nominal amount of the annuity. From this proposition too I must dissent. As I see it, the trustees can only perform their duty properly, *i.e.*, provide an annuity of £100 free of tax, if they know what is the tax that the annuitant has to pay, and they are accordingly entitled to obtain from her all necessary information and to satisfy themselves that it is correct. D
If the annuitant was a payer of sur-tax, she would⁹ have to give the trustees all the information about her income which would enable them to provide her with an annuity free of tax. I see no reason why she should not do so, whatever may be the measure of the freedom that she claims.

Finally I must recur to the contention that, if the solution that I favour is adopted, the mode of payment prescribed by the testatrix is ignored. If this is the necessary result I do not shrink from it. It is to my mind preferable to saying E
that a bequest of an annuity of £100 free of tax to an annuitant who, if she had £100 of income and no more, would pay no tax, is equivalent to a bequest of an annuity of £153 16s. 11d. upon which she ultimately pays tax of £6 5s. 7d., and recovering £47 11s. 4d. by way of personal relief and allowance hands that sum over to another. But I would not finally express an opinion that it is the necessary result. It may well be that it would be proper in the administration of this trust, in order to give effect to the testamentary intentions, for the trustees to make the necessary advances by means of equal half-yearly payments subject to the necessary accounting when the annuitant had recovered the tax paid in respect of £100, *i.e.*, in the year under review the sum of £35. I do not venture, particularly as this is a case arising under the law of Scotland, to express any view upon this without hearing argument on the part of the annuitant and the residuary legatees. F G

I would allow this appeal and answer the question of law stated for the opinion of the court by saying that the decision of the majority of the commissioners was not right.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue*, agent for Henry Barton, *Solicitor of Inland Revenue for Scotland* (for the appellants); *Beveridge & Co.*, agents for *Cooper & Brodie, W.S.*, Edinburgh (for the respondent). H

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

LEACHINSKY v. CHRISTIE.

[COURT OF APPEAL (Scott and Lawrence, L.J.J., and Uthwatt, J.), **May 30, 31, June 1, 4, July 17, 1945.**]

Trespass—Trespass to the person—False imprisonment—Arrest without warrant—Charge of unlawful possession under local Act—Name and address of person charged known to police at time of arrest—Charge not justifying original arrest or continuing detention under arrest—Dismissal of charge at police court—Re-arrest—Subsequent charge of larceny—Charge dismissed—Common law plea of justification not available unless charge of felony preferred—Liverpool Corporation Act, 1921 (c. lxxiv), ss. 507, 513.

The plaintiff, a Russian, carried on his business as a "waste" merchant in Liverpool. Both his home and business addresses were known to the police. On Aug. 31, 1942, he was arrested by the defendants, who were police officers, and charged under the Liverpool Corporation Act, 1921, s. 507, with "unlawful possession" of a bale of cloth. He was detained in custody until the following day when he was brought before the magistrate and remanded in custody until Sept. 9. Thereafter he was remanded on bail until Sept. 15. At the hearing the plaintiff was discharged but before leaving the court he was re-arrested, no fresh charge having been preferred at the time. Later in the day the Leicester police, charging him with larceny, took him to Leicester with a view to his committal for trial. That charge was dismissed by the magistrates. The plaintiff brought an action against the defendants, officers of the Liverpool Police Force and others, to recover damages for false imprisonment and trespass to the person. Although the offence of "unlawful possession" charged against the plaintiff was one for which there was, in the circumstances, no statutory power of arrest without warrant, the defendants contended that their action was justified because there was a reasonable and probable cause for suspecting, and in fact suspecting that the plaintiff had stolen or feloniously received the cloth:—

HELD: (i) although the defendant police officers purported to arrest the plaintiff without a warrant under the Liverpool Corporation Act, s. 507, their action was unjustified, since by sect. 513 of the Act, such arrest and detention without warrant was only lawful if the name and residence of the person arrested was unknown and could not be ascertained.

(ii) (LAWRENCE, L.J., dissenting) the common law power of arrest was limited to a specific charge and arrest must be made only on that charge. A person, therefore, could not be lawfully arrested for a misdemeanour by a constable merely because the constable reasonably suspected him of having committed a felony. The arrest and detention was, accordingly, a false imprisonment of the plaintiff.

Dumbell v. Roberts (8) followed.

(iii) the re-arrest of the plaintiff after the dismissal against him of the charge of unlawful possession under the Liverpool Corporation Act was not justified and amounted, in the circumstances, to false imprisonment.

[EDITORIAL NOTE. The point considered in this case is the question whether a charge of felony may give *ex post facto* validity to a previous wrongful arrest without warrant for misdemeanour. SCOTT, L.J., reviews the history and constitutional importance of the power of lawful arrest and holds that (a) arrest is merely the first step on the procedural road to trial and punishment or acquittal and (b) arrest must be on a definite charge which must be stated at the time of arrest. UTHWATT, J., agrees, observing that it appears logically to follow that a person cannot be lawfully arrested by a constable for a misdemeanour merely because he reasonably suspects him of having committed a felony. LAWRENCE, L.J., while concurring in the judgment reversing the court below, disagrees with the principles laid down in *Dumbell v. Roberts* (8), on the ground that it places the police in a position of great difficulty, since it is merely their function to bring before the court a person reasonably suspected of felony. In his view, therefore, it is not essential for the party to be told the nature of the charge at the time of his arrest.

AS TO ARREST WITHOUT WARRANT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 85-97, paras. 112-122; and FOR CASES, see DIGEST, Vol. 14, pp. 175-186, Nos. 1534-1653.]

Cases referred to:

*(1) *Entick v. Carrington* (1765), 19 State Tr. 1029; 14 Digest 189, 1694; 2 Wils. 275.

- (2) *Walters v. Smith (W. H.) & Son, Ltd.*, [1914] 1 K.B. 595; 14 Digest 177, 1549; 83 L.J.K.B. 335; 110 L.T. 345.
- (3) *Timothy v. Simpson* (1835), 1 Cr. M. & R. 757; 14 Digest 179, 1577; 3 Nev. & M.M.C. 127; 5 Tyr. 244; 4 L.J.M.C. 73; 4 L.J.Ex. 81.
- * (4) *Liversidge v. Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338; 66 L.T. 1.
- (5) *Greene v. Secretary of State for Home Affairs*, [1942] A.C. 284; [1941] 3 All E.R. 388; 111 L.J.K.B. 24; 166 L.T. 24; *affg. S.C. sub nom. R. v. Home Secretary Ex p. Greene*, [1941] 3 All E.R. 104.
- (6) *Wilkes v. Wood* (1763), Lofft. 1; 11 Digest 510, 118; 19 State Tr. 1153.
- (7) *Leach v. Money, Watson and Blackmore* (1765), 19 State Tr. 1001; 11 Digest 510, 120.
- * (8) *Dumbell v. Roberts*, [1944] 1 All E.R. 326; 113 L.J.K.B. 185; 170 L.T. 227.
- (9) *Marriner v. Bath & Wells (Bp.)*, [1893] P. 145; 19 Digest 404, 2351.
- (10) *R. v. Hughes* (1879), 4 Q.B.D. 614; 14 Digest 168, 1459; 48 L.J.M.C. 151; 40 L.T. 685; 14 Cox C.C. 284.
- (11) *Turner v. Postmaster General* (1864), 5 B. & S. 756; 14 Digest 167, 1458; 34 L.J.M.C. 10; 11 Jur. N.S. 137.

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APPEAL by the plaintiff from a decision of STABLE, J., without a jury, at the Lancashire Assizes, dated June 20, 1944. The action was one for damages for false imprisonment against the Liverpool police. Originally the Leicester police were also sued, but the claim against them was dropped. The facts and arguments are fully set out in the judgment of SCOTT, L.J.

Neville Laski, K.C., and *Rose Heilbron* for the appellant.

E. G. Hemmerde, K.C., and *H. I. Nelson, K.C.*, for the respondents.

Cur. adv. vult.

SCOTT, L.J.: The appellant (to whom I will refer as "the plaintiff") was without warrant arrested on a charge of misdemeanour by the respondents Christie and Morris, respectively detective constable and detective sergeant in the Liverpool police force, on Aug. 31, 1942, in his own place of business as a "waste" merchant in Beaufort Street, Liverpool. The statute under which they purported to be acting was the Liverpool Corporation Act, 1921. That Act contains the following provisions: sect. 507:

(1) Any person brought before any court of summary jurisdiction charged with having in his possession any thing which there is reasonable ground to believe or suspect has been stolen and who does not account to the satisfaction of the court for his possession of the same shall be liable to a penalty not exceeding five pounds or in the discretion of the court to imprisonment for any term not exceeding two months with or without hard labour. (2) If any person so brought before any court shall declare that he received such thing from some other person or that he was employed as a carrier agent or servant to convey the same for some other person such court shall cause such other person and also if necessary every former or pretended purchaser or other person through whose possession the same shall have passed to be brought before a court and examined. (5) For the purposes of this section . . . the expression "stolen" means stolen or unlawfully acquired or detained . . .

Sect. 513 provides as follows:

It shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant—(1) Any person whose name and residence shall be unknown to such constable and cannot then be ascertained by him and who shall commit any offence against [*inter alia*] (A) the provisions of . . . this Part of this Act.

The plaintiff was a "waste" merchant dealing *inter alia* in the waste materials of tailoring businesses. He was a Russian Jew brought to this country by his parents at the age of two in about 1891. When he grew up he carried on business first in Manchester, and then from 1931 to 1937 in Duke Street, Liverpool. In that year he moved to a warehouse office at 196 and 198 Beaufort Street, Liverpool; it was there that he was arrested. He had for the last 18 years before the trial lived at the same house in Eberon Road, Southport. Both his addresses were known to the police at the time of arrest.

He was in the habit of purchasing his supplies from various towns, and for some four months previously had been buying occasionally from a tailoring firm called Michaelson in Leicester. On Aug. 26, he there bought three bales of waste cuttings for £4 6s. 0d., such waste being habitually sold by weight. On Aug. 27 he called with a van to pay for and collect what he had bought, and, according to his story, incidentally asked Michaelson with whom he was doing the deal if he had any "remnant" out of which to make a dress for his wife. Michaelson

replied by saying he had many ; and in the result the plaintiff bought the lot for £22 and they were packed into a single bale. The contents included linings and stockinet as well as cloth ; but it was referred to as the bale of cloth and I will so speak of it. In accordance with his usual practice he paid cash for the whole purchase. He then carried off the four bales in his van to a carrier trading to Liverpool and sent them there with 23 other bales of waste bought from other sellers in Leicester, describing the lot for the purpose of the carrier's charges, made by weight, as "waste," and thus misdescribing the bale of cloth. A The others had all been bought by weight and their weights were known. The cloth bale he estimated at 1 cwt., and the carrier was content so to treat it. On Aug. 29, the Liverpool police, apparently having already some suspicion, based on grounds which were not alleged in either the original or the amended defence, and indeed never explained by them in evidence, examined the plaintiff's consignment at the garage, including the carrier's invoice showing the whole, B including the bale of cloth, described as "waste."

On Aug. 31 the two defendants, Morris and Christie, with a junior officer, came to the Beaufort Street warehouse to watch the delivery of the bales, but did not announce their presence to the plaintiff, who was there helping his two women employees and the carrier's man to carry the bales into the warehouse. All the 26 bales of waste proper had to be weighed in order to check the purchases, C but it was unnecessary to weigh the bale of cloth as that had not been bought by weight. Accordingly whilst the 26 bales were carried into the warehouse to the weighing machine, the bale of cloth was left near the door at the back of the warehouse, through which all had been carried in. Then the police came in and in effect taxed the plaintiff with having described that bale to the carrier as "waste." Not being satisfied with his answers, they arrested him on a charge of "unlawful possession" under the Liverpool Act, and took him in custody D to the Essex Street Bridewell. As they knew his name and address this action was patently not authorised by the Liverpool Corporation Act, s. 513, and they knew it. Their supposed legal excuse—for the first time plainly put forward in an amendment made in their defence during the trial—was that they reasonably suspected the plaintiff of larceny. In cross-examination their excuse for purporting to arrest under the Liverpool Act was simply that it was "convenient" so to do.

E It is this last claim by the Executive to a discretionary power of arrest without warrant, outside the statute, coupled with an attempted justification after the event under a common law power to arrest—exercisable only in certain circumstances and only for a specific purpose—that makes this appeal so important to the public. I anticipate my judgment by saying now, first, that this common law power had no application to the facts of the case ; secondly, that the conduct of the police involved a grave dereliction of duty ; and, thirdly, that the judgment F of the judge was wrong. He took the view throughout, as appears from his interventions during the evidence, and from his judgment, that the police were justified in their action on the grounds that before arresting on the statutory charge they had a well-founded suspicion that the plaintiff had stolen the cloth, although they did not at the time purport to arrest on any ground but the Liverpool Act ; and it was from that legal standpoint that he considered the evidence about what passed at the plaintiff's premises that morning, and particularly the plaintiff's manner and his inadequate answers. In doing so I think G he was wrong ; and it is our duty to consider that evidence from a different point of view.

The plaintiff was obviously very much upset in mind by the mere fact of the visit of the police ; but it is important not to draw a wrong inference from his mental disturbance. The purchase of all the bales of genuine waste and of the H bale of cloth had all been real purchases, and they had been entered up by him into his purchase book with the money figures. Unfortunately there was no discovery, by either side, of documents, but there was no dispute below that from his purchase book, which was in evidence, his regular practice was to enter up all transactions in a ledger and one or two other books. The purchase book was of octavo size and he carried it in his pocket as a rule, but on Aug. 31 he happened to have left it in the pocket of the suit he had been wearing the previous week which was at his house. In the bale were several stout cards apparently of a kind used for wrapping cloth round ; but there were

two loose ones which he had seen written on in pencil by the seller Michaelson in his own hand. They only showed figures, without any description of the various pieces of cloth, linings and stockinet, and the record of pieces, lengths and sizes was very inaccurate; but the money figures of the sums paid by the plaintiff were accurate and quite clear.

So far as concerned any charge of theft, the money figures would be a practically conclusive corroboration of the plaintiff's story of the purchase; and the purchase book would clinch the matter. On such a charge the plaintiff would have had an obvious and quite natural reply based on truth and, what is more important for drawing any inference from his behaviour, a clear conscience. But cloth (including linings and stockinet) was rationed and could not lawfully be bought except upon exchange of the appropriate number of coupons; and there was in the bale altogether a considerable quantity of cloth, linings and stockinet; the contents were measured subsequently, in November, at a total of 105 yards; and it is difficult to believe that the plaintiff did not know that his purchase of all these pieces without surrender of coupons was a breach of the rationing law; if he did, and thought that that was the reason of the visit of the police, his guilty conscience might well have tempted him to prevaricate, or even lie. As, however, subsequently he was never prosecuted for that offence, and as there was no issue before the court below on that question, it would be wrong for this court to go so far as to draw a definite conclusion that he did really know he was doing wrong in buying without coupons, and was, therefore, lying; especially as the mere fact of the police having watched and then suddenly pounced on him would be quite sufficient to upset him.

There was no evidence upon which the judge could find, or did find, that the plaintiff had bought for black market purposes; but again I feel certain that the plaintiff would naturally expect the police to suspect him of purchasing for that purpose; and that thought would add to his discomfiture. And for reasons which I will state presently, I feel nearly certain that Leachinsky's mind, when the Leicester police approached him, was very definitely disturbed by the same harassing thoughts. I am satisfied that not a word was said that morning by the Liverpool police at the plaintiff's premises, before they arrested and took him off to the Bridewell, about any charge of stealing; and I am not disposed to think that the impression of their having a charge of theft in their minds was really in the plaintiff's mind; what he feared was a charge about the coupon business. Had the police thought that morning, that they had a reasonable and probable cause for arresting him on suspicion of larceny, they would, I hope, have frankly told him so, and given him a fair and open chance of clearing himself, if he elected to speak; and he had such an absolute defence on that charge, that I feel sure he would have spoken out, had they said any such thing. All he had to do was to tell them that he had left his purchase book behind in his other coat, and that they could ask the Southport police on the telephone to go and verify it; and had they made difficulties about doing that, he would have insisted on the fact, vital on that charge, though irrelevant on a coupon charge, that his seller's own handwriting on the long card showed the very money figures in question, which would prove that he had bought and not stolen. That he had the figures in his mind is proved not only by his evidence, which I see no ground for rejecting on this point, but also by the reference in the Leicester record of the conversation, which says:

Leachinsky states he bought this cloth last Wednesday from Michaelson, 416, Church Gate, whilst in Leicester for £22 without coupons when he bought the clippings.

And, in his statement at the Bridewell, which he dictated to Christie and signed, he gave the exact money figures for waste and cloth. His trouble evidently was, that he felt he had to give a reason for buying without coupons, and in his statement he gave the best excuse he could—a lame one at that—namely, that he did not buy the cloth for re-sale but for domestic use.

No charge of a rationing offence having ever been brought to trial, or even made before the judge, it would not be right for this court to make any assumption of actual guilt. What I am concerned to show is that when the police suddenly arrived he may well have thought that an inquiry into that charge was the real purpose of their visit.

The police, after arresting him, acted promptly, as the judge rightly recognised; they telephoned to Leicester without delay. Both records show that they had

taxed him about "no coupons." The Liverpool record adds: "We believe that the cloth had been stolen in the Leicester district," but they do not say "from Michaelson" whose name they had mentioned earlier in the conversation. That record is incomplete as the Leicester police are there only recorded as saying: "We have had cloth stolen from Church Gate (where Michaelson's premises were situate) recently"; the Leicester record of the same conversation records that Branson of the Leicester police said: "We had a quantity of cloth stolen on Friday last from Church Gate"; (Friday being Aug. 28), and then records the reply of Sergeant Morris at Liverpool: "I don't think that it can be *that* as *this* cloth was sent to Liverpool on Aug. 27." That omission in such a record is open to criticism. At 7 p.m. there is a further telephone message saying that they had obtained and read over on the telephone:

... a statement from Michaelson ... who has missed various lengths of cloth from his premises and it is quite possible Leachinsky may have stolen them. Will you please have him interrogated and if he admits the offence give us a ring and escort will be sent.

This message appears at greater length and with more detail in the Liverpool record. The middle of it contains these sentences:

Have ascertained that Leachinsky called there on Aug. 26 and again on Aug. 27, and on the latter occasion he bought three sacks of tailor's cuttings for £4 5s. 7d. (not £22 as stated) and took them away. Michaelson has now examined his stocks and has found that a large quantity of cloth is missing and, from the description given by you it seems likely that this is some of the cloth you have recovered. Leachinsky has the run of the factory at Michaelson's.

Michaelson was lying to the Leicester police, and I have no doubt lying in order to conceal his rationing offence. The plaintiff had already been charged by Christie before the defendant Sergeant Tindall (who was in charge at Essex Street) with "unlawful possession" under the Liverpool Act; and, in spite of the police having his name and address, he was kept in custody. Christie was thus again acting illegally; and if Sergeant Tindall was, under the rules of the Liverpool Police Force, entitled on that occasion to give orders to Christie, it was manifestly his duty to call Christie's attention to the fact that the charge was not one which justified either an original arrest, or continuing detention under arrest since the police knew the plaintiff's name and address; and it would then, I think, necessarily follow that by acting on Christie's request he would make himself party to the false imprisonment by arrest without warrant, and in the eye of the criminal law an accessory to the assault on the plaintiff's person; for Christie's intimation that "bail was not advisable" brought the fact of detention plainly to his notice. The plaintiff was kept a prisoner all night, and next morning the prosecuting constable was accordingly directed to ask for his remand for a week in custody. This request was naturally granted by the stipendiary, as the police never told him that, when they arrested the man, they knew his name and address.

I can state the subsequent events quite shortly. On Sept. 8 the plaintiff was brought up again, but it is a matter of further criticism of the Liverpool police that they had made no attempt to have Michaelson present as a witness in court so as to give the prisoner the benefit of the mandatory provision of the Liverpool Act, s. 507 (2), which I have quoted. On that day his solicitor asked for and got from the magistrates a remand on bail to Sept. 15. On that date (the Leicester police having been misled by Michaelson into deciding to prosecute for larceny) the Liverpool police asked leave to withdraw their charge of unlawful possession; and the stipendiary discharged the plaintiff, but Christie prevented his release. He was taken down to the cells and kept there until the arrival in the evening of the Leicester police. At the trial below Christie took responsibility for this. That was clearly a separate and second wrongful arrest, no fresh charge having been preferred upon the withdrawal of the charge of unlawful possession, and no re-arrest on the charge of larceny being made until the Leicester police arrived in the evening and made it. The judge treated this arrest in the morning by Christie as a trivial and negligible wrong—a "mere second detention." I do not so regard it, nor do I regard it as a light matter that a judge should so treat it.

The plaintiff was taken to Leicester and there charged with a view to his committal for trial for larceny. Michaelson was called and gave evidence—

having repeated in writing to the Leicester police his accusation against the plaintiff of theft; he completely broke down under cross-examination by the plaintiff's solicitor and the charge was dismissed by the magistrates. Michaelson originally said this about the plaintiff:

I have not sold any of the cloth enumerated above to the accused Leachinsky, or to any other person. Leachinsky had no authority to remove any of the cloths or linings enumerated from my premises.

Michaelson was sued for libels contained in the written statements by him to the Leicester police. These statements were published to the police on a privileged occasion; but the plea of such privilege was, of course, rendered futile by the actual malice of the writer's motive. The action was naturally compromised and Michaelson got off cheaply on payment of £250 and solicitor and own client costs to the plaintiff. The judge at the end of his judgment in this action said that the plaintiff left the court without the slightest fragment or vestige of suspicion attaching to his name, from which it would seem that the judge was ignoring any rationing offence as an issue not before him; but that is all the comfort that the plaintiff got below.

From the preceding narrative of facts it is obvious that the appeal by the plaintiff from the judgment against him in his action against the Liverpool police for damages for false imprisonment raises questions about the law of arrest which affect essential principles of the British Constitution and are of supreme importance to individual liberty; indeed, both directly and indirectly the judgment below cuts down, in far-reaching ways, the freedom under the general law from liability to arrest by the Executive without judicial warrant, which apart from war legislation, original and delegated, every individual person within the King's allegiance enjoys to-day. That freedom from liability to non-judicial arrest by the Executive is absolute, unless the arrest falls within one or other of the clearly defined cases where the law allows it.

Claims to such a power have in the past been put forward on behalf of a Secretary of State (see HALSBURY, Hailsham Edn., Vol. 6, p. 663, para. 863), but have no foundation at common law except on a charge of high treason: see note (b) to that para., and the decision there cited, *Entick v. Carrington* (1). In that case a Secretary of State had issued a warrant purporting to authorise the defendants to break into the plaintiff's house and seize his papers; and the defence relied on such a practice of nearly 80 years standing as showing that the Executive Government have such a power at common law: but the court in holding that the Secretary of State had no such power and that the acts of breaking, entering and seizure effected under the warrant were illegal; and further that the practice in question could not alter the law, said at p. 1066:

Where is the written law that gives any magistrate such power? I can safely answer there is none; and, therefore, it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

To appreciate the momentous significance of the normal rule of personal freedom within the law it is helpful to contrast that rule with its extreme opposite in the legislative grant, for war purposes, of arbitrary power to the Executive, which took shape in Defence Regulation 18B. Parliament by section 1 (1) of the Emergency Powers (Defence) Act, 1939, gave practically unlimited powers to His Majesty—i.e., to the Executive Government—by Order in Council:

... to make such regulations ... as appear to him to be necessary or expedient for securing the public safety, the defence of the realm ...

Subsect. 2, without prejudice to the above general powers, provided that defence regulations might:

... make provision ... for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the safety or the defence of the realm.

The first order (No. 927 passed in council on Aug. 25, 1939) did not contain any regulation for detention. That provision was however made on the day the war began by Order No. 978 of Sept. 1, and in it the much debated reg. 18B appeared in its first form, permitting the Secretary of State:

... if satisfied, with respect to any particular person, that with a view to preventing him acting in any manner prejudicial to the public safety or the defence of the realm, it is necessary so to do, make an order ... (c) directing that he be detained,

And adding that a person so detained "shall be deemed to be in legal custody." By subsequent amendment, made by Order No. 1681 of Nov. 23, 1939, an amended 18B was passed, and its first paragraph ran :

If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety . . . he may make an order against that person directing that he be detained. And that is the form which was subsequently the subject of litigation up to the House of Lords.

- A I call attention to this legislation because it affords the most extreme contrast I know to the general rule of the freedom of the individual within the realm as recognised by our law in peace-time. The 18B power of arbitrary detention by the Executive, created by emergency legislation for war purposes only, is the very antithesis of the ordinary legal rule that no one can be arrested at all, unless the law itself confers the power. The legal powers so conferred are quite clear. I will take the common law point first. For the purpose of a criminal proceeding the common law concedes to a constable the power of arrest without warrant in the case of a suspected felony ; and indeed imposes on him a duty to do so : ARCHBOLD'S CRIMINAL PLEADING (31st Edn.), p. 1005 ; STEPHEN'S HISTORY OF CRIMINAL LAW, Vol. 1, p. 494 ; KENNY'S OUTLINES OF CRIMINAL LAW (15th Edn.), p. 529. It concedes the same power even to a private person, though to him only if that felony has in fact been committed ;
- C (*Walters v. Smith* (2)), whereas to a constable it gives the power of arrest on suspicion of felony, whether a felony has been committed or not. But even for suspected felony neither private person nor constable can arrest unless he has reasonable grounds for his suspicion. The limited scope of arrest on suspicion is brought out by the contrast of full knowledge : for both a constable and a private person not only may, but must, arrest any person who, in his presence, commits a felony, HAWKINS' PLEAS OF THE CROWN, 8th Edn., Vol. II, c. 12, sect. 1 ; and if a person is about to commit a felony, or even a breach of the peace, even a private person may detain him temporarily, until the danger is over (*Timothy v. Simpson* (3)).

- On the other hand at common law no offence of less gravity than felony (for which it should be remembered the penalty at common law was always death) subjects the offender to arrest without warrant, even at the hands of a constable.
- E Except in the case of an actual breach of the peace no person—whether public or private—has by the common law any power of arrest for misdemeanour. These common law principles were practically settled by the time of SIR MATTHEW HALE (1609-1676), though it is probable that, in the Middle Ages, they could not have been expressed in the form stated above (HALE, HISTORY OF PLEAS OF THE CROWN, Vol. II, Ch. X-XII : HOLDSWORTH, HISTORY OF ENGLISH LAW, 3rd Edn., Vol. III, Ch. VI, ON PROCESS, at p. 603). In the course of English history a good many statutes, some general, some local, have been passed conferring, chiefly on constables, power to arrest without warrant for various misdemeanours or offences punishable on summary conviction : see, for instance, the Town Police Clauses Act, 1847, s. 28 (which specifies some 30 such offences), but in every such case the exercise of the statutory power is conditioned by the express terms of the enabling statute ; and many contain special safeguards for the protection of the individual. An illustrative list of
- G such statutes is to be found in the article on CRIMINAL LAW AND PROCEDURE by that great master of that subject, the late AVORY, J., in HALSBURY, Halsbury's Laws of England, Vol. 9, at pp. 89-95 in the notes to para. 119. It will be observed that the condition attaching to the power of arrest under the Liverpool Act, namely, that the constable does not know and cannot ascertain the name and address of the person arrested, appears in several of the statutes cited, on pp. 92-95.
- H If a constable arrests when he does know, or could ascertain, the name or address of the person arrested, the arrest is without legal authority and therefore wrongful—as AVORY, J., said in para. 121 of the above article, at p. 96.

The very essence of the law of arrest of a person suspected of an offence is that arrest is the first step in an intended criminal proceeding against that person. This is very simply stated in the above article by AVORY, J., in para. 102, at p. 77 :

The first step in the ordinary course of criminal procedure is to bring a person charged with a crime before a justice or justices of the peace in order that the charge may be investigated. The attendance of an accused person before justices is secured either by

summons or by arrest, either under or without a warrant. Summonses and warrants of arrest are issued by a justice on an information being laid before him. A warrant of arrest may issue on a summons being disobeyed, or may issue in the first instance. Summonses, warrants, and arrests are mere machinery for securing the attendance of an accused person . . .

Arrest without warrant obviously cannot have been allowed by the common law for a different purpose, or within laxer limitations than arrest under warrant but in a warrant, as in a summons, the nature of the charge had always to be stated (see sect. 103 of the same article). The Criminal Justice Act, 1925, A s. 32, provides that :

Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings . . . shall be sufficient if it contains a statement of the specific offence. . .

That provision is in substance very old law. So is para. 103 of the article of AVORY, J., to the same effect. An information to found the warrant must be in writing and on oath (*ibid.* para. 105); and it cannot (unless the particular statute concerned provides otherwise) include more than one offence—a rule giving effect to the principle that an accused person has a right to know what the charge is against him; it is the rule against “duplicitv.” B

The broad view that arrest has always been a step in procedure, and, therefore, strictly limited by the objective to which the proceedings are addressed, is made clear in STEPHEN'S HISTORY OF THE CRIMINAL LAW (1883), Vol. 1, C Ch. VII, at p. 184 :

Having in the last chapter traced the history of the courts of a criminal jurisdiction, I now proceed to the history of the procedure followed for the punishment of criminals. I shall give the history of each step in the procedure separately, and I intend in the present chapter to treat of the procedure from the arrest of the offender to his discharge or committal for trial. This consists of two stages, namely, the apprehension of the offender, closely connected with which is the law as to the suppression of offences, and D the preliminary investigation before a magistrate, which results in the discharge, or committal for trial, or bailing of the supposed offender.

In that chapter he is considering early history. At p. 493 of Ch. XIV he is discussing contemporary procedure :

In England, and, so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons. Incidentally this has already appeared in the course of this work, but I may now put together what has already been stated. The police in their different grades are no doubt officers appointed by law for the purpose of arresting criminals; but they possess for this purpose no powers which are not also possessed by private persons . . . A policeman has no other right as to asking questions or compelling the attendance of witnesses than a private person has; in a word, with some few exceptions, he may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily. E

Parenthetically I ought to add that in quoting STEPHEN'S reference to the absence of any special power vested in the police to question a person with a view to or after arrest, I am not forgetting the judges' rules about questioning: (see ARCHBOLDS' CRIMINAL PRACTICE, 31st Edn., at pp. 371-2). On pp. 496-7 STEPHEN describes the change in trial by jury from an investigation by men knowing the facts to a consideration of evidence tendered to them by others, G and the change in the function of justices of the peace from quasi-prosecutors to committing magistrates, and then, on p. 497, continues with this very significant passage in connection with his comparison of the English system with foreign systems :

It was thus by a series of omissions on the part of the legislature to establish new officers for the administration of justice as the old methods of procedure gradually changed their character, that English criminal trials gradually lost their original character of public inquiries, and came to be conducted in almost precisely the same manner as private litigations. H

The last quotation makes pertinent a reference to the parallel of civil proceedings. There, too, in the history of our law arrest played a prominent part; and there too, in the courts of both Common Pleas and King's Bench, the arrest was normally a first, or almost a first, step in procedure in an action; because except by original writ issuing out of the Chancery, there was no other

method of ensuring the presence of the defendant before the court in the days when attorneys could not enter appearance. At common law before the Statute of Westminster the Second (13 Edw. I, c. 10) it was in general necessary for both plaintiff and defendant to appear in person, as, without the King's special warrant by writ or letter patent, appearance by attorney was impossible (see TIDD'S PRACTICE, 9th Edn., 1828, at p. 92). There were various judicial writs, addressed by the courts to the sheriff for the arrest of an intended defendant.

A That of *capias quare clausum fregit*, which even came by degrees to be an assumed fiction for the purpose of founding jurisdiction, was one: the writ of attachment, or *pone per vadium et salvos plegios*, that is to say arrest to enforce bail, was another; a third was the writ of *capias ad respondendum*, likewise a judicial writ addressed to the sheriff: see the precedent printed in full in BLACKSTONE'S COMMENTARIES, 1st Edn., Vol. III, in Appendix No. III, p. xiv:

B *Capias ad respondendum* George the second by the grace of God of Great Britain, France and Ireland, King, defender of the faith, and so forth, to the sheriff of Oxfordshire, greeting. We command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of Easter in five weeks, to answer to William Burton, gentleman, of a plea that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith: and whereupon you have returned to our justices at Westminster, that the said Charles hath nothing in your bailiwick, whereby he may be distreined. And have you there then this writ. C Witness Sir John Willes, knight, at Westminster, the sixteenth day of April, in the twenty-eighth year of our reign. Sheriff's return. *Non est inventus*. The within-named Charles Long is not found in my bailiwick.

The author deals with the topic of arrest in ch. 19, entitled "Of Process," and there (on pp. 280 to 290) he explains the procedure in the Court of Common Pleas where the arrest was by *capias* and in the King's Bench where it was by D "bill"—"a kind of *capias*" (p. 284), or by attachment. "Distress infinite," under which repeated distresses levied upon the defendant's goods could go on for ever, was a felicitous substitute for the compulsion of arrest in the case of—for example—peers and members of Parliament, who by law could not be arrested: (at p. 289). The institution of the proceeding *coram iudice* depended in legal theory on bringing the defendant bodily before the court, just as much as the satisfaction of the judgment, when given, depended on taking his body E by way of *ca. sa.* until he paid.

The preceding references to, and reflections upon, our old procedural law, justify, I think, the following conclusions as to a constable's power of arrest: (i) Arrest on a criminal charge always was and still is a mere step on the procedural road towards committal, trial, verdict, judgment, and punishment—or acquittal, as may result; (ii) the power of arrest conferred by the law is F limited to the purpose of the particular proceeding, *sc.*, the specific charge formulated; (iii) the arrest must be made on that charge only; and the person arrested must be told by the constable at the time of arrest what the charge is. The constable cannot lawfully keep an open mind, and remain still undecided at the moment of arrest; he must make up his mind and formulate the charge on which he decides, and then arrest on that charge; (iv) if, having G told the accused, before arresting, what the charge is, he then either changes his mind or becomes undecided, he has no longer any power to arrest on that charge; and if he does so arrest, he acts illegally and is guilty of the tort of false imprisonment; (v) if he arrests on a specific charge, but before he has brought the prisoner before the appropriate judicial authority he changes his mind and decides to keep him on another charge, his power to detain automatically ceases and it becomes his immediate legal duty then to release the prisoner and make a new arrest on the new charge.

H To prevent misunderstanding, it is well to add, that in discussing the procedural character of arrest without warrant (whether by a constable or a private person) and pointing out how limited is the scope of the power conferred by the law, I am, of course, not suggesting that the initial absence, or the subsequent cessation, of the legal right to arrest or detain will of itself affect the jurisdiction of the court to deal with the accused person when he has once been brought before it; quite different considerations apply to that question. Neither the committing magistrate nor the trial court will lose jurisdiction merely because it appears by evidence or admission, that the prisoner has been arrested in circumstances

which, for any of the reasons I have stated, was unlawful, although that fact may well influence discretion as to bail; but the person so wronged will have his cause of action against the person who arrested him unlawfully; and in an action for false imprisonment every harm to the plaintiff casually resulting from the original wrong will be matter for the jury to consider in assessing the quantum of general damages, and, of course, it is open to the jury to give exemplary damages. Again, to prevent misunderstanding, it may be well to point out, that once a prisoner has been lawfully arrested on a definite charge and brought before a magistrate's court for committal, there is nothing in the law of arrest to prevent a more serious charge being added to or substituted for the existing charge. That question appertains not to the law of arrest but to the procedural law of the court.

The aspect of the law of arrest which is most directly relevant to the present appeal is that of the purpose for which the arrest is made. The ultimate object which the law has in view in authorising arrest, is, of course, the protection of society; but arrest is not an end in itself. What the law grants is not a right, but only a power, although it may also be imposing a duty—especially on a constable. When effected, the arrest is in essence just a step in the administration of criminal justice, and not the less so that it is the first step—or at any rate the first step *inter partes*—for process may begin by information and warrant, or summons, at a stage before the accused is involuntarily made party to the *lis* between the prosecutor and him. It is by bringing him in person before the court, whether committing magistrate or judge and jury, that he is made a party; and the whole purpose of arrest, just as much as of the initial steps of information, warrant or summons, is to give the court jurisdiction over the alleged offender, in order that justice may be done, and that he, if found guilty, may be punished. The corporal presence of the offender is just as essential to trial, verdict and judgment, as to punishment; and, if he be innocent, it is equally essential to him, as well as to the prosecution. English justice could not be what it is without that fundamental feature. In short, in our administration of justice the presence of the offender is basically the original starting point of any criminal proceeding; and none the less so, that on the one hand bail may be substituted for the body of the accused by judicial order, or on some occasions at the early stage before he comes before the magistrate, by permission of the Executive, namely, the police; and that on the other hand the presence of the accused in court is not essential in some summary cases.

Consideration of the last mentioned requisite of criminal procedure—the presence of the accused in court, which apart from minor exceptions is essential—leads logically to another essential rule of this branch of law, which, also is pertinent to the present appeal. An arrest must not only be on a definite charge and for the purpose of prosecuting that charge, but it must be expressly stated at the time to be on that charge. The law does not allow an arrest *in vacuo*, or without reason assigned; and the reason assigned must be that the arrest is for the purpose of a prosecution on the self-same charge, as is the justification for the arrest. It follows, and it is a principle lying at the very roots of English freedom, that if a man is arrested on one charge he is entitled to his release the moment the prosecution of that charge is abandoned. The prosecution cannot arrest on one charge, abandon their intention to proceed on that charge, and then keep him in cold storage still nominally on that charge, whilst they enquire into the possibility of putting forward a different charge. To do that they must release him; then, when they propose to put forward some other charge, they can make that new charge the occasion of a new arrest. That is still the law today, when the vast majority of prosecutions are public, just as truly as it was in earlier times when they were mostly private; and by public and private I mean conducted by a public authority and by a private individual respectively.

It follows from what I have said that the practice, if there be one, which the judge obviously had in mind, of arresting a supposed murderer, for instance, on a minor charge, as a means of preventing his escape from justice at a time when the police suspect, but have not sufficient clues to constitute reasonable and probable cause for arresting the suspect for the suspected crime, is in my opinion illegal, and gives the person arrested a cause of action for false imprisonment. In practice the police would, as a rule, incur no liability for

substantial damages, except where their anticipatory suspicions prove ill-founded: but it is important, for the sake of the great principle of the liberty of the subject, that the illegality of the practice should be widely known—to judges, to the legal profession, to the police and to the public. It is better than an occasional criminal should escape punishment, than that the judges should let in the thin edge of the wedge for discretionary arrest at the instance of the Executive.

A The rule of law today is that unless the limiting conditions at common law, or by statute, are strictly observed by the constable, the arrest he makes is illegal and constitutes an actionable wrong for which the arrested person may sue him in trespass, the damages being at large. It is this right of action in the King's Court for any unauthorised arrest or detention by the Executive which, above all other legal rights, is, under our Constitution, the foundation upon which the freedom of the individual rests. And it is because in my opinion the judgment of the judge fails to give effect to this principle of freedom that I regard this appeal as one of supreme importance; and it is for that reason that I have in this judgment invoked the contrast of Defence Regulation 18B. Parliament thought right to confer on the Executive Government (acting through the machinery of Orders in Council) an unfettered arbitrary discretion to arrest any person if it thought it unsafe to leave that person at large.

B As I have already pointed out, Order No. 978 left the discretion completely at large; No. 1681 introduced descriptive words to guide the Home Secretary but the courts held—solely on the question of interpretation—that the language of the amended 18B still conferred an absolute discretion, leaving no issue for trial in the courts. I myself among other members of the Court of Appeal delivered a judgment to that effect; and the House of Lords by a majority, LORD ATKIN dissenting, held that that view was right (see *Liversidge v. Anderson* (4), *Green v. Secretary of State for Home Affairs* (5)). LORD ATKIN in both cases expressed a different view solely because he could not persuade himself that the language of 18B was really clear enough to confer so startlingly wide a discretion on the Executive as was thought in both cases by the Court of Appeal and by the other noble Lords party to the decisions of the House in the two appeals. LORD ATKIN's opinion though dissentient is of great value, because it contains a considered analysis of our law on the very topics which I think give to the present appeal such cardinal importance. It is not necessary to quote it; but I refer to *Liversidge v. Anderson* (4), at pp. 228-232 ([1941] 3 All E.R., at pp. 351-353), where his Lordship dealt with the power of arrest and the phrase "reasonable and probable cause." The authoritative value of that part of his judgment, though *obiter*, was not affected by the view of the majority upon which the decision turned; and is directly in point in the present case.

F It is of vital importance to the whole nation that the right of arrest without warrant should always be closely watched by the courts whenever a case bearing upon it comes before them. Subject only to the sovereignty of Parliament which under our Constitution can make any law, English liberty is absolutely dependent on our courts of justice. To keep clear the distinction between the functions of the Executive and those of justice is vital. The English nation has been wont in the past to speak of autocracy in any form as the enemy of personal freedom, but it is equally true that the good working of democracy (in the true sense of that much abused word) depends upon the Rule of Law; that is the essential theme of DICEY'S LAW OF THE CONSTITUTION, Ch. V; of ANSON'S LAW AND CUSTOM OF THE CONSTITUTION, 4th Edn., by Berriedale Keith, Vol. II, Pt. I, ch. VI, sect. 3 and of C. K. ALLEN'S LAW AND ORDERS; and that is why this appeal is of such importance. Arrest by the Executive uncontrolled by the courts has happened in past times in English history; and it needed the intervention of the courts to curb the Executive: *Wilkes v. Wood* (6) *Leach v. Money* (7), and *Entick v. Carrington* (1). The *lettres de cachet* of 18th century France afford another illustration; the Gestapo in Germany in recent years afford a third; and finally it is the fear of a repetition of that vast, insidious and progressive evil of encroachment by the Executive on the proper sphere of the judiciary which is paramount in men's minds when they say they fear and therefore hate bureaucracy.

H One of the most serious aspects of the facts is that Christie in cross-examination made grave admissions; that he knew when he arrested the plaintiff he

had no power to do so, as he had read the section of the Liverpool Act; that he arrested him and then kept him in detention and asked a remand in custody, all because he used that charge purely as a matter of convenience, pending further enquiries as to whether the charge of stealing could be put forward. I regard his admissions as involving a grave stain on the reputation of the Liverpool Police Force, and I am unable to agree with the judge's view that they behaved properly.

I venture to refer to what I said in *Dumbell v. Roberts* (8), on the latter half of p. 329. There was not the faintest risk of the plaintiff running away; if on the morning of Aug. 31 they entertained any substantial suspicion of the plaintiff being a thief and wanted to give him a chance of clearing himself they ought to have told him frankly that they suspected him of having stolen the bale; instead they frightened him about "unlawful possession" which obviously meant a rationing offence—particularly if he was, as I think probable, guilty of it. The plaintiff's evidence was never cross-examined to and never contradicted by Morris who alone was present when he made that frightening statement to the plaintiff. This is what the plaintiff swore that Morris said:

Q.—And the other officer Morris? A.—I had complaints about the questions he put to me at the time and his response to them. Q.—You mean about his manner?

A.—Yes. Q.—What was wrong with his manner? A.—When I replied he pooched everything I said. He said "Don't think we have just dropped on you just like a bolt from the blue. We have made a good many inquiries before we have come. We know you have done this sort of thing many times before, and you must not think we are flat-footed policemen who have just dropped in on you like that." At the same time he repeatedly pointed out that it was not his case but Christie's case. He said that he was only in it because he was attached to the police station in the district in which my warehouse was situated, and that it would be best for me to tell the whole truth about the transaction, and that is what I did.

That was after Christie had left the office to interview the women in the warehouse. Nothing appeared in the course of the trial to warrant any such language.

The judge heard the witnesses and, I therefore, abstain from criticising in detail the views he formed of their answers, beyond saying that I feel he must have been much influenced by his opinion that the Liverpool police had made no mistake in law and were acting with propriety.

Apart altogether from the failure of the evidence in the case to substantiate any conceivable plea of justification there are two fatal defects of pleading in the defence. The first arises on the decision of the judge to overrule the objection of counsel for the plaintiff, and to allow an amendment intended to set up a plea of arrest on the common law footing of a reasonable suspicion of felony, namely, that the plaintiff had stolen the bale. As originally pleaded the defence contained no allegation of arrest under the common law power attaching to suspicion of felony. The only averment was of an arrest under the statute. There was no other arrest in fact and none was alleged. Even if an arrest for two offences had been put forward, it would have been bad for the same reason as a double statement in any document within the Criminal Justice Act, 1925, s. 32, to which I have referred, would have been bad. It was, therefore, the duty of STABLE, J., to ignore the words "which he had stolen" at the end of para. 3 of the original defence as being "unnecessary and tending to embarrass the fair trial of the action" within R.S.C. Ord. 19, r. 27; in truth they were words which should have been struck out. Under sect. 507 (5) of the Liverpool Act "unlawful possession" is defined as meaning "stolen or unlawfully acquired"; under it, therefore, it is enough for the prosecution in such a case to prove that at some time between the lawful possession of the true owner and the possession of the person charged with an offence under the section, there has been a theft, or false pretences or other breach of the law vitiating the latter's right of possession, committed by somebody; but the section does not call for his identification. The maximum penalties of £5 or two months show that no serious offence is within its ambit. For these reasons it follows that the judge ought *ex debito justitiæ* to have allowed the objection of counsel for the plaintiff to the amendment.

There is another defect in the defendants' plea of justification, which would still be present even if the amendment had been properly allowed, and if, when allowed, the amended defence had contained a sufficient plea of justification on the common law ground of felony. The plaintiff was arrested soon after

noon on Aug. 31 and then taken to Essex Street Bridewell. Para. 3 discloses no justification of an arrest on the common law ground in those of the particulars attached to that paragraph, which refer to what happened before arrest; they are relevant only to the statutory ground for arrest without warrant. Indeed there is no allegation in the particulars anywhere that the plaintiff was told of the suspicion of felony until the morning of Sept. 1, prior to his appearance before the stipendiary. But every plea of justification to a claim, whether of libel or slander, or of wrongful dismissal or of trespass, must under R.S.C. Ord. 19, r. 4 :

... contain a statement of the material facts on which the party pleading relies for his ... defence.

(See the cases cited, with quotations from the judgments, in the notes to that rule in the WHITE BOOK.) It is common, much too common, to put material facts into "particulars" under r. 6. The really material facts of justification should be stated in the defence itself pursuant to r. 4 and not relegated to so-called "particulars," which are often not settled with the same care as the pleading itself. R. 6 I regard as appropriate rather, not to strictly "material" facts, essential to the cause of action or ground of defence, but to facts of which the opposing party ought to be made aware in order to prepare his evidence : see the statement by LORD PENZANCE, at p. 146, in *Marriner v. Bishop of Bath and Wells* (9), and the observations by the editors of the WHITE BOOK in their notes to r. 6 of Ord. 19. The precedent of a defence in BULLEN AND LEAKE (9th Edn.), at pp. 973-975 bears out the view I have just expressed. Judged by this criterion there was never at any stage of the action an adequate plea of justification to the arrest at the plaintiff's premises on the basis of the common law defence of suspicion of felony. It follows that the many objections and protests by counsel for the plaintiff throughout the examination in chief of the defendant Christie were well founded and that the judge ought to have allowed them. It is important for the trial judge to remember that the objecting counsel is often in the dilemma of choosing between seeming to be captious or even discourteous and failing to protect his client through not objecting when he ought.

I am loth to embark upon any critical analysis of the oral evidence in the case for several reasons. In the first place the whole of it was affected in greater or less degree by the erroneous view the trial judge took of the powers and duties of the police in the respects I have endeavoured to explain, and consequently of the issues he had to try. It made him, I think, more sceptical of the plaintiff's evidence of Christie and Morris than I think was just. Counsel for the defendants admitted that the police never on the morning of Aug. 31 suggested that the plaintiff had stolen the bale ; but the judge had the common law defence in his mind all the time and I think that he was under the erroneous impression that all through Aug. 31 the plaintiff realised from the start that the real charge was larceny and not a misdemeanour about coupons. None the less I hesitate to discuss in any detail how far his misconception of the law affected his inferences, because he had, of course, the advantage over this court of seeing and hearing the witnesses. Further, the big issue in the appeal does not depend for its solution on any nice appreciation of the details of the evidence.

I have already criticised the action of Sergeant Tindall when at 5.45 p.m. on Aug. 31 he took the charge and failed to order the plaintiff's release. But the fundamental misconception of the legal position in the minds of the Liverpool police had further evil results. The conduct of Sergeant Dalzell, who conducted the proceedings on the morning of Sept. 1 before the stipendiary, is also open to criticism ; for he accepted and acted on Christie's instructions to ask for a remand in custody. He, like Tindall, knew the terms of the Liverpool Act, and ought to have realised that they had no power whatsoever under it to arrest or detain the plaintiff, whose name and address were well-known to them. He said he did not understand the law ; but as prosecutor it was his duty to know the law, and he owed a duty to the court to be careful not to mislead it—just as counsel would have owed such a duty. He knew that the reason the plaintiff had been brought to the court in custody was that he had been arrested on a charge under the Liverpool Act. He, therefore, knew that the plaintiff had been wrongfully arrested and ought to have told the stipendiary what the position was. I cannot but regard him as in that way responsible

for the stipendiary's mistaken order for a remand in custody, and the judge appears, quite wrongly, to have exonerated him on the irrelevant ground that the plaintiff might have been arrested on the common law ground. The sooner this sort of delusion in the minds of the police about their powers is got out of their minds the better for the public and the Rule of Law in England.

Since writing this judgment I have read the judgment of LAWRENCE, L.J. I was aware in a general way of the different view that he was taking and that is why I have felt bound to express my reasoning at such length. Had the court been of one mind on the gravity of the case, I should have been disposed to assess the damages on the evidence given, and my figure would have been one calculated to deter similar action by the police in future; but in the circumstances I think we should limit our order to allowing the appeal and directing an assessment of damages.

But in the assessment there is one matter to be taken into account to which I have not yet referred. By an amendment of the statement of claim allowed at the trial the plaintiff alleged that without his consent photographs of him and finger prints were taken, and that this action constituted a trespass to his person. The defendants Christie and Morris were charged with responsibility for it on the footing that it was to their knowledge the natural consequence of their wrongful arrest. In the sense that it might properly be taken into account by a jury in assessing damages I think the claim well founded; but that result would, I think, follow even if the plaintiff were held to have, in his *de facto* position of a prisoner, consented to the operation; as if he did not consent the magistrate could, if he was a prisoner under remand, have ordered him to submit. On the facts of the case I regard the question of the legal rights of the police to do what they did as academic, for the real question is as to what is a fair award of damages to give him for the whole of the indignities which his false imprisonment inflicted on him. But I feel bound to add that if an accused person ought to be on bail, as was the plaintiff's case, because he ought never to have been arrested, it is in my opinion very wrong to treat him as if he were a prisoner arrested on a justifiable suspicion of felony. I realise the need of the police to know the antecedents of a prisoner when convicted in order to answer the inquiries of the court about him before sentence; but that need is not a justification for treating a person wrongly arrested in the same way.

In regard to the terms of the order of the court there are one or two points to bear in mind. The last two defendants having been dismissed from the action before trial, the order will only concern the first four defendants. The statement made below and before us that the Corporation of Liverpool accept all responsibility for all costs payable by members of the Liverpool Police Force makes it unnecessary to distinguish between individual defendants, who are liable in damages; but no case was made before us against Balmer, who apparently had no responsibility for the wrongful detention of the plaintiff on Sept. 15. Nor was any case against Tindall really argued before us; therefore, although I have drawn attention to his conditional duty, I have not formed any final opinion as to his liability. In my view, the damages should be assessed by a jury, directed to have in mind the principles expressed in this judgment.

The order of the court will accordingly be; (i) allow the appeal as against Christie and Morris, dismiss appeal against Tindall and Balmer; (ii) discharge order of the court below except in so far as it orders Leachinsky to pay costs of Moorhouse and Cole; (iii) judgment against Christie and Morris for the first imprisonment and against Christie for the second imprisonment, for damages to be assessed on each cause of action; (iv) order Christie and Morris to pay Leachinsky's costs of action except in so far as increased by claims by Leachinsky against Tindall, Balmer, Moorhouse and Cole; (v) Christie and Morris to pay Leachinsky's costs of appeal except in so far as increased by making Tindall and Balmer respondents; (vi) no order as to costs of Tindall or Balmer in the court below or in the Court of Appeal.

We will consider later the question of the mode of trial in regard to damages.

LAWRENCE, L.J.: This appeal raises three questions: (i) whether STABLE J., was right in believing the defendant officers when they swore that when they arrested the plaintiff without a warrant they suspected that he was guilty

of felony; (ii) whether they had reasonable grounds for such suspicion, and (iii) whether the fact that they arrested and charged the plaintiff with unlawful possession of the goods in question prevented or estopped them from justifying the arrest on the ground that they in fact suspected the plaintiff of felony and that there were reasonable grounds for so doing.

A STABLE, J., in a careful and elaborate judgment held that there were reasonable grounds for the defendants' suspicions and found as a fact that the defendants *bona fide* entertained those suspicions. In my opinion the judge's judgment ought to be affirmed on both these points. No criticism of the facts as stated by STABLE, J., was made to us except as to the time of the first police telephone message, and of the credit which he attached to the witnesses. Wherever there was a conflict of evidence or wherever it was essential to say whether he believed certain evidence the judge stated his finding clearly. In certain matters the judge accepted the evidence of the plaintiff, *e.g.*, that it was a casual inaccuracy on the plaintiff's part that the bale of cloth was consigned as waste. For my own part I do not think I should have come to that conclusion but as I did not hear the plaintiff give his evidence it appears to me clear that I cannot disagree with the judge's view. In other matters he accepted the evidence of the police (not on all occasions for he did not accept the evidence of Sergeant Dalzell).

B In my opinion it is impossible for this court without seeing the witnesses to disagree with the judge's findings on credibility. Apart, however, from the view the judge took of the credibility of the witnesses, their evidence as to their state of mind at the time of arrest appears to me to be strongly supported by the contemporary documents which were in evidence. Immediately after arrest, namely, at 1.35 p.m., the defendant Detective Constable Christie telephoned to the Leicester police saying:

C We would like you to interview Michaelson, as we believe that this cloth has been stolen in your district. Leachinsky has no receipts or invoice, but Messrs. Blands Ltd.'s delivery note is for 27 bales of 'Waste.'

D It appears to me impossible to suppose that this statement of Detective Constable Christie's belief was concocted as he was not at that time charging the plaintiff with felony.

E A great deal of cross-examination and some argument before us was directed to the question whether a *bona fide* suspicion can be entertained of alternatives and it was argued that if the police suspected, among other offences, black market offences, they could not at the same time suspect a felony. This argument, in my opinion, is fallacious. Suspicion necessarily contemplates alternatives. If you only suspect guilt you must contemplate the possibility of innocence and it appears to me that you may suspect two or more different crimes on reasonable grounds. The fact that indictments for larceny almost invariably contain counts for receiving appears to me to show this. I proceed therefore on the basis that the police *bona fide* suspected the plaintiff of felony at the time of his first arrest; it was not suggested that they did not at the time of the second arrest.

F On the second question I am of opinion that they had reasonable grounds for such suspicion. They knew that he had consigned the goods under a false description; they had seen him handle the one bale of cloth and place it apart from the other bales; when told that they had reason to believe he had received a bale of cloth he said he knew nothing about it; when they examined the bale in his presence and found it contained a large amount of cloth and he was asked for an explanation he said he had bought it as rags; when asked where he got it he refused to say; when asked if he had any receipt or invoice he said he had not, and did not mention the cards referred to in the evidence or his purchase book.

H Upon the third question I am of opinion that STABLE, J., was wrong in distinguishing this case from the case of *Dumbell v. Roberts and Others* (8), and I consider this court is bound by that decision to hold that the appellant was entitled to succeed in this action. I agree with STABLE, J., however, in thinking that the decision in *Dumbell v. Roberts and Others* (8) may place the police in a position of great difficulty.

As my brethren have gone fully into their reasons for agreeing with the decision in that case, I think I ought to state the reasons why I respectfully differ from them. The case of *Walters v. W. H. Smith & Son* (2), does not appear to me

to be the same in point of reasoning, for it was the case of a private person and there is no doubt that a private person who arrests without warrant must show that the felony for which he made the arrest has been committed. In such a case it would obviously be irrelevant to show that some other felony had been committed. But in the case of a police officer it is unnecessary for him to prove that any felony has been committed and unless he is bound to state to the person arrested at the time of arrest the felony on which he arrests the question cannot arise whether his suspicions were of the felony stated on arrest. A

The decision in *Dumbell v. Roberts and Others* (8) appears to me to involve that a policeman who decides to arrest on suspicion of a felony must tell the person arrested at the time of arrest what felony he suspects him of. There is nothing in the authorities which suggests that a constable's right to arrest without warrant depends upon what the constable says to the person arrested at the time of arrest. The constable's right is said to depend on the state of his mind. Constables are not lawyers and cannot possibly tell what charge will ultimately be brought against the person arrested. *R. v. Hughes* (10), and the cases there cited show that the legality of the charge does not depend upon the legality of the arrest and the Indictable Offences Act, 1848, ss. 8, 9 and 10, provide that no objection shall be taken to any information, complaint, summons or warrant for defects in substance or form or for any variance between it and the evidence. B

Justices may commit for any indictable offence or offences of which there is in their opinion a probable presumption of the accused's guilt (Indictable Offences Act, 1848, s. 25). There is nothing to indicate that their power is dependent upon the police having charged the accused with the same offences as those for which they commit or upon the police having said anything to the accused upon arrest. Nor does the committal bind the prosecution to draw the indictment for the offence upon which the accused was committed. C

It appears to me, therefore, that it is not essential that the party charged should be told the nature of the charge at the time of his arrest. If what the constable says at the time of arrest is not binding in the sense that the person arrested can subsequently be charged with a different offence or if the constable is not bound to say anything at all, it seems to me impossible to hold as a matter of law that an arrest is wrongful because the constable gives a wrong reason for it though he might have given a right one. Let me take the case of a police constable who suspects on reasonable grounds that A.B. has killed C.D. and that A.B. is about to escape. Is it to be said that he cannot arrest the killer until he has made up his mind whether he is arresting him for murder or for manslaughter? The man cannot be charged with both felonies and it may be a matter of the gravest doubt which he has committed. Or suppose a constable sees a man apparently trying to evade him with a knife covered with blood in his hand; is the constable not to arrest because he does not know whether the man has committed murder, manslaughter or wounding with one or other felonious intent? Or, again, suppose the police officer arrests on suspicion of one felony; the officer at the police station enters on the charge sheet another, either because further evidence has come in or because he disagrees with the constable's view; the chief constable for similar reasons orders that a different charge shall be made and the magistrate, again taking a different view, commits upon another charge. Can it be that the police officer has made an unlawful arrest because the man is not charged before the court with the same felony as that which the police officer suspected him of? D E F G

The difficulty in the present case arises because on the facts found, which I think must be loyally accepted, the police, though suspecting on reasonable grounds a felony, thought it right to arrest on the express charge of a misdemeanour on which they knew or ought to have known they had no right to arrest because they knew the plaintiff's address. But if constables can arrest in a proper case without giving any reason to the person arrested it does not in my view make the arrest unlawful in a proper case that they make a charge which is erroneous and is not proceeded with. H

In my opinion no formal charge need be made by the constable at the time of arrest and when a formal charge is made either then or subsequently it can be varied at any stage of the trial subject to the discretion of the court which will ensure that the person accused has a fair opportunity of answering the charge.

(See Indictment Act, 1915, s. 5.)

In my opinion the function of the Executive is to bring the person arrested before the court for what they reasonably suspect him to have done provided it is felonious; it is the function of the Judiciary to decide whether he did it and whether it constituted a crime and what crime; it is not the function of the Executive to decide upon the exact legal nature of what the arrested person has done.

A It is argued that it is unfair not to let the person arrested know what the charge against him is and no doubt it is desirable that he should be informed as soon as possible of the facts which are said to constitute a crime on his part and ultimately when the indictment is framed what the actual charge is. But the undoubted fact that the charge may be altered seems to me to show that the right to know the charge only comes into existence when the indictment is finally drawn. The object of the rule that constables may arrest without warrant on reasonable suspicion of a felony must be to prevent escape and to assist the police in their duty of detecting such serious crimes as felonies and it appears B to me that the liberty of the subject and the public interest in the detection of crime are sufficiently protected by the necessity of the constable *bona fide* suspecting that the person he arrests has committed a felony and having reasonable grounds for that suspicion. It is, in my view, important to remember C that crime is not a game played on both sides in accordance with rules and I am, therefore, reluctant to assent to rules which in my view may unduly hamper the police in matters which may be matters of life and death.

A further question is raised as to the second arrest on Sept. 15, and, as I understand it, the appellant's contention is that Detective Constable Christie in ordering the police to detain the appellant when the stipendiary ordered his discharge from the dock falsely imprisoned the appellant. At that instant D of time Christie undoubtedly suspected the appellant of a felony on reasonable grounds and was none the less entitled to arrest him although the prosecution was to take place in Leicester and the Leicester police were not there to perform the ministerial office of taking the appellant away. I think it was unlawful to arrest in court, as is suggested, but I agree with STABLE, J., that the difference between being arrested in court and outside court is unsubstantial.

E For these reasons, though I respectfully disagree with the principles which I conceive to have been laid down in *Dumbell v. Roberts* (8) and by my brethren in this case, I agree that this appeal must be allowed.

UTHWATT, J.: I agree with the judgment of my Lord.

I propose for the purpose of arriving at a conclusion upon the legality of the arrest made on Aug. 31, 1942, to make the assumption that STABLE, J., was right in finding that Christie at the time he made the arrest suspected on reasonable grounds that Leachinsky had committed a felony. But it is clear beyond F doubt that Christie arrested Leachinsky with a view not to the prosecution of Leachinsky for that felony, but with a view to the prosecution of Leachinsky for the offence of unlawful possession—an offence which is not a felony and for which in the circumstances which obtained there was no statutory power of arrest without warrant. The question of law that then arises is whether Christie can, in an action for false imprisonment based on that arrest and the ensuing G detention, justify by reason of the suspicion he is assumed to have reasonably entertained.

Under our system a person may be lawfully arrested under the authority of a warrant, or without a warrant either under express statutory provision or under the common law power of arrest. The common law power of arrest may be exercised as well by a private person as by a constable, and may be exercised either in respect of any felony or in respect of some misdemeanours. It is a condition of lawful H arrest, where felony enters into the matter, that if a constable arrests there should be entertained by him a suspicion of felony based on reasonable grounds—the test is an objective one—and that if a private individual arrests, there should have been also a felony committed in fact. As regards misdemeanours, the rule of the common law is entirely different. Persons guilty or suspected of misdemeanours cannot be arrested at common law except in cases of an affray or violence to an individual, and then only where the person arrested is taken in the act or immediately after its commission. The point of the rules of law as to arrest for misdemeanour is obviously that the arrest is to be made

only in order to preserve the peace.

There is, therefore, for the purpose of arrest, a marked distinction in the common law between felonies and misdemeanours. But both in the case of misdemeanour and felony, the act to be justified is an arrest. Arrest is a step in criminal procedure directed to leading to an adjudication in due course of law upon the conduct in the matter in hand of the person arrested. For it is the duty of a constable arresting without warrant with all due speed to bring the individual arrested before a court of justice having jurisdiction in the matter, and it is the duty of the private citizen either to take that course or to hand the supposed offender over to a constable with a view to that course being taken. Neither can justify private detention. There is no lawful arrest, therefore, unless the interference with the individual's liberty is made as a preliminary step to an investigation by a court of justice. From these two considerations—first, the marked distinction between the circumstances justifying an arrest where felony is in question and the circumstances justifying an arrest where misdemeanour is in question, and, second, the fact that arrest is a step in criminal proceedings—it appears to me logically to follow that a person cannot be lawfully arrested for a misdemeanour by a constable merely because the constable reasonably suspects him of having committed a felony. The facts which are necessary to justify the arrest of a suspected felon dictate the purpose for which alone that power of arrest may be used. The contrary conclusion involves acceptance of the proposition that there is a class of persons—suspected felons—who may be arrested without warrant for any offence. That proposition is untenable.

No authority supporting the defendants' contention was cited and my own researches have failed to find any that support it. The authorities point the other way. In *HAWKINS' PLEAS OF THE CROWN*, 8th Edn., (1825) Vol. II., ch. xii, p. 120, the matter is put this way :

As to the fourth particular, *viz.*, in what manner an arrest for such suspicion is to be justified in pleading. Sect. 18. It seems to be certain, that. . . regularly he ought expressly to shew that the very same crime for which he made the arrest, was actually committed.

I quote this on account of the phrase "the very same crime." *Walters v. Smith* (2) is I think in point. In that case the plaintiff in an action for false imprisonment had been arrested for stealing a particular book by the defendants—private individuals. That particular book had not been stolen. Other books had been stolen and the defendants had reasonable grounds for thinking that the plaintiff had stolen them. Much of the old law is there referred to and I do not propose to cover the same ground. It was held that the plaintiff was entitled to recover. There was not identity between the crime for which the arrest was made and the crime entering into the circumstances supposed to justify the arrest.

The old form of pleading as shown in the books of precedents supports the plaintiff's contention. The plea of justification in an action for false imprisonment traces the case from the moment of the supposed offender's apprehension for a stated offence to the proceedings before a magistrate having jurisdiction "in order that he (the offender) might be dealt with according to law in respect of the said offence" (*BULLEN & LEAKE* (1868) Edn., pp. 796, 797), or "to answer the premises (*CHITTY ON PLEADING*, 7th Edn., 1844, Vol. III, p. 327 *et seq.*). In my opinion there was on the facts no defence in law to this claim for false imprisonment and for that false imprisonment *Christie* and *Morris* are liable.

I would add that the matter of an unlawful arrest is not likely to be the subject of detailed consideration when the arrested person is brought before a magistrate. An individual who is before a court of justice under an arrest may be charged—I speak generally—with any offence which that court has jurisdiction to entertain. The jurisdiction of the court to try the offence with which he is then charged is not affected by the fact that the arrest was illegal (see *Turner v. Postmaster General* (12); *R. v. Hughes* (10)). The jurisdiction to take cognizance of the offence is one thing; the fact that the accused's presence has been unlawfully secured is another thing. At most the accused's right before that court, where the arrest is unlawful, is to demand release from the illegal arrest and to ask for an adjournment to enable him to prepare his case in respect of the charge then made. As regards *Christie's* action on Sept. 15, 1942, in securing that

Leachinsky was not discharged as ordered by the magistrate—an action which involved interference with Leachinsky's freedom—I am of the opinion that there was a clear case of false imprisonment by Christie. Leachinsky was entitled to be freed and Christie secured that he should not be freed. Whether an arrest in the face of the court can ever be justified is open to question (see COMYN'S DIGEST, 1765, IMPRISONMENT, (H.5)), but it is not necessary to enter into that question. The interference with the due operation of the order for discharge is to my mind sufficient. No doubt Christie, once Leachinsky had been in fact discharged, could, in aid of the Leicester police force with a view to Leachinsky's prosecution for felony, have forthwith lawfully arrested him, but that is exactly what he did not do. I agree, therefore, with STABLE, J., there was a false imprisonment—and indeed at the close of the hearing before us this was admitted—but I disagree with the view taken by STABLE, J., that the matter can be dismissed on the footing that it is *de minimis*. In the matter of a trespass to the person a petty impertinence is not beneath the notice of the law, just as dignified insolence is not above it. The assumption and exercise of authority over the disposition of Leachinsky's person in defiance of the magistrate's order under colour of Christie's position as a police officer does not fall within the rule *de minimis*. Leachinsky was entitled to be dealt with according to law and it was not for Christie for reasons of convenience to supersede the law.

There are some observations upon the facts of this particular case which I desire to add. First: Leachinsky has little cause to be persuaded of the efficiency and fairness of the Liverpool police. The judge below accepted Christie as a truthful witness and I am content to accept the judge's view. On that basis, I fail to see that Christie had reasonable grounds for suspecting that Leachinsky had been guilty of any felony and Christie's own answers in cross-examination indeed seem to me to rule out the existence of reasonable grounds. I find it difficult to reconcile Christie's detailed statement that he could not decide between theft, receiving, unlawful possession and dealing in the black market without coupons—for all of which, according to him, he had reasonable grounds of suspicion—with the existence in fact of suspicion of felony on reasonable grounds. Suspecting a felony or something which is not a felony was not in the particular circumstances suspecting a felony on reasonable grounds. His immediate choice of a prosecution for something not a felony hardly helps the view that a felony was suspected on reasonable grounds, any more than the fact that it was only by amendment of the pleadings made at the trial that it was alleged that suspicion of felony was entertained. Sergeant Tindall, who had a power to release on bail in a case such as the present under the Summary Jurisdiction Act, 1879, s. 38, did not profess to consider the propriety of exercising the power vested in him. He had instructions that the detective in charge of the case was the officer to decide whether bail should be given or not. The anonymous giver of these instructions might well employ his time in considering the purpose for which the power is given, and the person to whom it is given, and reflect on the impropriety of giving any direction and the fatuity of the direction given in light of the purpose the power is designed to serve. That purpose is not the automatic recording of the wish of the arresting officer or his superior, but the due and fair administration of the criminal code. It is of a piece with the proceedings of the day before that the police opposed bail at the hearing of Sept. 1, that on the occasion of one of the applications to the magistrate for bail the police opposed bail on the grounds *inter alia* that there was no jurisdiction to grant it (no one was able to tell the court the foundation for such a contention); that at the hearing on Sept. 15 Michaelson was not in court, though apparently at the previous hearing his attendance had been asked for pursuant to sect. 507 (2) of the Liverpool Act; and that following on the order "Case withdrawn—prisoner discharged" the case at Liverpool ended as it began with Christie's unlawful domination over the plaintiff's person. Second: As regards the other parties concerned the judge stated:

Leachinsky leaves this court without the slightest fragment or vestige of suspicion attaching to his name [and] the police with whom I am concerned here and the others in my judgment discharged their difficult and indeed delicate duty honestly, reasonably and within the limits which the law permits.

I do not agree. As regards the police officers, I cannot see that their duty

was difficult or delicate. I do not question their honesty. Some of the Liverpool officers did not keep within the limits of the law; and in many of their actions there was substituted for the working of reason a mechanical exercise of power. So far as Leachinsky is concerned the judge rightly or wrongly disbelieved much of his evidence and thought him guilty of some offence relating to coupons. But Leachinsky's breaches of the cloth rationing regulations do not affect his right to personal liberty. The transgressor of the law while disobeying it can still rely on the law and assert the law's supremacy.

Appeal allowed. Order for assessment of damages.

Solicitors: J. H. Milner & Son, agents for Silverman & Livermore, Liverpool (for the appellant); Cree & Son, agents for W. H. Baines, town clerk, Liverpool (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

BARRATT v. GOUGH-THOMAS.

[CHANCERY DIVISION (Vaisey, J.), July 10, 1945.]

Solicitors—Lien—Mortgage—Solicitor acting for mortgagor and mortgagee—Title deeds in custody and control of solicitor—Mortgagor owing to solicitor costs of transaction and moneys advanced by solicitor in connection therewith—Death of mortgagee—Solicitor one of the executors—Redemption action—Solicitor not entitled to lien upon the title deeds.

On Dec. 11, 1919, the plaintiff purchased certain freehold farm property situated at Oswestry in Shropshire. By a deed, dated the same day, he mortgaged the property to one Reece to secure the repayment with interest of a sum of £5,000 which Reece had advanced to him. In the mortgage transaction the first defendant (the claimant) asked for both the mortgagor and the mortgagee. On Feb. 13, 1941, Reece died and on Feb. 10, 1942, his will was proved by the four defendants who were the executors thereby appointed including the claimant. The latter on completion of the mortgage had received, in his professional capacity, the deed of conveyance as well as the deed of mortgage and had held these documents on behalf of the mortgagee. In a redemption action, brought by the plaintiff, the issue was raised by this defendant (the claimant) that he had a lien against the plaintiff and that after the redemption of the mortgage he had a personal right to withhold the title deeds of the mortgaged property from the plaintiff until the plaintiff had repaid to him the costs owed in respect of the mortgage transaction and also certain moneys advanced by the claimant to the plaintiff in connection with that transaction, or other transactions contemporaneous therewith. The question for the determination of the court was whether in the particular circumstances a solicitor's general lien existed and could be set up in respect of the documents of title held by the claimant:

HELD: the claimant having, by operation of law, become joint owner, subject to redemption, of the mortgaged property and the title deeds, the deeds must be regarded as having passed out of the custody and control of the claimant as a solicitor into the hands of those to whom such custody belonged as of right, namely the four defendants. Since redemption involved the return by the mortgagee not only of the estate but of the *indicia* of the title to the estate, the claimant's obligations, shared with the other defendants as mortgagees were paramount to, and so destructive of, his present claim. The claimant was, therefore, not entitled to any lien upon the documents.

Re Walker, Meredith v. Walker (1) distinguished.

[EDITORIAL NOTE.] It was held in *Re Nicholson* (2) that a solicitor acting for both mortgagor and mortgagee in the preparation of a mortgage loses his lien on the title deeds in his possession for costs due to him from the mortgagor. Here the solicitor, who had so acted, was one of the personal representatives administering the estate of the deceased mortgagee and it is held that, quite apart from the decision in *Re Nicholson* (2) he has no lien, since he now holds the title deeds as owner and not as a solicitor; physically they are in his possession but constructively in the possession of all the executors.

AS TO SOLICITOR'S RETAINING LIEN, see HALSBURY, Hailsham Edn., Vol. 31, pp. 238-244, paras. 265-267; and FOR CASES, see DIGEST, Vol. 42, pp. 267-269, Nos. 3016-3027.]

Cases referred to :

* (1) *Re Walker, Meredith v. Walker* (1893), 68 L.T. 517; 42 Digest 263, 2981.

* (2) *Re Nicholson, Ex. p. Quinn* (1883), 53 L.J.Ch. 302; 42 Digest 269, 3027; 49 L.T. 811.

(3) *Re Messenger, Ex p. Calvert* (1876), 3 Ch.D. 317; 42 Digest 268, 3023; 45 L.J.Bey. 134; 34 L.T. 920.

(4) *Re Snell* (1877), 6 Ch.D. 105; 42 Digest 268, 3024; 46 L.J.Ch. 627; 37 L.T. 350

(5) *Re Mason and Taylor* (1878), 10 Ch.D. 729; 42 Digest 286, 3025; 48 L.J.Ch. 193.

(6) *Drummond v. Muirhead and Guthrie Smith* (1900), 2 F. (Ct. of Sess.) 585; 42 Digest 268, 3023 iii; 37 Sc.L.R. 433; 7 S.L.T. 401.

(7) *Re Stannard's Estate*, [1897] 1 I.R. 415; 42 Digest 269, 3032 ii.

(8) *Stevenson v. Blakelock* (1813), 1 M. & S. 535; 42 Digest 260, 2938.

(9) *Pelly v. Wathen* (1849), 7 Hare 351; 42 Digest 266, 3004; 18 L.J.Ch. 281. 13 L.T.O.S. 43; *affd.* (1851), 1 De G.M. & G. 16; 21 L.J.Ch. 105; 18 L.T.O.S. 129.

(10) *Re Llewellyn*, [1891] 3 Ch. 145; 42 Digest 268, 3021; 60 L.J.Ch. 732; 65 L.T. 249.

(11) *Brunton v. Electric Engineering Corpn.*, [1892] 1 Ch. 434; 42 Digest 269, 3026; 61 L.J.Ch. 256; 65 L.T. 745.

(12) *Re Dee Estates, Ltd., Wright v. Dee Estates, Ltd.*, [1911] 2 Ch. 85; 10 Digest 749, 4686; 80 L.J.Ch. 461; 104 L.T. 903.

(13) *Young v. English* (1843), 7 Beav. 10; 42 Digest 268, 3022; 13 L.J.Ch. 76.

(14) *Re Mosely* (1867), 15 W.R. 975; 42 Digest 268, 3020.

ADJOURNED SUMMONS to determine a question arising out of a redemption action between the plaintiff (mortgagor) and the defendants, being the legal personal representatives of the mortgagee. One of the defendants had acted as the solicitor for the plaintiff and the mortgagee, and had the custody of the title deeds to the property. The plaintiff owed to the defendant his costs in respect of the mortgage transaction and also certain moneys advanced by the defendant to him in connection with this transaction. The title deeds are still in the custody of the defendant who claims that he has a lien against the plaintiff and that after the redemption of the mortgage he has a personal right to withhold the title deeds of the mortgaged property from the plaintiff. The facts and arguments are fully set out in the judgment.

J. Neville Gray, K.C., and *C. Montgomery White* for the plaintiff.

R. F. Roxburgh, K.C., and *Donald H. Cohen* for the defendants.

VAISEY, J. : I have in this case to consider whether in the particular circumstances a solicitor's general lien exists and can be set up in respect of certain documents of title.

This is a redemption action, the plaintiff being the mortgagor and the defendants (there are four of them) being the legal personal representatives of the mortgagee. The first named of the defendants, William Gough-Thomas (I will call him "the claimant") is the solicitor who is asserting the existence of the lien. The question arises between the plaintiff, on the one hand, and the claimant, on the other; and I am dealing with it (not perhaps quite regularly) as an issue proper to be raised in the action, notwithstanding that the plaintiff's right to redeem is in no way disputed by the defendants. The claimant's case is that he has a lien not against the mortgagee but against the plaintiff, and that after the redemption of the mortgage he has a personal right to withhold the title deeds of the mortgaged property from the plaintiff. What I have to decide is whether that case is well founded or not.

The facts, when disencumbered of what appear to me to be irrelevancies, are simple. The mortgaged property, consisting of a freehold farm and other hereditaments at Oswestry, in Shropshire, was purchased by the plaintiff at an auction sale and conveyed to him by a deed dated, as I was told, Dec. 11, 1919. By another deed, dated the same day, he mortgaged the property to one Reece to secure the repayment with interest of a sum of £5,000 which Reece advanced to him. The £5,000 in fact went towards payment of the purchase money due from the plaintiff to the vendor of the property. The affair was, no doubt, carried through in a familiar and ordinary manner as a single transaction on the part of the three persons concerned, that is to say, (a) the vendor, (b) the plaintiff as purchaser and as mortgagor, and (c) Reece as mortgagee. The claimant acted in the matter as solicitor both for the plaintiff and for Reece.

The deed of mortgage contains a recital of the plaintiff's seisin of the property, and a notional interval of time must be taken to have divided the delivery of the deed of conveyance from the delivery of the deed of mortgage.

In his capacity of solicitor to the plaintiff the claimant received the deed of conveyance (with, I think, some earlier title deeds) from the vendor, and in that capacity held them during the notional interval of time to which I have referred. As soon, however, as the deed of mortgage was delivered the claimant took it, and along with the deed of conveyance and earlier title deeds held it, on behalf of his other client, namely Reece. All these documents have ever since remained, and they still are, in the physical possession or custody of the claimant, who has all along been (and, I understand, still is) a practising solicitor. On Feb. 13, 1941, Reece died. On Feb. 10, 1942, his will was proved by the four defendants, one of them being the claimant, who were the executors thereby appointed. A

I am not asked to consider the particular indebtedness to which the lien, if lien there be, extends, but I understand that the plaintiff owed the claimant not only his costs in respect of the transaction to which I have referred but also certain moneys advanced by the claimant to the plaintiff in connection with that transaction, or other transactions contemporaneous therewith. I also understand that the indebtedness may be wholly or partly statute-barred. I only mention this in order to indicate why it is that the lien would be very valuable to the claimant. B

In the course of the hearing I suggested to counsel for the plaintiff and the claimant respectively that the circumstance of the claimant having become by operation of law one of four joint mortgagees might have an important bearing on the case. I understood them to say that it was in their view unimportant and at the time I was disposed to agree with them. On considering the matter, however, I have come to regard that circumstance as the deciding factor in this case. C

I approach the matter thus. Suppose that the claimant in the lifetime of Reece had taken a transfer of the mortgage, thereby becoming sole mortgagee, and then suppose that the plaintiff had sought to redeem. In such a case the claimant would, in my judgment, have been bound not only to re-convey or otherwise release the mortgaged property to the plaintiff but also to restore to him the title deeds. Redemption involves the return by the mortgagee not only of the estate but of the *indicia* of the title to the estate. It seems to me that the claimant could not, in the case supposed, have been heard to say that in his capacity of solicitor he was entitled to preclude himself from discharging in full his duties as mortgagee—chiefly, as I think, for the reason that he would not be holding the deeds as solicitor at all but solely as mortgagee. A solicitor connotes a client, and a man cannot be solicitor to himself. An owner of property whether it be a mortgage or any other kind of property, cannot say that he holds it, or the *indicia* of his title to it, otherwise than as its owner. The circumstances that he happens to be a solicitor is fortuitous and irrelevant. D

In my view, just as a man cannot be solicitor to himself, so also he cannot be solicitor to himself and others. In the present case he may, colloquially speaking, be the solicitor to the four defendants (including himself) as executors of the will of Reece, but when the position is analysed the inaccuracy of such a statement is revealed. When the claimant joined in proving that will he became joint owner (subject to redemption) of the mortgaged property and the deeds, and thenceforward held both it and them as such part owner and not as solicitor to anybody. The description of him as solicitor to the executors or to the estate of Reece, while accurate enough for most purposes, is seen when examined to be an inexactitude. E

I hold that the claimant's obligations (shared with the other defendants) as mortgagee are paramount to, and so destructive of, his present claim. I will assume that the deeds are and always have been in a safe or strong-room in the office where the claimant carried on his profession: but where is the client on whose behalf he can be said to be holding them? Not his co-executors, for their rights are no greater than his, and, of course, he has no retainer from the plaintiff. If he had continued to hold the deeds as solicitor for somebody the case might well have been otherwise, but he does not now hold the deeds as a solicitor; and, therefore, as it seems to me, his claim fails. F

It would be strange if a solicitor could, by personally becoming transferee of a mortgage, withhold the title deeds on redemption in order to compel the mortgagor to pay him his statute-barred bill of costs, but such a consequence would necessarily flow from a decision in the claimant's favour in the present case. To put the matter in yet another way, I think that the deeds must be regarded as having by the force of circumstances passed altogether out of the custody and control of the claimant as a solicitor and as having now come to the hands of those to whom such custody belongs as of right, namely the four defendants. The fact that the one of them who happens to keep them in his house or office happens also to be a solicitor is an accident which is merely fortuitous. Placing the deeds in the solicitor's office, or allowing them there to remain, comes, in my view, to exactly the same thing as if they had been placed in a bank in the names of all four defendants. The deeds cannot, in the nature of things, be in the actual physical possession of more than one of the four defendants at any one time, and the possession of the one is constructively the possession of all.

I have, in connection with what I have said, considered the case of *Re Walker* (1), which seems to me to be a different case from the present. There the solicitor's trusteeship was constituted at the instance and for the purposes of the client against whom he was setting up his lien: here the "ownership," was acquired by the claimant in circumstances in which the plaintiff was in no way concerned or interested.

Such being the view which I have formed, I shall deal quite shortly with the question of how the case would have stood apart from the special, and to my mind determining, factors upon which I have thus far based my decision. If Reece had not died, or if the claimant had not been one of his executors (and so his sequel in title) I should have been faced with the reported authorities which counsel consider (and I agree with them) to be conflicting. Had the choice been necessary, I should have followed the later decision of BACON, C.J., in *Re Nicholson* (2), which is adverse to the claimant's contentions, rather than his earlier decision in *Re Messenger* (3), which is favourable to them. The headnote in *Re Nicholson* (2) is as follows, at p. 302:

A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title-deeds in his possession for costs due to him from the mortgagor, even though the costs were incurred prior to the mortgage and the title-deeds never left the solicitor's office.

There follows a *semble* with which I agree (though it seems to be only the reporter's own deduction) that *Re Messenger* (3) is not good law.

I have some difficulty in understanding the case of *Re Snell* (4), and I may say the same about *Re Mason & Taylor* (5).

The Scottish case of *Drummond v. Muirhead* (6) is in the claimant's favour. I have already mentioned *Re Walker* (1), in which it would appear that *Re Messenger* (3) and several other cases were cited, but not *Re Nicholson* (2).

The Irish case of *Re Stannard* (7) may also be relied upon by the claimant.

I have not obtained any very clear guidance from the other cases to which my attention was called, namely, *Stevenson v. Blakelock* (8), *Pelly v. Wathen* (9), *Re Llewellyn* (10), *Brunton v. Electrical Engineering Corpn.* (11), and *Re Dee Estates, Ltd.* (12). The reconciliation of the various authorities is, I think, impossible, and the choice between them is difficult. On the extent of the lien (assuming it to exist) see *Young v. English* (13) and *Re Moseley* (14).

I would add that this type of lien (described as a general or passive or possessory lien) is a very exceptional right, not covering, for example, the moneys owing to a man who, though in fact a solicitor, was acting in reality as a land agent. (See *Re Walker* (1)). The right is one which, in my judgment, ought to be upheld and safeguarded, but ought not, on the other hand, to be extended, nor held to exist in unprecedented circumstances.

I will declare that on the redemption of the mortgage the defendants are bound to hand over the deeds to the plaintiff, and that the claimant is not entitled to any lien upon them. The costs of all parties of the action so far as attributable to, or increased by, the raising of this issue must be borne and paid by the claimant personally. I can see no justification for allowing any of such costs to fall on the estate of Reece, or, except to the small extent hereinafter indicated, on the plaintiff. The taxation giving effect to this shou'd, as e.g. as

the plaintiff's costs, be on a party and party basis as between himself and the claimant, the plaintiff bearing the difference, if any, between his costs as between solicitor and client and his costs as between party and party. As to the other costs, there must be a complete indemnity to the estate of Reece and to the defendants other than the claimant.

Declaration accordingly.

Solicitors: *Field, Roscoe & Co.*, agents for *Batten & Whitsed*, Peterborough (for the plaintiff); *Rooke & Sons*, agents for *W. Gough-Thomas*, Ellesmere (for the defendants).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

Dictum of LORD RUSSELL OF KILLOWEN, at p. 421, *applied*.
DEAN v. BRUCE. [1951] 2 All E.R. 926.

REGIONAL PROPERTIES, LTD. v. OXLEY.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Porter and Lord Simonds), **July 5, 30, 1945.**]

Landlord and Tenant—Rent restriction—Tenancy agreement allowing bonus on punctual payment of rent—Agreement terminated by notice from landlord increasing rent—Additional rent on account of statutory increase for rates—Statutory tenancy—Whether proviso for bonus imported into statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), ss. 2, 15 (1)—Rent Restrictions (Notices of Increase) Act, 1923 (c. 13), s. 1.

The appellants were the landlords of certain premises which were subject to the Rent Restrictions Acts and the standard rent of which was fixed at £90 per annum by a tenancy in 1938. By an agreement, dated Jan. 30, 1941, the respondent became the tenant of the premises under a tenancy agreement, the rent being payable by equal monthly instalments of £7 10s. in advance. The agreement contained a proviso for a bonus to the tenant of 16s. 8d. per month in the event of the rent being paid punctually. On Feb. 27, 1943, the appellants notified the respondent that the rent of the premises as from Mar. 28, 1943, would be £92 1s. 6d. per annum, the additional £2 1s. 6d. being a statutory increase for rates. The notice operated as a notice determining the tenancy (under the Rent Restrictions (Notices of Increase) Act, 1923, s. 1), and on its expiry the respondent became the statutory tenant of the premises. The question to be determined was whether the proviso for a bonus to the tenant on the punctual payment of the rent was consistent with the provisions of the 1920 Act and was incorporated into the statutory tenancy by sect. 15 (1) of the Act:—

HELD: whether the proviso was regarded as part of the *reddendum* or as a separate and independent term of the tenancy, it was inconsistent with the provisions of the 1920 Act and was not incorporated into the statutory tenancy by sect. 15 (1) of the Act.

[*Per LORD MACMILLAN*]: after an effective notice of the increase of rent had been given, all stipulations in the original contract of tenancy relating to the amount of rent payable were superseded and the statutory tenant must pay the rent stated in the notice.

Decision of the Court of Appeal ([1944] 2 All E.R. 510) *reversed*.
Bryanston Properties Co., Ltd. v. Edwards (1) *overruled*.

[EDITORIAL NOTE.] This case decides that a proviso for a bonus on punctual payment of rent is inconsistent with the provisions of the Rent Restrictions Acts, and is not imported into a statutory tenancy, reversing the decision of the Court of Appeal, and overruling the *Bryanston* case (1). It is held that the standard rent is fixed by statute, and any term of the agreement which affects the quantum is inconsistent, whether or not it is part of the *reddendum*.

AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Supplement.]

Cases referred to:

- *(1) *Bryanston Properties Co., Ltd. v. Edwards*, [1944] 1 K.B. 32; [1943] 2 All E.R. 646; 113 L.J.K.B. 161; 169 L.T. 362.
- *(2) *Phillips v. Copping*, [1935] 1 K.B. 15; Digest Supp.; 104 L.J.K.B. 78; 152 L.T. 175.

(3) Capital and Counties Properties, Ltd. v. Butler, [1944] 1 K.B. 730; [1944] 2 All E.R. 223.

APPEAL by the landlord from a decision of the Court of Appeal (LORD GREENE, M.R., MACKINNON and LUXMOORE, L.J.J.), dated July 6, 1944, reported [1944] 2 All E.R. 510, affirming a decision of His Honour JUDGE DRUCQUER, made at Willesden County Court and dated Apr. 19, 1944. The facts are fully set out in the opinions of LORD THANKERTON and LORD RUSSELL OF KILLOWEN.

A *John W. Morris, K.C.*, and *S. Seuffert* for the appellants.

Graham Brooks and *Frederick Hallis* for the respondent.

The House took time to consider its opinion.

LORD THANKERTON: My Lords, by an agreement dated Jan. 30, 1941, the appellant company let to the respondent a flat at Pullman Court, Streatham Hill; cl. 1 of the agreement provided that the tenancy was to be:

B . . . for the term of 3 months from Oct. 28, 1940, at the clear yearly rent of £90 payable by equal monthly payments of £7 10s. in advance the first payment to be made on the signing hereof Provided always that if the premises shall be held thereafter the tenancy shall be continued as a tenancy from month to month determinable by one month's previous notice in writing given by either party to the other on the 28th day of any month to expire on the 27th day of the month next following And Provided
C further that the landlord shall credit the tenant's account with an additional sum of 16s 8d. upon the tenant paying to the landlord the sum of £6 13s. 4d. within 14 days of the day on which any monthly payment of rent ought to be made to the landlord in accordance with the provisions hereinbefore contained.

The respondent continued in possession after the expiry of the three months and is still in possession. On Feb. 27, 1943, the appellant company gave written notice to the respondent that the rent of the premises as from Mar. 29, 1943, would be £92 1s. 6d. per annum, composed of the standard rent of £90 and a statutory increase of £2 1s. 6d. in respect of rates. It is not in dispute
D that the standard rent as fixed by a previous tenancy agreement, was £90, or that the increase in respect of rates was permitted by statute. The notice thus served on the respondent operated as a notice to quit, and, upon its expiry, a statutory tenancy came into existence, which is more particularly regulated by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1),
E which provides:

A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act . . .

The short question between the parties is whether the second proviso in cl. 1 of the original contract of tenancy as to the landlord crediting the tenant with
F 16s. 8d. on payment of his monthly rent within 14 days is consistent with the statutory provisions. The respondent raised the matter by proceedings in the Willesden County Court, and the county court judge rightly held himself bound by the decision of the Court of Appeal in *Bryanston Property Co., Ltd. v. Edwards* (1), and decided in favour of the respondent, and his decision was unanimously affirmed by the Court of Appeal, who also held that the case was ruled by the
G decision in the *Bryanston* case (1). In this appeal the appellant company challenges the correctness of the decision in the *Bryanston* case (1), and it will be necessary to examine it critically.

In the *Bryanston* case (1) a flat was let from Feb. 8 to Mar. 25, 1941, and thereafter from quarter to quarter, until determined by a quarter's notice in writing, at a yearly rent of £275 payable quarterly in advance; cl. 4 (1) of the tenancy agreement provided:

H So long as the present state of war shall exist between Great Britain and Germany and for 3 months after the quarterday next following an armistice the landlord will allow the tenant to deduct from the rent hereby made payable the sum of £85 per annum by equal quarterly payments . . .

The landlord duly terminated the contractual tenancy on Sept. 29, 1942, and the tenant continued in possession as a statutory tenant. It was held that the standard rent was £275, but that the tenant was entitled, under sect. 15 (1) of the Act of 1920, to the benefit of cl. 4 (1) of the original agreement. LORD GREENE, M.R., said at p. 38 ([1943] 2 All E.R., at p. 649):

Apart from authority, it seems to me to be reasonably clear that the provision with regard to deduction from rent during the war is a term or condition of the original contract. The phrase "terms and conditions" is, again, not very technical. The subsection does not use the word "covenant," but, subject to what I have to say about the authorities, the word "terms" must, I think, include covenants. For instance, if the original contract of tenancy contained repairing covenants by the tenant, those covenants would, I think, be imported into the statutory tenancy when the contractual tenancy came to an end. In the present case, what we have is not a covenant, but what is quite aptly described as a term of the agreement, namely, a provision inserted in favour of the tenant enabling him in certain circumstances to satisfy the obligation to pay the rent of £275 by the payment of a lower sum. That, I should have thought, was beyond question a term of the tenancy agreement.

After a reference to *Phillips v. Copping* (2), in which it was held that, when under the contractual tenancy the rent was lower than the standard rent, the landlord was entitled, when the tenant held over as a statutory tenant, to increase the rent up to the standard rate, LORD GREENE, M.R., said, at pp. 40, 41 ([1943] 2 All E.R., at p. 650) :

The present case is very different from that. This is not a case of carrying the covenant to pay rent into the statutory tenancy. The landlord increases the rent to £275. That rent, as I have said, is the standard rent. The question then arises whether the right which the tenant had possessed with regard to precisely the same rent under the tenancy agreement is imported into the statutory tenancy by virtue of the section. It seems to me that a provision whereby the defendant can satisfy his obligation to pay the higher rent by paying a lower rent, is truly a term of his tenancy, and, accordingly, that his right to make that deduction against what has now become the standard rent under the statutory tenancy is maintained and preserved. That conclusion is not merely in accordance with the language of the section, but is also an eminently just result.

MACKINNON and DU PARCQ, L.JJ., concurred.

My Lords, I respectfully venture to doubt the correctness of the remark that this conclusion was an eminently just result. The tenant gets statutory fixity of tenure on payment of a statutory rent, and I should have thought it would be at least as just that he should not be entitled to pay a lower rent, merely because of a term or condition of the original tenancy. But our duty is to construe the words of the statute. LORD GREENE, M.R., accepts that the expression "terms and conditions" in sect. 15 (1) of the 1920 Act must include covenants, of which the covenant to pay rent will be one, but it will be excluded because of its inconsistency with the provisions of the Act; he further accepts that the provision there in question enabled the tenant to satisfy his obligation to pay the higher rent by paying a lower rent, although he describes the rent payable under the statutory tenancy as precisely the same as the rent under the original agreement. Although the same in amount, as it happened in that case, the statutory rent appears to me to be different in quality, particularly in respect of the statutory limitations, which, in my opinion operate in two directions, *viz.*, by limiting the landlord's right to the standard rent, along with the increases permitted by sect. 2 of the Act, and by authorising the landlord to obtain a rent up to that amount, as was decided, in my opinion, by *Phillips v. Copping* (2).

In the present case LORD GREENE, M.R., after stating that the present case fell within the *Bryanston* case (1), said ([1944] 2 All E.R., at p. 512) :

It is not a question of importing the *reddendum* into the statutory tenancy; it is a separate and independent term of the tenancy by which, in certain circumstances, the tenant can get a bonus on punctual payment.

I find myself quite unable to regard the proviso in this case apart from the rent clause of which it is made an integral part, qualifying the obligation to pay rent. But, further, even if the proviso were to be regarded as a separate and independent term of the tenancy, in my opinion it would still be inconsistent with the provisions of the Act with regard to standard rent, as explained in *Phillips v. Copping* (2). It is unnecessary to refer to *Capital and Counties Properties, Ltd. v. Butler* (3).

I am, therefore, of opinion that the decision in the *Bryanston* case (1) was wrong, and that the decision in the present case, which followed it, is erroneous.

I therefore propose that the appeal should be allowed, and the judgment of the Court of Appeal, except as to costs, and the judgment of the county court

judge should be set aside, and the action should be dismissed. In accordance with the undertaking given by the appellants to the Court of Appeal, this House should order that the appellants do pay the respondents costs of this appeal, as between solicitor and client.

LORD RUSSELL OF KILLOWEN : My Lords, in Feb., 1943, Oxley was the tenant of flat No. 49, on the terms of the agreement of Jan. 30, 1941. By the terms of that agreement the yearly rent payable was £90, payable by equal monthly payments of £7 10s., payable in advance, but subject to a proviso :

A . . . that the landlord shall credit the tenant's account with an additional sum of 16s. 8d. upon the tenant paying to the landlord the sum of £6 13s. 4d. within 14 days of the day on which any monthly payment of rent ought to be made to the landlord in accordance with the provisions hereinbefore contained.

B Apart from all conveyancing technicalities, there can be no doubt of this, that as a result of this proviso, the rent which the tenant is called upon to pay need not exceed £80 per annum. The terms of this contract of tenancy which fix the rent to be paid are such that the rent paid in any year may vary between the limits of £90 and £80, according to the number of monthly payments made within the 14 days.

C On Mar. 29, 1943, Oxley's tenancy under that agreement came to an end, and he became a statutory tenant at a standard rent under or by virtue of the Rent and Mortgage Interest Restrictions Acts, 1920-1939. The standard rent was fixed by reference to the rent payable by a former tenant, one Pickles, who held the premises under a tenancy agreement of Aug. 9, 1938, at a rent of £90. The standard rent was £90 increased by an increase of rates payable by the landlord to a sum of £92 1s. 6d. per annum. But although Oxley's tenancy had become a statutory tenancy it is provided by sect. 15 (1) of the Act of 1920 that the tenant :

D . . . shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act . . .

Oxley claims to be entitled to the reduction of rent which was given to him by his original contract of tenancy. The sole question seems to be whether the proviso is consistent with the provisions of the Act. If it is, the decisions below are right. If it is not, the appellant succeeds on this appeal.

E The proviso in question cannot as it stands, fit into the statutory tenancy at an annual rent of £92 1s. 6d., but apart from this verbal difficulty, I am of opinion that any term of the original tenancy which, if imported into the statutory tenancy would or might in any way affect the amount of the standard rent which is fixed by the Act, cannot be treated as a term which is consistent with the provisions of the Act. I doubt whether the technical conveyancing term

F *reddendum* can properly be applied to such a contract of tenancy as the agreement of Jan. 30, 1941, but if it can, the proviso forms part of it, being a qualification of what has been stated before, changing the fixed rent into a rent variable and ranging between the two limits which I have indicated. I think the true question to ask oneself in a case like this is not whether the term is contained in a *reddendum* but : Will the importation of this term into the statutory tenancy affect in any way the amount of the standard rent which the statute fixes ?

G If it does it is not consistent with the provisions of the Act, and it is not within sect. 15 (1).

I would allow the appeal.

LORD MACMILLAN : My Lords, the facts of this case are simple. The appellants let to the respondent a flat in London for 3 months from Oct. 28, 1940, and thereafter from month to month at a yearly rent of £90 payable by equal monthly payments of £7 10s. The clause in the tenancy agreement whose side-note is "rent" and which fixes the rent as above stated, concludes as follows :

H And provided further that the landlord shall credit the tenant's account with an additional sum of 16s. 8d. upon the tenant paying to the landlord the sum of £6 13s. 4d. within 14 days of the day on which any monthly payment of rent ought to be made to the landlord in accordance with the provisions hereinbefore contained.

On Feb. 27, 1943, by notice under the Rent and Mortgage Interest Restrictions Acts, 1920-1939, the appellants notified the respondent that the rent

of the flat as from Mar. 28, 1943, would be £92 1s. 6d. per annum, made up of £90 being the standard rent of the premises and £2 1s. 6d. representing an increase of rates. This notice operated as a notice determining the tenancy: (see the Rent Restrictions (Notices of Increase) Act, 1923, s. 1). The respondent thereafter occupied the premises by virtue only of the Acts as a statutory tenant; but sect. 15 (1) of the Act of 1920 provides that a statutory tenant:

... shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act . . .

The question at issue between the parties is whether the respondent, as he maintains, is entitled to the rebate of 16s. 8d. monthly for prompt payment as provided in the original contract of tenancy, or whether, as the appellants maintain, the respondent as a statutory tenant is not entitled to the benefit of the rebate as not being a term or condition of the original contract of tenancy which is consistent with the provisions of the statute.

I would observe in the first place that the provisions for a rebate in the original contract of tenancy is in terms inapplicable to the changed circumstances. It provides that the rebate is to operate:

... upon the tenant paying to the landlord the sum of £6 13s. 4d. within 14 days of the day on which any monthly payment of rent ought to be made.

After the notice of increase of rent became operative, the respondent became liable to pay to the appellants a monthly rent of £7 13s. 5d., instead of the original monthly rent of £7 10s., and a rebate of 16s. 8d. on the increased rent would reduce it to £6 16s. 9d., and not to £6 13s. 4d. The rebate was applicable to a monthly rent of £7 10s., and is inapplicable to the increased monthly rent of £7 13s. 5d. The rebate of 16s. 8d. plus a payment of £6 13s. 4d. by the respondent would by 3s. 5d. fall short of the increased monthly rent of £7 13s. 5d.

But in any case the provision for a rebate contained in the original contract of tenancy is not, in my opinion, a term or condition of the original contract which is consistent with the provisions of the Act. Under the Act the landlord is entitled to increase the rent up to any figure which does not exceed the standard rent plus the permitted statutory increases. When he gives a valid notice of increase of rent, the rent from the date when the notice takes effect is the rent specified in the notice. It becomes the statutory rent of the premises and all previous stipulations as to the amount payable cease to have any effect. So far as the monetary position is concerned, the liability of the statutory tenant is fixed, and fixed exclusively, at the figure stated in the notice which brings the statutory tenancy into existence. I am disposed to agree with the view expressed by MAUGHAM, L.J., in *Phillips v. Copping* (2), at p. 24, where he says of sect. 15 (1) of the Act of 1920 that the phrase as to the statutory tenant being entitled to the benefits of all the terms and conditions of the original tenancy so far as consistent with the provisions of the Act:

... is not so framed as to extend to the case of the payment of rent. It is not dealing with rent.

The Court of Appeal in the present case had before them their decisions in two previous cases in which the question arose as to the carrying forward into the statutory tenancy of a provision in the original tenancy agreement for an abatement of rent: (*Bryanston Property Co., Ltd. v. Edwards* (1); *Capital and Counties Properties, Ltd. v. Butler* (3)). In the former, a provision as to an abatement of rent during the war was held to be imported into the statutory tenancy, while, in the latter, a similar provision was held not to be carried forward. The distinction which LORD GREENE, M.R., in the present case draws between the ground of judgment in the former and the ground of judgment in the latter of these previous decisions is as he says ([1944] 2 All E.R., at p. 512): "a fine one and depends on technicalities of language." I venture to think it is unduly technical and in a matter of this sort, affecting doubtless many small tenancies, it would be unfortunate if each case had to be decided on such technical considerations. In my view, after an effective notice of increase of rent has been given, all stipulations in the original contract of tenancy relating to the amount of rent payable are superseded and the statutory tenant must pay the rent which is stated in the notice, no more and no less. This is not an unreasonable result. A landlord may well be disposed to make concessions

in the case of a tenant whose tenancy may be terminated at short notice, but it is a different matter to require him to continue these concessions indefinitely to a statutory tenant whose tenancy he cannot terminate except with the sanction of the court under prescribed conditions.

I should accordingly allow the appeal.

A LORD PORTER : My Lords, this case raises a short question under the Rent Restrictions Acts on which I think all your Lordships are agreed. As we are differing from the opinion of the Court of Appeal I express very shortly the reasons for my dissent from their view.

The material provision is the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), which is as follows :

B A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act . . .

C In the present case the respondent has become the statutory tenant of a house of which the standard rent is £90 a year payable by equal monthly instalments of £7 10s. in advance. The provision to this effect in the tenancy agreement is immediately followed by a further provision that on the termination of the original term the tenancy should be a monthly one. The agreement then goes on to say :

Provided further that the landlord shall credit the tenant's account with an additional sum of 16s. 8d. upon the tenant paying to the landlord the sum of £6 13s. 4d. within 14 days of the day on which any monthly payment of rent ought to be made to the landlord in accordance with the provisions hereinbefore contained.

D The rent which the landlord is now entitled to charge, apart from any question of a right to reduction on prompt payment, is £92 1s. 6d., the extra £2 1s. 6d. being in respect of increased rates payable by the landlord. This fact, however, I regard as immaterial.

E In these circumstances, the respondent claims that amongst the terms of his original tenancy which have been transported into his statutory tenancy by reason of sect. 15 (1) of the 1920 Act is the provision that his rent should be reduced on punctual payment. The appellants say, however, that such an importation is inconsistent with the provisions of the Act, inasmuch as there is nothing in the Act which prohibits the landlord from increasing the rent up to the amount of the standard rent and permitted increases, and that, amongst the terms and conditions which are to be incorporated into the statutory tenancy, rent is not included.

F It was accepted by the respondent that sect. 15 (1) did not prevent a landlord who had been charging less than the standard rent from raising it to the standard rent and the decision in *Phillips v. Copping* (2) was accepted. So was the decision in *Capital and Counties Properties, Ltd. v. Butler* (3), in which the Court of Appeal held that, in a case where premises having a standard rent of £120 were let subject to one month's notice at £95 during the war and £114 thereafter the option clause of paying £95 during the continuance of hostilities was not imported into the statutory tenancy. The reasoning of the Court of Appeal in each case was that the terms and conditions referred to in sect. 15 (1) did not include the provision in the tenancy agreement as to the amount payable as rent. Whatever was pure *reddendum* was, in this view, unaffected by sect. 15 (1), with the result that the full standard rent might be charged to a statutory tenant and to decide otherwise would be to incorporate a term inconsistent with the Act.

H Meanwhile, however, the Court of Appeal had decided in *Bryanston Property Co., Ltd. v. Edwards* (1) that a provision in an agreement of tenancy permitting the deduction of £85 from the standard rent during the existence of the war was not part of the *reddendum*, but was imported into the statutory tenancy which came into force when that agreement was determined. My Lords, if I thought that such a term formed no part of the provision determining the rent payable, or that the deduction allowed for prompt payment in the case under consideration was a separate term of the agreement, not forming part of the stipulation as to the *quantum* of rent payable, I should agree with the Court of Appeal. But I do not so regard it. It is, to my mind, a part, and a vital part,

of the *reddendum*; it regulates the amount of rent payable and is concerned only with the determination of the rent which shall be payable, the very matter with which the fixing of a standard of rent is concerned. If it be a term or condition, I think its incorporation amongst the terms of the statutory tenancy would be inconsistent with the provisions of the Act. But I am inclined to think its importation can also be negatived on the grounds which MAUGHAM, L.J., thought conclusive in *Phillips v. Copping* (2), at p. 24 :

. . . the phrase is not so framed as to extend to the case of the payment of rent. A

I should allow the appeal.

LORD SIMONDS: My Lords, as we are reversing the unanimous decision of the Court of Appeal, I will very shortly add my reasons for doing so.

When the appellants served on the respondent the notice dated Feb. 27, 1943, and he remained in possession of the demised premises after the expiration of the notice, he did so under the protection of the Rent Restrictions Acts. He became what is conveniently called a statutory tenant. It was the corollary of this that he became liable to pay upon demand the standard rent together with any permitted increases. It is common ground that the standard rent was £90 per annum and that the permitted increases were £2 1s. 6d. per annum. *Prima facie*, therefore, the respondent became liable to pay a rent of £92 1s. 6d. per annum. It is, however, contended by the respondent, and the Court of Appeal has upheld his contention, that by virtue of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), he can satisfy his obligation in respect of rent by the payment of a lesser sum than £92 1s. 6d. The subsection provides that he :

. . . shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of [the] Act . . . D

The "original contract of tenancy" which reserved a rent of £90 per annum payable by equal monthly instalments of £7 10s. in advance contained also a proviso that the landlord should credit the tenant's account with an additional sum of 16s 8d. upon the tenant paying the landlord the sum of £6 13s. 4d. within 14 days of the day on which any monthly instalment of rent became due. It is upon this proviso, which is in effect a provision for reduction of rent upon punctual payment, that the respondent relies. It is a term or condition of the tenancy, and he says that it is consistent with the provisions of the Act. E

This is the simple issue in the case. The Act in effect says that the tenant shall pay a rent of £90 with permitted increases, which may for this purpose be disregarded: the original contract of tenancy says that he shall pay a rent of £90, with the qualification that it shall be reduced upon punctual payment. Are these two obligations the same or different? If they are different, there is an inconsistency and the obligation imposed by the Act must prevail. It is to my mind clear that they are different. An irreducible rent and a rent reducible in a certain event are not the same thing from the point of view of either landlord or tenant. It cannot, in my opinion, make any difference whether the provision for reduction is found in the so-called *reddendum* or in some other part of the document. Wherever it is found, it operates to qualify a rent which the Act imposes without qualification. The conventional must give way to the statutory provision. G

The Court of Appeal in the present case followed its earlier decision in *Bryanston Property Co., Ltd. v. Edwards* (1). It follows from what I have said that that case was, in my opinion, wrongly decided and should be overruled.

Appeal allowed.

Solicitors: *Hyman Isaacs, Lewis & Mills* (for the appellants); *F. E. Clifford* (for the respondent). H

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

EMILY ROSE HILTON v. SUTTON STEAM LAUNDRY (A FIRM).

[COURT OF APPEAL. (Lord Greene, M.R., du Parcq and Morton, L.JJ.),

Followed. *FINNEGAN v. CEMENTATION Co., LTD.* [1953] 1 All E.R. 1130.

Executors were administrators—Administrator—Relation back—Writ issued before grant of letters of administration—Claim under Fatal Accidents Acts—Widow claiming as administratrix—Whether decision in Ingall v. Moran applicable—Application to amend writ by suing in individual capacity as dependant—Nature of representative capacity required to be stated in indorsement—Limitation of time—Amendment not allowed—Fatal Accidents Act, 1846 (c. 93)—Fatal Accidents Act, 1846 (c. 95)—R.S.C., Ord. 3, r. 4.

Limitation of Actions—Amendment of writ and statement of claim—Claim under Fatal Accidents Acts—Widow claiming as administratrix—Writ issued before grant of letters of administration—Decision in Ingall v. Moran—Application to amend writ by suing as dependant—Application made after statutory period—Amendment not allowed—Fatal Accidents Act, 1846 (c. 93)—Fatal Accidents Act, 1864 (c. 95)—R.S.C., Ord. 3, r. 4.

The appellant was the sole dependant of her husband who died as the result of an accident on Oct. 29, 1942. On Feb. 19, 1943, the appellant issued a writ, as "administratrix" of the estate of the deceased, claiming damages for negligence and breach of statutory duty against the respondents under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. The statement of claim, delivered on Mar. 15, 1943, stated that the appellant brought the action "as administratrix of the deceased's estate for the benefit of such estate" under the Law Reform Act "and for the benefit of herself the sole dependant of the deceased" under the Fatal Accidents Acts. At the time of issuing the writ and the statement of claim, letters of administration had not been taken out by the appellant and a grant of administration was not obtained until Oct. 22, 1943. On Dec. 10, 1943, it was decided in *Ingall v. Moran* (1), an action under the Law Reform (Miscellaneous Provisions) Act, 1934, that the subsequent grant of letters of administration did not operate retro-actively to validate the original writ which, from the beginning, was a nullity. The appellant thereupon applied to amend the writ and statement of claim by striking out the references to the Law Reform Act and the words "as administratrix of the deceased's estate," so that the claim would be by her in an individual capacity as a dependant, under the Fatal Accidents Act, 1864. It was contended on behalf of the appellant that the decision in *Ingall v. Moran* (1) did not apply to a claim under the Fatal Accidents Acts, because, under these Acts, there was no substantial difference between a claim by a personal representative and a claim by a dependant in his personal capacity; the beneficiaries would be the same in each case, and the estate of the deceased was not concerned in the matter. The respondents contended that, as more than 12 months had elapsed since the cause of action accrued, the amendment could not be allowed so as to deprive them of their rights under the statutory limitation imposed by the Fatal Accidents Act, 1846, s. 3:—

Held: (i) although the result was the same whether an action under the Fatal Accidents Acts was brought by the personal representative or by the dependants, the action was, nevertheless, brought in different capacities; since R.S.C., Ord. 3, r. 4, provided that the indorsement should show in what capacity a plaintiff was suing and the appellant had bound herself to an action in a representative capacity which she did not possess, the principle laid down in *Ingall v. Moran* (1) was applicable.

(ii) the amendment could not be allowed as it would deprive the respondents of their rights under sect. 3 of the 1846 Act.

[EDITORIAL NOTE.] It was held in *Ingall v. Moran* (1) that the doctrine of relation back of an administrator's title does not apply to an action commenced by an administrator before grant. It is held in this case that the principle of *Ingall v. Moran* applies to a claim in a representative capacity under the Fatal Accidents Acts and that therefore a grant of administration subsequent to the issue of the writ has no retro-active operation to validate the original writ.

The writ having been issued in a representative capacity, the court refuses to allow an amendment making the writ one issued in a personal capacity, since this would deprive the defendant of the benefit of the limitation period in the Fatal Accidents Acts, arising by reason of the application of *Ingall v. Moran* (1) to the circumstances of this case.

AS TO THE DOCTRINE OF RELATION BACK, see HALSBURY, Hailsham Edn., Vol. 14, pp. 176, 177, paras. 277-281; and FOR CASES, see DIGEST, Vol. 23, pp. 67-70, Nos. 513-535.

AS TO INDORSEMENT ON WRIT OF REPRESENTATIVE CAPACITY, see HALSBURY, Hailsham Edn., Vol. 26, p. 24, para. 28. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 20. A

AS TO REFUSAL OF AMENDMENTS BY REASON OF THE STATUTORY BAR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 784, 785, para. 1087; and FOR CASES, see DIGEST Vol. 32, pp. 534, 535, Nos. 1873-1879.]

Case referred to :

**(1) Ingall v. Moran*, [1944] 1 K.B. 160; [1944] 1 All E.R. 97; 113 L.J.K.B. 298; 170 L.T. 57. B

INTERLOCUTORY APPEAL by the plaintiff from an order of BIRKETT, J., dated July 6, 1945, confirming an order of the master refusing leave to amend the writ and statement of claim in an action brought under the Fatal Accidents Acts, 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. The facts are fully set out in the judgment of LORD GREENE, M.R.

C. L. Henderson, K.C., and *B. M. Goodman* for the appellant. C

F. W. Beney, K.C., and *T. F. Davis* for the respondents.

LORD GREENE, M.R. : This has every appearance of being an unfortunate case. The appellant, Mrs. Emily Rose Hilton, is the widow and the sole dependant of her deceased husband, who died at once as the result of an accident which took place on Oct. 29, 1942. The result, therefore, was that the period of 12 months allowed for the bringing of a claim under the Fatal Accidents Acts began to run on that day. D

On Feb. 19, 1943, *i.e.*, about 5 months after the death, the appellant issued a writ, on the face of which she is described merely as a widow : the indorsement is in the following terms :

The plaintiff claims as administratrix of Frank John Hilton deceased for damages for negligence and breach of statutory duty pursuant to the provisions of the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. E

Upon its face that, of course, raises two quite separate causes of action which have a fundamental difference. A claim under the Law Reform (Miscellaneous Provisions) Act, 1934, is a claim for the benefit of the estate; the money recovered falls into the estate and is subject to the will, if any, of the deceased person and to the claims of his creditors. A claim under the Fatal Accidents Acts, on the other hand, has this difference, that the money recovered, in a case like the present where there is only one dependant, will go to the dependant whether the action is brought by the personal representative of the deceased or by the dependant in her personal capacity. She is entitled, in certain circumstances, to sue in her personal capacity under the Fatal Accidents Act, 1934. Under the Act of 1864 the person to bring the action was the legal personal representative, not for the benefit of the estate but for the benefit of the dependants, and, by the amending Act of 1864, a dependant was entitled to bring an action in cases where there was no personal representative, or, if there was one, the personal representative failed to bring proceedings within 6 months. Whichever is the form of action the result is precisely the same, because the money recovered does not form part of the estate of the deceased person, but goes, as through a conduit pipe, to the dependants who are entitled. F

If the appellant had, in fact, held letters of administration at the date of this writ, no difficulty would have arisen; but she did not. She delivered a statement of claim on Mar. 15, 1943, and it is argued on her behalf that, on the true construction of that statement of claim, she has shifted her ground, as regards the claim under the Fatal Accidents Acts, in this respect, *viz.*, that in the statement of claim she is claiming under that Act in her personal capacity and not in a representative capacity. So far as the claim under the Law Reform Act is concerned it is not suggested, and, of course, it could not be suggested, that her claim was otherwise than in her alleged capacity as administratrix. G H

In my opinion, the statement of claim as regards the claim under the Fatal Accidents Acts, does not bear the interpretation suggested. The statement of claim follows the writ, and in respect of both Acts the claim purports to be made in a representative capacity. Para. 1 of the statement of claim says this :

The plaintiff, who is the widow of Frank John Hilton deceased brings this action as administratrix of the deceased's estate for the benefit of such estate under the Law Reform (Miscellaneous Provisions) Act, 1934, and for the benefit of herself the sole dependant of the deceased for damage by reason of the death of the deceased under the Fatal Accidents Acts, 1846 to 1908.

I should have thought, reading that as a piece of English, that the words "as administratrix of the deceased's estate" covers both limbs of the claim, each limb introduced by the words "for the benefit of"—in the one case "for the benefit of the estate," and, in the other case, "for the benefit of herself as sole dependant." That seems to me to be the natural construction of the words. It is argued that the words "as administratrix of the deceased's estate" must be confined to the claim under the Law Reform Act. I do not so read the paragraph. Later in the statement of claim, the appellant gives the particulars pursuant to the Fatal Accidents Acts which she is bound to do under the statutes; name of the person on whose behalf the action is brought, Emily Rose Hilton, widow of the deceased; and then in her own prayer she claims damages (i) under the Fatal Accidents Acts, and (ii) under the Law Reform Act, not distinguishing in any way the alleged two different capacities. I think, therefore, that the statement of claim must be read in the way I have indicated. But, even if that be wrong, it does not alter the result of this application.

The statement of claim having been delivered on Mar. 15, 1943, on May 17, 1943, the respondents' solicitors wrote a letter to the appellant's solicitors acknowledging a letter from the latter, in which they said that no letters of administration had been taken out as the value of the estate was under £100. The respondents' solicitors then asked whether the appellant in those circumstances was entitled to sue as administratrix. Her solicitors considered the point, and on July 27, having taken the advice of counsel, they wrote saying that it would be necessary for the appellant to take out letters of administration and suggesting that the action should be stayed pending the obtaining of the grant. It would appear from that letter that the solicitors were under the impression that, notwithstanding the lack of letters of administration when the writ was issued, a subsequent grant which they were proposing to apply for would in some way operate retrospectively so as to validate the writ. Indeed, there was, I think, current in some quarters a belief that that was the law, that a subsequent grant would validate a writ which had been issued in the alleged capacity of administratrix so that the writ became a good writ *ab initio*. The solicitors obtained for the appellant a grant of administration on Oct. 22, *i.e.*, a week before the expiration of the statutory period of 12 months within which an action under the Fatal Accidents Acts had to be brought.

On Oct. 26, 27 and 28, 1943, *Ingall v. Moran* (1) was argued in this court and judgment was delivered on Dec. 10, *i.e.*, after the expiration of the 12 months.

In that case the plaintiff was claiming under the Law Reform (Miscellaneous Provisions) Act, 1934, and based his claim upon his alleged representative capacity as administrator. At the date when the writ was issued no letters of administration had been taken out and they were not taken out until 2 months later. The question before this court was whether, in those circumstances, the action was competent, and it was held that it was not: that the subsequent grant of letters of administration did not operate retro-actively to validate the original writ, which, from the beginning, was a nullity.

If the principles there laid down are applicable to this case it would mean that the original writ here was a nullity and could not be validated by anything that happened afterwards, either by the alleged new basis on which the statement of claim is said to have been framed, or by the grant of letters of administration, or by an order of the court under any of the Rules of the Supreme Court, on the ground that it was a mere irregularity. It is said, however, that the principles of that case do not apply, and, before considering briefly the arguments, I must say a word about the actual nature of this appeal. It is an appeal from an order

of BIRKETT, J., confirming an order of the master who refused the appellant's application for leave to amend her writ and statement of claim. The nature of the amendments asked for was this. In the writ, the appellant sought to strike out the words "as administratrix of the estate of Frank John Hilton deceased" and the reference to the Law Reform Act. I can get rid of the latter point at once by saying that, so far as the claim under the Law Reform Act is concerned, it seems to me—and, indeed, the contrary is not suggested—that *Ingall v. Moran* (1) completely covers the case for the very simple reason that that was a claim under the Law Reform Act, and the claim under that Act is a claim for the benefit of the estate. Looked at, therefore, as a claim under the Law Reform Act, this action was bound to fail for the reason that no letters of administration had been granted when the writ was issued. It was, therefore, desired to lighten the ship by striking out the claim under the Law Reform Act which was doomed to failure. But the intention of the rest of the amendment of the writ which was sought for clearly was to get rid of the allegation of the representative capacity of the plaintiff, and leave the writ as a writ issued by her, not as administratrix but in her personal capacity, pursuant to the power of a dependant under the Fatal Accidents Act, 1864, to bring an action in his or her name. In the statement of claim, consequential amendments are sought by getting rid of the claim under the Law Reform Act, and by getting rid of the reference in para. 1 of the statement of claim to the allegation that she was bringing the action as administratrix, leaving the statement of claim quite clearly upon its face a claim in an action by her in her individual capacity. A B C

The substantial question we have to decide is whether or not those amendments will have the effect of altering the position of the respondents for the worse with regard to the statutory period of limitation laid down in the Fatal Accidents Act, 1864, s. 3. It was suggested that, if the action went to trial on the writ and pleadings unamended, it would still be open to the plaintiff to argue before the trial judge that the misdescription was a mere technicality which could be remedied by a special order of the court under the Rules of the Supreme Court. It was not desired to leave matters in that shape, and it was thought convenient to test the position by applying now for leave to amend. If the leave to amend was refused, the position of the appellant would be that she could either go on in the hopes of getting the irregularity, if that is all it is, forgiven by the court at the hearing, or she could save herself the expense of continuing with an action which must necessarily fail. D E

The question, as I see it, is this. Supposing that this amendment is not allowed and leaving aside the question of whether the court can remedy the mistake which has been made, if the action proceeds to trial as it now stands will it necessarily fail? If the principles laid down in *Ingall v. Moran* (1) apply to the claim under the Fatal Accidents Acts, as they unquestionably apply to the claim under the Law Reform Act, the answer to that question must be that the action will fail. If the amendment is allowed, the action will not fail on that ground, although, of course, it may fail on the merits. The result, therefore, would be this. If we allow the amendment we shall be prejudicing the position of the respondents, who are, as things stand, in the position to argue that the appellant's case is irreparably lost because the action she had brought is incompetent, and the amendment which we are asked to allow would enable her to set upon its feet an action which was defective and incompetent. Carrying that a stage further, if the action is incompetent the appellant can do nothing, because the time for launching a new competent action has elapsed. If we set the action upon its feet by allowing this amendment, the respondents will, in that respect, be prejudiced because they will obtain no benefit from the limitation period laid down by the statute. F G

It is very well settled that the court does not allow amendments where the effect of doing so would be to deprive a defendant of any defence open to him under a statutory limitation, and that will be the very effect of allowing this amendment if the principles to which I have referred, laid down by this court in *Ingall v. Moran* (1), are applicable to the case. There is only one ground of distinction which has been suggested to us as differentiating this case from that. It is pointed out correctly that, in *Ingall v. Moran* (1), the only claim involved, and the only claim that could be brought, was a claim by the personal representative of the deceased, because the benefit of the claim, if it was made good, H

would enure to the benefit of the estate. It is then pointed out that the position here is now different; that there is no difference of substance between a claim under the Fatal Accidents Acts by a personal representative and a claim by a dependant in his or her personal capacity. In either case, it is said, the cause of action is precisely the same, although the statutes enable two different classes of persons to sue; the beneficiaries of the judgment, if obtained would be the same; the estate of the deceased is not concerned in the matter, and the personal representative was only brought in as the person to sue under the original Act as a matter of convenience and not as a matter of substance.

I should not be adverse to discovering any proper distinction which would enable this unfortunate slip to be corrected. Apart from the fact that the solicitors for the respondents in fairness pointed out the difficulty, there appear to be no merits on their side. But the statutory limitation is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statutory limitation is entitled to insist upon his strict rights. He is similarly entitled to insist upon the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings, and so forth. In this case it seems to me that to allow this amendment would be to deprive the respondents of the benefit of sect. 3 of the 1846 Act, by setting the action on its feet again and, in effect validating *ab initio* the original representative writ. The distinction suggested between this case and *Ingall v. Moran* (1) is one which, in my opinion, does not produce the result suggested. It is perfectly true that the result is the same whether an action under the Acts is brought by the personal representative or by the dependants. It does not, however, alter the fact that the action, looked at technically, is an action in different capacities, and the capacity in which it is brought must, under R.S.C., Ord. 3, r. 4, be stated in the indorsement on the writ. If that was done in this case, the appellant bound herself to an action in a representative capacity which she did not possess, and, unfortunately, she must take the consequences.

In the result, sorry though I am, and sorry as BIRKETT, J., was, to be compelled to come to this conclusion, the appeal in my opinion must be dismissed with costs.

DU PARCQ, L.J.: I agree. I think there is no mistake in the conclusion to which the judge came. I agree with the reasons given by my Lord, and I have nothing to add.

MORTON, L.J.: I also agree, and I share the regret which is felt by the other members of the court.

Appeal dismissed with costs.

Solicitors: *Eland, Nettleship & Butt* (for the appellant); *Simmons & Simmons* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

EDMUND HANDCOCK (1929) LTD. v. FURNESS-HOULDER
ARGENTINE LINES, LTD., THE PRINCESA.

[COURT OF APPEAL (Scott, MacKinnon and Lawrence, L.JJ.), July 9, 1945.]

An appeal by the plaintiffs from the decision of LORD MERRIMAN, P., dated Apr. 17, 1945, and reported in [1945] 2 All E.R. 182, was dismissed.

Wilfrid Clothier, K.C., and *Robert Gething* for the appellants.

F. A. Sellers, K.C., *Owen Bateson* and *G. N. W. Boyes* for the respondents.

Solicitors: *Ingledeu, Brown, Bennison & Garrett*, agents for *Ingledeu & Sons*, Cardiff (for the appellants); *Middleton, Lewis & Clarke* (for the respondents).

MORRISON v. JACOBS.

Observations of SCOTT, L.J., and
MACKINNON, L.J., at pp. 430, 431
explained. MURRAY, BULL &
v. MURRAY. [1952] 2 All E.R. 10

[COURT OF APPEAL (Scott, MacKinnon and Lawrence,
1945.)]

Landlord and Tenant—Rent restrictions—Recovery of possession—Expiry of contractual tenancy—Notice to quit—Tenant holding over—Acceptance of rent by landlord—Statutory tenancy—No necessity for notice to quit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1)—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3, Sched. I, para. (h)—Rent and Mortgage Interest Restrictions Act, 1939 (c. 17), s. 3.

By an agreement made on June 7, 1939, and operative from June 12, 1939, a house belonging to the appellant was let to the respondent for one year at a rent of £208 per annum, payable by weekly instalments of £4. There was an option at the end of the agreement which provided that, on the expiration of one year, the respondent might elect to continue his tenancy for a further period of three years. The Rent Restrictions Acts applied to the house because its rating valuation was lower than the minimum laid down by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3. On the expiry of the agreement on June 11, 1943, the respondent remained in occupation of the house and paid his rent, although the appellant had served him with two notices to quit, one in July, 1943, and another in Mar., 1945. In dismissing an action for possession brought by the appellant, the county court judge took the view that when the agreement expired "there was a continuing common law tenancy from year to year which had never been determined."

HELD: (i) the county court judge arrived at his decision by an error in law. Although the appellant had received rent from the respondent because he continued to occupy the house after the expiry of the agreement, the mere acceptance of the rent did not justify the inference that a new tenancy from year to year had been created.

Davies v. Bristow (1) applied.

(ii) to obtain an order for possession the appellant had to satisfy the court that possession of the house was reasonably required on one of the grounds set out in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (h), without the necessity of serving the respondent with a notice to quit.

[EDITORIAL NOTE.] The question considered here is whether a tenant holding after the expiration of his lease, who is protected by the Rent Restrictions Acts, and from whom the landlord accepts rent, becomes a tenant from year to year entitled to six months' notice to quit. It is held that there is no such common law tenancy created in these circumstances, since the landlord cannot eject his tenant. The voluntary abstention by the landlord from the exercise of his rights is an essential factor in the creation of a new tenancy by conduct.

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-332, paras. 392-396; and FOR CASES, see DIGEST, Vol. 31, pp. 576-581, Nos. 7256-7297.]

Cases referred to:

- (1) *Davies v. Bristow*, *Penrhos College v. Butler*, [1920] 3 K.B. 428; 31 Digest 459, 6065; 90 L.J.K.B. 164; 123 L.T. 655.
- (2) *Shuter v. Hersh*, [1922] 1 K.B. 438; 31 Digest 570, 7173; 91 L.J.K.B. 263; 126 L.T. 346.
- (3) *Hartell v. Blackler*, [1920] 2 K.B. 161; 31 Digest 456, 6040; 89 L.J.K.B. 838; 123 L.T. 171.

APPEAL by the plaintiff, a landlord, from a decision of His Honour JUDGE WILLOUGHBY JARDINE, made at Bow County Court, and dated June 7, 1945. The facts and arguments are fully set out in the judgments of SCOTT, and MAC-KINNON, L.JJ.

A. W. Roskill for the appellant.

A. E. Holdsworth for the respondent.

SCOTT, L.J.: This appeal raises a point which I can state quite shortly thus. The house was a house from the point of view of rent a long way outside what are the usual limits of houses coming under the Act, but it came under the Act

because its rating valuation was lower than the minimum laid down by the 1939 Act, which came into force on Sept. 1, 1939. In Apr., 1939, a few months before that Act came into operation and before it was passed, the landlord let to the tenant a house at Leytonstone for one year certain at £208 yearly, payable by equal weekly instalments of £4, and there was an option at the end of the agreement which provided that, on the expiration of the term of one year, the tenant might elect to continue his tenancy for a further period of three years certain. The agreement was made on June 7, but it was to operate as from June 12. I assume that that option was exercised and the term therefore ran out on June 11, 1943. Thereafter the landlord, quite naturally, knowing that the house was under the Rent Restrictions Acts, took the rent which was payable to him week by week and at the moment when the agreement expired did not want possession of the house. But by Apr., 1945, and for some months before that, he had been wanting it for his own possession and wanting, therefore, to make an application for possession under the Rent Restrictions Act, 1933, Sched. I, para. (h), pursuant to that Act. He did in fact serve two notices to quit, one in July, 1943, because the tenant had not given up possession, and another in Mar., 1945.

The judge came to this conclusion at the end of the case :

I hold that there was a continuing common law tenancy from year to year which had never been determined.

If a common law tenancy from year to year had been entered into by agreement between the landlord and the tenant on the expiration of the four years' term, then a notice to quit of six months to expire at the end of a year would have been necessary, that is to say, to expire on June 11, 1944, or June 11, 1945. No such notice was given by the landlord.

I think the judge has come to the conclusion he did by a mere error of law. He has thought that because in some cases long before the Rent Restrictions Acts were thought of a tenant has continued in occupation—what is loosely called holding over—and the landlord had accepted rent, there may in certain circumstances be justified an inference that the landlord has entered into a new tenancy agreement with the tenant for a tenancy from year to year or with the characteristics of such a tenancy. To hold that in the circumstances prevailing under the Rent Restrictions Acts any such inference of consent in fact and a *consensus ad idem* between the two parties on the terms of the new agreement was legitimate because before those Acts in certain circumstances such an inference could be drawn, I think is erroneous. The facts which are relevant to that are that in law the landlord of a statutory house cannot now get possession unless he observes the conditions or provisions of the Acts which entitle him to get possession. They are now contained mostly in the 1933 Act, Sched. I.

It is argued for the tenant here that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, which so to speak reads into the statutory tenancy the terms and conditions of a contractual tenancy, applies. In my view, those questions are irrelevant. The one question in the case is whether the mere fact of receiving the weekly rent when he did receive it afforded any evidence that he was entering into a new contractual arrangement to take the place of what I will call the four years' lease that had run out. In my view, they afford no evidence at all to justify that inference. I think the true view of it is that he took the rent and was willing to take it and believed that his right to regain possession depended entirely on satisfying the terms of the Acts. At the time when the four years' lease ran out he did not want the house, it was only later that he wanted it. I have no doubt that is the reason why he served his notice to quit in Mar., 1945. It was not necessary for him to do it because all he had to do was to come to the court and satisfy the county court judge that the conditions were such as to bring him within one of the provisions of the 1933 Act, entitling the judge to make an order for possession even though alternative accommodation was not offered.

There being no evidence to support the judge's finding, there must be a new trial in order that the county court judge should deal with the questions which are made essential to a judgment for possession by sect. 3 of the 1933 Act, and by the commencement of Sched. I, and the terms of para. (h) of that schedule. The case will be sent for trial on those issues to another judge.

MACKINNON, L.J.: I agree. This was a claim by the owner of a house to recover possession of it from a man who was in occupation. The defence of the man who was in occupation is: "I am a tenant of yours pursuant to a lease granted by you to me for a yearly tenancy. Such a lease you can only put an end to by a six months' notice to quit. You have given no such notice and, therefore, you have no enforceable claim for possession." To that contention the landlord answered: "The only contract of demise between us was one for four years, which expired by effluxion of time some time ago. Since the expiration of that demise you have remained in possession, not by reason of any new demise from me, but because the Rent and Mortgage Restriction Act deprived me of the power to turn you out." The tenant seeks to reply to that proposition of the landlord by saying: "I agree that my original contractual lease was ended as you say, but I stayed on and paid the rent and you have accepted the rent and by that conduct you have granted me a new contractual demise."

I am quite satisfied that that last contention of the tenant is entirely without foundation and that it is so is sufficiently shown by the principle of the decision of *Davies v. Bristow* (1). At common law if the landlord has acquired a right to claim possession against his tenant and instead of exercising that right he allows him to remain in the house and accepts rent from him as before, the parties by their conduct may with reason be held to have entered into a new contract of demise. But the essential factor in those circumstances is that the landlord voluntarily abstains from turning the tenant out. When the tenant remains in possession, not by reason of any such abstention of the landlord but because the Rent and Mortgage Restriction Acts deprive the landlord of any power of intervention, no such inference can properly be drawn. That is the basis and the very obvious and cogent basis of the decision in *Davies v. Bristow* (1).

The only other thing I wish to say is that some reliance was placed by counsel for the respondent upon sect. 16 (3) of the 1920 Act, which, referring to acceptance of rent by the landlord for a period after the expiration of the notice to quit, refers to it as acceptance during the period of three months. I gather the suggestion of counsel for the respondent was that after the three months the acceptance of rent would afford some evidence of the creation of a new tenancy. The answer to that suggestion is, I think, found quite clearly in a passage in the judgment of SCRUTTON, L.J., in *Shuter v. Hersh* (2), at p. 450:

If, however, *Hartell v. Blackler* (3) is not the law, and the law is as stated in *Davies v. Bristow* (1), there is no reason why it should be taken that acceptance of rent after the expiration of the three months should prejudice the position and create a new tenancy.

The real truth is that counsel for the respondent in this argument of his is seeking to rely upon the decision in *Hartell v. Blackler* (3), which was held to be wrongly decided in *Davies v. Bristow* (1).

I agree that the appeal should be allowed and an order made for the hearing of the case on its merits by another county court judge.

LAWRENCE, L.J.: I agree and I only desire to add that sect. 15 (1) of the 1920 Act appears to me to show that the mere acceptance of rent cannot give rise to a new contractual tenancy because it provides that:

A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy . . .

Therefore, a tenant who retains possession under the Act and so creates a statutory tenancy must observe the terms of the original contract. It follows that payment of rent, which is one of the terms of that original tenancy, cannot give rise by itself to a new contractual tenancy.

Appeal allowed. Order for new trial.

Solicitors: Breeze, Benton & Co. (for the appellant); W. Daybell (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

BENNINGA (MITCHAM) LIMITED v BIJSTRA.

[COURT OF APPEAL (Scott, MacKinnon and Morton, L.J.J.), June 21, July 3, 1945.]

Landlord and Tenant—Rent restriction—Premises let “in consequence of employment”—Dismissal of employee—Notice to quit—Employee remaining in occupation and paying weekly rent—Claim for possession—Premises reasonably required by landlords for “person engaged in whole-time employment”—Date of plaint—Date of hearing—New employee in whole-time employment at date of hearing—Date of hearing material—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 16 (3)—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) (a), Sched. I, para. (g).

The appellant had been engaged by the respondents as an engineer in their factory and, in consequence of his employment, he went, in Nov., 1941, into occupation of a house, belonging to the respondents, at a rent of 10s. a week. In Dec., 1944, the appellant ceased to be employed by the respondents but continued to occupy the house, paying the same rent as before. In Feb., 1945, the respondents engaged another person as engineer who was only able to commence employment with the respondents on Apr. 16, 1945. Notice to quit was served on the appellant on Feb. 13, 1945. The respondents brought an action for possession against the appellant, the plaint in the county court being issued on Mar. 20, 1945. At the hearing, on May 2, 1945, an order for possession was made by the county court judge. On appeal, it was contended for the appellant (i) that at the material time the appellant was not in occupation of the house by reason of his employment by the respondents, since a new tenancy had been granted and rent had been paid by the appellant pursuant to that new tenancy; (ii) that at the material time, *i.e.*, the time of the issue of the plaint, the new employee was not “a person engaged in the whole-time employment” of the respondents:—

HELD: (i) after notice to quit the appellant’s tenancy became a statutory tenancy within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 16 (3), and, therefore, the acceptance of rent by the respondents did not create a new tenancy.

(ii) the material time to consider whether the new employee was “a person engaged in the whole-time employment” of the respondents, was the date of the hearing in the county court. At that time the new employee was so employed and the respondents were, therefore, entitled to possession.

Read v. Gordon (1) explained and distinguished.

Nevile v. Hardy (4) applied.

[EDITORIAL NOTE. The principal point here decided is that the conditions which must exist under the Rent Restrictions Act in order to prohibit the granting of relief must exist at the time of the hearing. It is held, therefore, that when possession is required for a full-time employee it may be granted although the employment had not commenced at the date of the writ or plaint, provided it had commenced at the date of hearing. The position is analogous to that in *Mann v. Merrill* [1945] 1 All E.R. 708, where it was decided that if property exceeded two acres at the time of the hearing it was outside protection by virtue of the 1939 Act, s. 3.

On the question of acceptance of rent after receipt of notice to quit, the case may be compared with *Thompsons (Funeral Furnishers), Ltd. v. Phillips* [1945] 2 All E.R. 49.

The words in the Schedule to the 1933 Act, “some person engaged in his whole time employment” are ambiguous. The word “engaged” has a different meaning according to whether the employer or the servant is under consideration, since an employer engages a servant by making an agreement, while in relation to the workman “engaged” may mean the making of the agreement or the actual doing of the work.

As to POSSESSION REQUIRED FOR LANDLORD’S EMPLOYEE, see HALSBURY, Hailsham Edn., Vol. 20, p. 331, para. 395; and FOR CASES, see DIGEST, Vol. 31, pp. 582-584, Nos. 7311-7330.]

Cases referred to:

* (1) *Read v. Gordon*, [1941] 1 K.B. 495; [1941] 1 All E.R. 222; 165 L.T. 113.

* (2) *R. v. Rogers and Others, Ex p. Hodson*, [1918] W.N. 128.

* (3) *Spencer v. Fox* (1922), 91 L.J.K.B. 929; 31 Digest 581, 7294; 127 L.T. 365.

* (4) *Nevile v. Hardy*, [1921] 1 Ch. 404; 31 Digest 582, 7312; 90 L.J.Ch. 158; 124 L.T. 327.

APPEAL by the defendant from a decision of His Honour JUDGE HURST, K.C., made at Croydon County Court and dated May 2, 1945. The action was one claiming possession of a dwelling house, situated at 27, Mortimer Road, Mitcham, bought by the plaintiff company for the occupation of their chief engineer. The defendant was ordered to give up possession of the house on June 20, 1945. The facts and arguments are fully stated in the judgment of MACKINNON, L.J. *J. P. Eddy, K.C., and Guy Willett* for the appellant, the defendant in the court below.

John Busse for the respondents, the plaintiffs in the court below.

Cur. adv. vult.

MACKINNON, L.J. : The plaintiff company, whose directors are apparently of foreign origin, manufacture margarine at a factory in Mitcham. The defendant is a Dutchman. He entered the employment of the plaintiffs in 1933 as an engineer, and later became their chief engineer. Up to Feb., 1941, he lived in a house of the plaintiffs, 92, Lavender Road, adjoining the factory. He then moved to a more distant residence. The plaintiffs found this to be inconvenient, and, in Nov., 1941, they managed to buy No. 27, Mortimer Road, close to their factory, in order that the defendant could be housed there. The defendant accordingly went into occupation of that house, paying 10s. a week rent, and being given a rent book. In Nov., 1944, the plaintiffs, for reasons of their own, became dissatisfied with the defendant as an employee. They were minded to dismiss him, and engage another man in his place, and to resume possession of their house in order there to house this successor. In this, traditionally, the land of freedom they found themselves unable to achieve either purpose without the intervention of officials and the county court. The Essential Works Order, as to his dismissal, and the Rent Restrictions Acts, as to possession of the house, had created the status by which contract had been replaced—in reversal of the process analysed by MAINE ON ANCIENT LAW.

The plaintiffs' application under the Essential Works Order, including an appeal, ended by the officials sanctioning the dismissal of the defendant as upon Dec. 13, 1944, and his employment therefore ceased on that date. The plaintiffs' application to the county court to get back their house was necessarily more delayed. The defendant has remained in occupation, and soon after found employment with competitors of the plaintiffs, half an hour's walk from the factory. He has paid the rent as before and the plaintiffs naturally accepted it. In Feb., 1945, the plaintiffs arranged with a man named Schuler to come to them as their new chief engineer. Schuler had to give notice, and get release, from his previous employers at Hull, and he was only able actually to start work at the plaintiffs' factory on Apr. 16, 1945. When he did so, he had to live in lodgings half an hour's walk from the plaintiffs' factory, and his wife had to remain at Hull until he could find a proper dwelling. This increased the desire of the plaintiffs to get the defendant out of their house, in order that Schuler could live in it.

All the above facts were proved by the plaintiffs' witnesses at the county court. The defendant's counsel called no evidence, but submitted that on the pleadings, and on the facts so proved, the judge was constrained by the Rent and Mortgage Interest Restrictions Acts to refuse the plaintiffs' application for possession. The plaint in the county court was issued on Mar. 20, 1945. With it was served particulars of claim bearing date Mar. 15. These alleged (a) that the house had been let to the defendant at 10s. a week ; (b) that notice to quit had been served on Feb. 13, 1945 ; (c) that the house was reasonably required by the plaintiffs for a person engaged in their whole time employment ; and (d) that the defendant had been in their employment and the house had been let to him in consequence of that employment, and he had ceased to be employed on Dec. 13, 1944. The defence denied (c) and (d) of these allegations in the claim. The judge on May 2, 1945, made an order for possession to be given by the defendant on June 20. Obviously he did so, having regard to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (a), and para. (g) of Sched. I to that Act. He must also have thought it " reasonable " to make the order, under the opening words of sect. 3 (1), and it would indeed have been surprising if, upon the facts I have narrated, he had thought otherwise.

The defendant served notice of appeal dated May 23, 1945. The notice specifies eight reasons for alleging error in law by the judge. These, however,

are variant methods of formulating the three contentions urged before us by counsel for the appellant. These contentions were: (i) that at the material time the defendant was not in occupation of the house by reason of his employment by the plaintiffs. He was in occupation after he ceased to be in their employment by virtue of a new tenancy granted to him by the plaintiffs, who had accepted rent pursuant to that new tenancy; (ii) that at the material time Schuler was not a person engaged in the whole time employment of the plaintiffs, A seeing that Schuler only began his actual work for the plaintiffs on Apr. 16, 1945; (iii) that the material time for both these considerations was the date of the issue of the plaint, Mar. 20, 1945.

- In my opinion all these contentions are erroneous. As to (i) the only plausible foundation for it that can be adduced is a perhaps sub-conscious recollection of a rule of the common law of landlord and tenant, namely, that a landlord who claims that a lease has been forfeited waives the forfeiture by subsequent acceptance of rent. It is expressly provided by the Rent and Mortgage Interest Restrictions Act, 1920, s. 16 (3), that no such rule shall apply to statutory tenancies, as they are called, under these Acts. The acceptance of rent by the plaintiffs after Feb. 13, 1945, when notice to quit was served on the defendant, clearly created no new tenancy, and, as the section says, the payment is only to be treated as mesne profits. Counsel for the appellant sought to rely on the decision of *Read v. Gordon* (1), where it was held that a new tenancy had been created with a man who had been in the employment of the landlord, and remained in possession after his employment terminated. That was a totally different case. The employers had given up their business in 1934, and, having then no employees but owning the house in which the defendant had been in occupation as an employee, they let him stay on for some 6 or 7 years at the old rent. They had clearly altered their function from that of owners of a business D providing a house for a workman, to owners of house property letting a house to a tenant. And in the latter capacity they had let the house to the defendant 6 or 7 years ago. The case is of no possible assistance to the contention of counsel for the appellant in this case.

- Proposition (ii) is slightly more difficult by reason of the ambiguity of the words "some person engaged in his whole time employment." The equivalent words in sect. 1 (3) of the 1915 Act were "some other person in his employ." E In sect. 5 (1) (d) of the 1920 Act they were "some person in his whole time employment." The words in that last section were, by sect. 4 of the 1923 Act, amended to read "some person engaged in his whole time employment." In *R. v. Rogers* (2), a divisional court had to consider the effect of the above words in the 1915 Act. A farmer had dismissed a foreman and given him notice to quit the house he had lived in. He wanted to get and could get, a new foreman, but the new man could only start work for him when the house was available. F The justices, moved by common sense and a consideration of the policy of the section, made an order for possession. The divisional court, I am sure reluctantly, overruled them, being constrained to hold that the prospective new foreman was not "some other person in his employ." An almost exactly similar case arose in *Spencer v. Fox* (3), on the words in the 1920 Act "some person in his whole time employment." The justices had made a similar common sense order for possession. G The divisional court with expressed reluctance overruled them, being constrained to hold that the new employee, waiting to start work directly the cottage was available for him, was not at the material time a "person in the whole time employment" of the landlord.

- The words in Sched. I to the 1933 Act with which we are concerned are "some person engaged in his whole time employment." The word "engaged" is deplorably ambiguous. An employer "engages" a servant when he makes an agreement with him for his services. A workman is "engaged" on work when he is actually carrying it out. In fact "engage" of a master has an entirely different meaning to "engaged in" of a workman. In the phrase we are concerned with the use is of the workman. I do not find it necessary to express a final opinion on the point, but I am inclined to think that it was not until Apr. 16, 1945, that Schuler became a "person engaged" in the whole time employment of the plaintiffs, however obvious it may be that the plaintiffs had "engaged" Schuler long before that date. I say it is unnecessary to decide that point because it would only avail counsel for the appellant, if he is right H

in his third contention, namely, that the material time to consider whether Schuler was then "a person engaged in the whole time employment" of the plaintiffs was Mar. 20, the date of the plaint. I think this is unsound. The material date for such consideration is May 2, when the case was heard by the judge. And Schuler had then been so "engaged" since Apr. 16. Normally, no doubt, a plaintiff's cause of action must exist at the date of his writ or plaint. The plaintiffs' cause of action is a claim to the possession of their freehold against a tenant who has received due notice to quit. That cause of action existed on Mar. 20. The Rent and Mortgage Interest Restrictions Acts do not forbid the bringing of an action; they only prohibit the granting of certain relief to which the common law would entitle the claimant, unless certain conditions have been fulfilled. The question whether those conditions exist must be determined when the question whether the relief claimed may be granted has to be decided, namely, at the hearing of the action.

Counsel for the appellant sought again to rely on *Read v. Gordon* (1), which I have already cited. In that case I said that the crucial time for deciding the question then in issue was the date of the notice to quit, and counsel for the appellant seeks to infer that the crucial time for deciding all questions under these Acts is the date of the notice to quit or of the plaint. That is an entire fallacy. According to the headnote in *Read v. Gordon* (1) the question was whether the tenant was :

... in the employment of the landlord or a former landlord and the house was let to him in consequence of that employment . . .

The plaintiffs sought to rely on the nature of the tenancy of the defendant, created some thirty years ago, and terminated some 6 or 7 years ago. In that case it was necessary to consider what was the nature of the defendant's tenancy when the plaintiffs' common law claim to possession arose, namely, when they served notice to quit. It provides no support whatever for the third proposition of counsel for the appellant.

In the result this appeal fails and must be dismissed with costs. I arrive at the result with the more satisfaction because the defendant's appeal is entirely without merits. It has added something to the windfall of adverse possession that the Acts have already given him, while it has lengthened that separation of Schuler from his wife of which justice would seem to call for the termination.

SCOTT, L.J. : I agree with the judgment MACKINNON, L.J., has just read, and I also agree with the judgment of MORTON, L.J.

MORTON, L.J. [read by SCOTT, L.J.] : The county court judge had to arrive at a conclusion on five questions, when he heard this case on May 2, 1945 : (i) Is it reasonable to make an order for possession of 27, Mortimer Road ? ; (ii) is this house reasonably required by the plaintiff company for occupation as a residence for some person engaged in its whole-time employment ? ; (iii) was the defendant in the employment of the plaintiff company ? ; (iv) was the house let to the defendant in consequence of that employment ? ; (v) has the defendant ceased to be in that employment ? All these questions arise under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (a), and para. (g) of Sched. I to that Act. I have been careful to use in each case the same tense as that which appears in the statute, because a great deal of the argument in the present case has turned upon the date at which these various questions must be considered. In my judgment, in answering the first two questions, the judge must have regard to the circumstances existing at the time when he hears the case, while for the purpose of answering questions (iii) and (iv) he must look back into the past.

The judge answered question (i) "Yes," and I cordially agree with him. I find it difficult to imagine a case in which it would be more reasonable to make an order for possession. As to question (ii), it is well settled that the words "is reasonably required," in para. (g) of Sched. I to the Act, referred to the date of the hearing. See *Neville v. Hardy* (4), at p. 407, a decision on the same phrase as it appears in the 1920 Act. I see no reason why the words which follow "engaged in his whole time employment" should refer to any other date. This being so, the judge was right in answering question (ii) in the affirmative. There can be no doubt that Schuler was a person engaged in the whole time employment of the plaintiff company from Apr. 16, 1945, onwards. It is, therefore, unnecessary to decide whether he answered this description at an

earlier date, but I think that he did not, for the reasons stated by MacKINNON, L.J. The evidence for the plaintiff company is :

Schuler was engaged in Feb., 1945, but had to give notice to his employers and he began with us in Apr., 1945.

A It seems to me that from Feb. to Apr., 1945, Schuler had been engaged for whole time employment in the future by the plaintiff company but was engaged in the whole time employment of other persons. I disregard the words in para. (g) of the First Schedule "or with whom . . . has been entered into" because it has not been proved in the present case that a contract for employment was entered into with Schuler conditional on housing accommodation being provided. As to question (iii), there can be no doubt that the defendant was in the employment of the plaintiff company for some years, up to Dec. 13, 1944. Therefore this question must also be answered "Yes." As to question (iv), it was stated by this court in *Read v. Gordon* (1), at p. 505, ([1941] 1 All E.R., at p. 225), B that the crucial time at which this question must be decided is the date of the notice to quit. In my view the question which has to be decided, as at that time, may be accurately stated as follows : Was the tenancy, which was determined by the notice to quit, a tenancy which had been granted to the tenant in consequence of his employment by the landlord ? In *Read v. Gordon* (1) this court took the view that the tenancy which was determined by the notice to quit was a new tenancy, which had not been granted in consequence of the C tenant's employment by the landlord.

D Counsel for the appellant argued that the evidence in the present case led to the same conclusion, but I do not accept this argument. It is true that the plaintiff company continued to accept the rent of 10s. a week from the defendant after his employment had ceased, but I can see no good ground for holding that a new tenancy was thereby created. In my view the rent continued to be paid under the tenancy created in the year 1941, and there can be no doubt that that tenancy was granted to the defendant in consequence of his employment by the plaintiff company. Thus the tenancy which was determined by the notice to quit served on Feb. 13, 1945, was a tenancy granted to the defendant in consequence of his employment by the plaintiff company and question (iv) must also be answered in the affirmative.

E As to question (v), there can be no doubt that the defendant had ceased to be in the employment of the plaintiff company before the county court judge heard the case. I incline to the view that this is the relevant date, but it is unnecessary to decide the point, as that employment had ceased before the date of the notice to quit and, of course, before the present proceedings were commenced.

F The result is that all the conditions laid down by the 1933 Act were fulfilled in the present case, and the county court judge rightly made an order for possession. I agree that this appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Churchill, Clapham & Co.* (for the appellant, the defendant in the court below) ; *Bulcraig & Davis* (for the respondents, the plaintiffs in the court below).

[Reported by C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NOTE.

Re THE HON. MRS. DEIRDRE SAMUEL,
THE TRUSTEE v. ISIDORE KERMAN.

[COURT OF APPEAL (Lord Greene, M.R., du Pareq and Morton, L.JJ.),
July 16, 17, 18, 19, 30, 1945.]

H An appeal by the trustee in bankruptcy from the decision of EVERSLED, J., dated May 3, 1945, and reported in [1945] 2 All E.R. 71, was dismissed, no opinion being expressed upon the propriety of the respondent's conduct in acting upon the instructions of the bankrupt.

G. O. Slade, K.C., and *V. R. Aronson* for the appellant.

Gilbert Beyfus, K.C., and *C. Gallop* for the respondent.

Solicitors : *Spector & Spector* (for the appellant) ; *Forsythe, Kerman & Phillips* (for the respondent).

Re LYONS, LYONS v. LYONS.[CHANCERY DIVISION (Vaisey, J.), **May 18, 1945.**]

Wills—Construction—Referential trusts—Gift to daughter of half residuary estate subject to proviso—£500 after deduction of income tax to be maximum annual income payable to daughter—Surplus income to be paid under other trusts—Statutory variation of tax burden—Sum of £500 “a stated amount”—Finance Act, 1941 (c. 30), s. 25.

By his will made on Feb. 20, 1936, the testator directed that the income of his residuary estate should be held on the same trusts as those declared with reference to a trust fund in a deed of the same date as the will. Under the deed, the annual income of half the trust fund was to be paid to the testator's daughter for a certain period subject to the proviso that if the net income after deduction of income tax payable to the daughter should in any year exceed £500 the surplus was to be applied under a discretionary trust as therein mentioned. The income of the other moiety was to be paid to O.M.L. during her lifetime subject to a similar proviso. The question to be determined was whether the Finance Act, 1941, s. 25, applied to the referential provisions of the will:—

HELD: the sum of £500 mentioned in the proviso was a “stated amount” within the meaning of the Finance Act, 1941, s. 25, and the section therefore applied to the referential provisions of the will.

[EDITORIAL NOTE.] Sect. 25 of the Finance Act, 1941, applies to any provision “however worded” for payment of a “stated amount” free of income tax. This case holds that the section is applicable to a provision in a will importing by reference the terms of a deed whereby the net income was payable to a beneficiary, but when this exceeded a specified sum after deduction of income tax the surplus was to go under a discretionary trust. This is held to be equivalent to a gift of the specified sum free of income tax, notwithstanding that the annual income might not amount to that sum.

AS TO TAX-FREE PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-390; and FOR CASES, see DIGEST, Vol. 39, pp. 165-168, Nos. 562-593. For the Finance Act, 1941, s. 25, see HALSBURY'S STATUTES, Vol. 34, p. 119.]

Cases referred to:

- (1) *Re Bird, Henn v. Birch*, [1944] Ch. 111; [1944] 1 All E.R. 132; 113 L.J.Ch. 79; 170 L.T. 39
- (2) *Re Berkeley, Borrer v. Berkeley*, [1945] 1 Ch. 107; [1945] 1 All E.R. 83; 114 L.J.Ch. 120; 172 L.T. 93.

ADJOURNED SUMMONS to determine whether the Finance Act, 1941, s. 25, applied to certain referential provisions in the testator's will. The facts are set out in the judgment.

Raymond Jennings for the plaintiff trustees.

Michael Bowles for the first two defendants, the executors.

H. O. Danckwerts for the widow of the testator and two daughters, beneficiaries under the will.

H. E. Salt for the defendant Mrs. Eileen Browning, a daughter of the testator and a beneficiary under his will.

F. Baden Fuller for S. L. A. Lyons, a beneficiary under the will of the testator.

N. C. Armitage for Mrs. Michael, a daughter of the testator, and a beneficiary under his will.

VAISEY, J.: The testator, Joseph Harold Lyons, made his will on Feb. 20 1936, and died on Mar. 26, 1938. The will was in due course proved. The estate was, and is, of considerable value. The originating summons which is now before me was issued on Oct. 30, 1942, and raised a number of questions and points on the construction of, or otherwise in connection with, the will. On May 26, 1944, it was amended so as to raise two additional questions of construction. One of these is all that remains to be decided now by me, everything else in the summons having been dealt with or disposed of, subject to a matter of administration as to which a liberty to apply was reserved by a previous order, and there are still, of course, some costs to be provided for. What I have now to determine is, put shortly, whether certain provisions imported by reference into the will, as I will presently explain, are affected by the now familiar terms of the Finance Act, 1941, s. 25.

The matter stands thus : After a variety of particular dispositions, which I need not specify, cl. 12 of the will is to the effect that, subject to those dispositions, the trustees are to stand possessed of the testator's residuary estate and the income thereof upon the like trusts in all respects as are by a certain deed of covenant therein mentioned dated Feb. 20, 1936 (the same date as the will) declared concerning the trust fund, defined in such deed, as an accretion to such trust fund. It has already been decided that the income of the residuary estate ought to be treated not as an accretion to the capital of such trust fund but as income thereof.

A It is necessary to look at the said deed of covenant which was in fact revoked under a power thereby reserved only about six weeks after its execution, but this is not material. I turn to the trusts thereby declared concerning the trust fund defined in the deed, and I can state them quite shortly. As to one half of the fund (called Eileen's fund), the trustees of the deed were to pay the annual income of it to the testator's daughter, the defendant, Eileen Marjorie Lyons (now Mrs. Browning) during her life or the life of her mother, whichever should be the shorter period, subject, however, to three provisos. The first of these dealt with the period during which Mrs. Browning should be under the age of 25 years and unmarried, and the third is a forfeiture clause. I need say no more about either of them. The second proviso is the important one ; it was to the effect that in the event of the net income after deduction of income tax payable to Mrs. Browning under the before-mentioned provisions exceeding £500 in any one year, the trustees were to pay or divide the surplus under a discretionary trust as therein mentioned. Upon the death of Mrs. Browning or her mother (whichever should die first), Eileen's fund was to accrue to Mrs. Lyons' fund (which I will presently mention) with a proviso that if Mrs. Browning were to die first leaving issue, then the income of Eileen's fund was to go to her issue so long as any of such issue and her mother were alive ; but again there is a proviso that in the event of the net income after deduction of income tax exceeding £500 in any one year, the surplus was to continue to go under the discretionary trust above-mentioned. The other moiety is called Mrs. Lyons' fund. The income of that was to be paid to the defendant, Olive Mary Lyons, whom I will call Mrs. Lyons, during her life subject to two provisos. The first is that in the event of the net income after deduction of income tax payable to Mrs. Lyons exceeding £500, or exceeding after the accruer of the other fund £1,000, the surplus was to go under the discretionary trust, and the second is a forfeiture clause. On the death of Mrs. Lyons, the income of Mrs. Lyons' Fund was to be added to and held upon the same trusts as are declared with regard to the income of Eileen's fund, but so that, in that event, the income was to be payable to Mrs. Browning during the whole of her life notwithstanding the death of her mother, and that the limit of £500 first mentioned in this judgment was to be increased to £1,000. Ultimate trusts, to which I need not further refer, are declared to take effect after the death of the survivor of the two ladies (Mrs. Browning and Mrs. Lyons) in favour of Mrs. Browning's issue and other persons.

G The trusts which I have mentioned as contained in the deed of covenant and imported referentially into the will are plain enough, though perhaps rather unnecessarily complicated. The difficulty arises not from the documents but from the terms of the Act of Parliament. The general effect of the Finance Act, 1941, s. 25, so far as it is relevant here, is that any provision, however worded, for the payment periodically of a stated amount free of income tax contained in any pre-war deed or will shall in respect of payments falling to be made in a year when income tax is at 10s. in the pound have effect as if for the stated amount there were substituted an amount equal to 20/29ths thereof. H Let me see whether this applies to the sum of £500 mentioned in the second of the three provisos to the trust for the payment of the income of Eileen's fund to Mrs. Browning. If it does, I think that it must apply equally to all the other indicated maximum sums ; if it does not, then the section does not affect the position at all.

Bearing in mind the words in the section " however worded," I ask myself whether this is not in substance a direction to apply annually the income of Eileen's fund first in paying £500 free of tax to Mrs. Browning, and secondly by applying the surplus (if any) under the discretionary trust. Though I have

left open the question of whether the trusts might not have been worded more simply, I have no hesitation at all in saying that they might easily have been worded otherwise, and I think that they might well have been worded, without producing the slightest variation in their effect, in the manner which I have just indicated. Mrs. Browning was to get £500 per annum free of tax—and no more. True it is that she might get less, that is if the income available did not in any particular year suffice to provide that sum, but none the less the £500 is, in my view, a “stated amount,” and notwithstanding the arguments to the contrary, I cannot see why the section does not apply to this case. It is said that the testator’s intentions will be thereby frustrated in the sense that Mrs. Browning will get less than the will says she is to get, and the persons entitled to the benefit of the discretionary trust will get more than the will says they are to get. Of course, that is the result of the section, which operates, and is clearly intended to operate, so as to relieve *pro tanto* those whose interests would otherwise have been diminished or those whose burdens would otherwise have been increased by the imposition of the higher rate of the tax. I agree that Mrs. Browning will get less than she would have got if the Act had never been passed and that the objects of the discretionary trust will get correspondingly more, but I cannot see the slightest difficulty in doing what the Act tells me to do, namely, to substitute in the second proviso which I am now considering for the sum of £500 the sum which is 20/29ths of £500, and to read that proviso as though that smaller sum had actually been stated in it instead of the sum of £500 but only, of course, in regard to such payments as may fall to be made while the tax stands at its present rate of 10s. in the pound.

The question as raised in the originating summons merely asks whether the section applies to the matter as regards the two sums of £500 which make the two maximum amounts now receivable by Mrs. Browning and Mrs. Lyons respectively. I am, however, clear that if I am right in the view which I have taken, the section applies, or may apply, to each of the sums of £500 and each of the sums of £1,000 to which I have made reference, and I think that the declaration should be so framed as to make this plain, the paragraph of the originating summons being so amended as to cover the wider ground.

My decision seems to accord with the authorities to which my attention was drawn of *Re Bird* (1), and *Re Berkeley* (2), if indeed those authorities are not conclusive of the present question and binding on me. No such fantastic consequences as were suggested to me in argument will, so far as I can perceive follow upon the decision to which I have come. The rights of the parties are not what the will plus the deed say they are, but are governed by the will plus the deed plus the Act, and the result is not in the circumstances unreasonable but one that achieves the plain object of the legislature.

I understand that the costs of the application have been taxed and provided for down to a certain past date, and I therefore now direct that the costs of all parties of the application be taxed as from the foot of the last taxation as between solicitor and client and raised and paid out of the capital of the residuary estate.

Declaration accordingly.

Solicitors: *Hyman Isaacs, Lewis & Mills* (for the plaintiff trustees and the first two defendants, the executors); *H. B. Wadlake, Saint & Co.* (for S. L. A. Lyons, and Mrs. Michael, a daughter of the testator, beneficiaries under his will); *Rubinstein, Nash & Co.* (for the defendant Mrs. Eileen Browning, a child of the testator and a beneficiary under his will); *Charles Russell & Co.* (for the widow of the testator, and two daughters, Mrs. Pritchard and Mrs. Fairey, beneficiaries under the will).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

Re CUSTANCE'S SETTLEMENT AND WILL TRUSTS,
KEPPEL AND CALVERT v. DOUGLAS AND CUSTANCE.

[CHANCERY DIVISION (Cohen, J.), July 11, 1945.]

Settlements—Protected life interest—Forfeiture—Receiver appointed under Lunacy Act—Fees payable to percentage account—Charge on income of life tenant—Discretionary trusts brought into operation—Lunacy Act, 1890 (c. 5), s. 148 (1), (3)—Lunacy Act, 1891 (c. 65), s. 27 (3)—Supreme Court Funds Rules, 1927, r. 67 (3)—Management of Patients Estates Rules, 1934 (S.R. & O., 1934, No. 269), rr. 148, 152, 154, 156.

- A. D. was entitled to a protected life interest under certain settlements. The relevant clauses in the realty settlement provided that "while his estate or interest would if an absolute estate or interest have become by reason of any act or event (other than the exercise of any power thereby or by statute conferred" on D.) "vested or charged in favour of some other person or persons or a corporation" the discretionary trusts should be brought into operation. The personalty settlement contained a similar provision should the income, if belonging to D. absolutely, become vested in, payable to or charged in favour of some other person or persons or corporation.
- B. D. was weak of intellect and various orders with regard to him had been made under the Lunacy Act, 1890, and in 1929 a receiver had been appointed. By the Lunacy Act, 1891, s. 27 (3), the power conferred on the Lord Chancellor by sect. 148 (1) of the 1890 Act to make rules fixing percentages and fees was extended to all proceedings under the 1890 Act, "whether relating to lunatics so found by inquisition or to any other person in relation to whom or to whose property" an order under the Acts had been made.
- C. Sect. 148 of the 1890 Act, therefore, applied to D., and by sect. 148 (3) a charge had been created on D.'s income. The question to be decided was whether an event contemplated by the relevant clauses of the settlements had occurred with the result that the discretionary trusts had been brought into operation. It was contended for D. that the discretionary trusts had not been brought into operation because the charge under sect. 148 (3) was to secure payment of expenses reasonably incurred in the management of the estate and the fees payable under sect. 148 should be treated as remuneration to an agent :—
- D. E. HELD : (i) the fees payable under sect. 148 of the 1890 Act could not be treated as remuneration to an agent since they were payable to the percentage account and applicable as part of the vote for the Supreme Court of Judicature.

Re Tancred's Settlement (2) distinguished.

- F. (ii) upon the true construction of the relevant clauses of the settlements, the charge created on D.'s income by sect. 148 (3) of the 1890 Act brought the discretionary trusts into operation.

G. [EDITORIAL NOTE. The question here is whether the charge of a lunacy percentage upon the estate of a lunatic under the Lunacy Act, 1890, s. 148 (3) is sufficient to bring into operation the discretionary trusts in a settlement containing a protective trust expressed to come into operation if the estate or interest should become vested or charged in favour of some other person or corporation. It is argued that this is no more than an arrangement for the payment of management expenses out of the estate, which was held in *Re Tancred's Settlement* (2) not to work a forfeiture, but it is held that fees payable to the percentage account are not analogous to remuneration payable to an agent by act of party or statute and the income passed to the trustees of the discretionary trusts.

- H. AS TO PROTECTED LIFE INTERESTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 597-600, para. 870, and Vol. 34, pp. 421-423, paras. 468, 469; and FOR CASES, see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.

FOR THE MANAGEMENT OF PATIENTS' ESTATES RULES, 1934, see HALSBURY'S STATUTES, Vol. 27, p. 367.]

Cases referred to :

* (1) *Re Marshall*, *Marshall v. Whateley*, [1920] 1 Ch. 284; 33 Digest 140; 173, 89 L.J.Ch. 204; 122 L.T. 673.

* (2) *Re Tancred's Settlement*, *Somerville v. Tancred*, *Re Selby*, *Church v. Tancred*, [1903] 1 Ch. 715; 40 Digest 561, 1005; 72 L.J.Ch. 324; 88 L.T. 164.

ADJOURNED SUMMONS to determine whether the discretionary trusts contained in two settlements and in the testator's will have been brought into operation. The facts are fully set out in the judgment.

E. M. Winterbotham for the plaintiffs.

Geoffrey Cross for the first defendant.

A. Guest Mathews for the second defendant.

COHEN, J. : On Nov. 16, 1910, Colonel Custance and his daughter executed two settlements, (i) a realty settlement and (ii) a personalty settlement. For the purpose of the point before me, it is sufficient to say that under each of these settlements, subject to successive life interests reserved to the settlors and to a limited interest in the case of the realty settlement in favour of the daughter's husband, the property comprised therein was directed to be held upon protective trusts for the benefit of the first defendant. I shall refer later in greater detail to the terms of those protective trusts. Subject thereto, the property was in each case to be held upon trusts for the benefit of the issue of the first defendant, the ultimate trust in each case being in favour of Colonel Custance. The plaintiffs are the surviving trustees of both settlements.

By his will dated Aug. 26, 1925, Colonel Custance appointed the second defendant and the plaintiff Calvert to be executors and trustees thereof and bequeathed his residuary estate upon trust for his daughter for life subject, however, to a certain provision for the first defendant. Subject to the life interest of the daughter the testator settled his residuary estate upon protective trusts (to the terms of which I must later refer in greater detail) for the first defendant, and subject thereto upon certain trusts for the benefit of his issue, the ultimate trust in default of issue being in favour of the second defendant.

Colonel Custance died on Sept. 29, 1925, and his will was duly proved on Dec. 18, 1925, by both executors. The daughter died on Feb. 13, 1944, and her husband died on Mar. 21, 1945, so that the only persons in existence presently or contingently interested in the settled funds are the first defendant and the second defendant. The first defendant was born on Nov. 17, 1902, and has never married. Even before he came of age he was delicate and various orders have been made under the Lunacy Act, 1890. For the purposes of this summons it is sufficient to say that on Feb. 15, 1929, his mother was appointed receiver, and after her death on July 7, 1944, another receiver was appointed in her place.

The question that arises is whether in those circumstances an event contemplated by the relevant clauses of the settlements and will has occurred with the result that the discretionary trusts have been brought into operation. To answer this question I must refer in greater detail to the wording of the clauses in the settlements and will. The relevant provision in the real property settlement is to the following effect :

Subject and charged as aforesaid to the use of the trustees during the life of [the first defendant] upon trust that except while [the first defendant, who was in fact the only child of the daughter] should be under the age of 25 years or while his estate or interest in the hereditaments thereinbefore appointed would if an absolute estate or interest have become by reason of any act or event (other than the exercise of any power thereby or by statute conferred on [the first defendant], vested or charged in favour of some other person or persons or a corporation the original trustees or the survivors or survivor or other trustees or trustee for the time being of those presents (thereinafter and hereinafter called "the settlement trustees") should allow [the first defendant] to enter into and remain in the possession and receipt of the rents and profits of the hereditaments thereby appointed and should during the excepted parts of the life of [the first defendant] enter into and continue in possession or receipt of the rents and profits of the hereditaments thereby settled [with certain powers of management] and should so long as they should remain in such possession or receipts as aforesaid or such shorter period or periods either continuous or discontinuous as they should in their absolute discretion think fit pay all or any part of the net estate and profits of the said premises and apply the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons namely [the first defendant] and his wife (if any) and his children or remoter issue for the time being in existence whether minors or adults and other persons for the time being interested in remainder whether absolutely contingently or otherwise in the premises thereby settled in such manner as the settlement trustees in their absolute discretion should think proper and subject to the discretion trust or power lastly thereinbefore contained should pay or apply the surplus of the said

rents and profits to the person or persons or for the purposes to or for which the net rents and profits of the said premises thereby settled would be payable or applicable if [the first defendant] were dead.

A The relevant provisions in the personalty settlement are in similar terms, save that the event on the occurrence and during the continuance of which the income is not to be payable to the first defendant is if the income, if belonging to him absolutely, would be vested in, payable [that is the different word] to or charged in favour of some other person or persons or a corporation. The relevant provision in the will is for practical purposes identical with that in the personalty settlement.

The Lunacy Act, 1890, s. 148, provides :

(1) The Lord Chancellor, with the concurrence of the Treasury, may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid.
 B (3) The percentage, or a proper proportionate part thereof (as the case may require), shall be charged upon the estate of a lunatic, and be payable thereout, although before payment thereof he die, or the inquisition be superseded, or be vacated and discharged on a traverse ; but in either of the two last mentioned cases the judge in lunacy may, if he thinks fit, remit or reduce the amount of the sum to be paid.

Under that Act the mere appointment of a receiver did not bring sect. 148 into operation, but by sect. 27 (3) of the Act of 1891 :

C The power conferred by sect. 148 of the principal Act to make rules fixing percentage and fees shall be deemed to extend to all proceedings under the principal Act or this Act, whether relating to lunatics so found by inquisition or to any other person in relation to whom or to whose property an order under the said Acts has been or may be made.

D The effect of that, of course, was to make the mere appointment of a receiver sufficient to make s. 148 applicable. The Lord Chancellor exercised the power conferred on him by sect. 148 (1). The relevant rules now in force are the Management of Patients Estates Rules, 1934, under r. 148 of which the percentage in the case of a lunatic not so found by inquisition is a percentage of 3 per cent. per annum. Under r. 152 :

E The master shall certify the amount of percentage payable in each case and the person who is to pay the same, and the time within which the same is to be paid, and such person shall pay the same out of the first money coming to his hands on account of income.

By r. 154 the percentage account is to be opened in the Accountant-General's office, and under r. 156 the amount to the credit of the percentage account is to be dealt with in accordance with the Supreme Court Funds Rules, 1927. Under r. 67 (3) thereof, the sum placed to the credit of that account, amongst other accounts :

F . . . shall be from time to time transferred to the Paymaster-General's cash account, for the credit of the vote for the Supreme Court of Judicature, or otherwise as the Treasury may direct.

G That being the state of the law, it is clear, (i) that the income (if any) to which the first defendant is entitled became payable to the receiver and, (ii) that a charge on the estate of the first defendant was created under sect. 148 (3) by reason of the appointment of the receiver.

It is established by authority binding on me that the mere fact that the income is payable to the receiver does not bring the discretionary trust into operation : See *Re Marshall* (1), where EVE, J., said, at p. 288 :

H The first question is whether that order [i.e., an order appointing the receiver] itself operated as a charge on the income of the fund of £6,000 or as a direction to pay the same to another person, and thereby put an end to the plaintiff's interest in that income. It is admitted however that this contention cannot be successfully put forward. The person appointed to act as a receiver under the Lunacy Act, 1890, s. 116, is not strictly a receiver but the statutory agent of the person of unsound mind, and his receipt is receipt by such person and certainly not the less so where, as in this case, the whole income is directed to be applied for the maintenance of such persons.

But in that case the attention of the court was not directed to sect. 148 (3), and it is argued that since sect. 148 (3) clearly creates a charge on the income of the first defendant, it must necessarily bring the discretionary trusts into operation. Counsel for the first defendant did not dispute that the section

created a charge, but he argued that this charge was to secure payment of expenses reasonably incurred in the management of the estate, and that a charge of this kind was not within the mischief against which the discretionary trust was intended to guard. He could cite no authority directly in point, but relied on the decision in *Re Tancred's Settlement* (2). The material facts are sufficiently set out in the last paragraph of the headnote :

A person entitled to a life interest, determinable if he should dispose or attempt to dispose of it, assigned it to the trustees of his marriage settlement upon trusts under which he was to receive the income for life. By the settlement he appointed the trustees his attorneys to receive the income, and gave them power to pay the expenses of managing the trusts : Held, that this was not a disposition or attempted disposition of his life interest so as to cause it to be forfeited.

At p. 724, BUCKLEY, J., said :

It is said that under the clause which authorises payment of the charges and expenses of the trust the trustees would have a right to look to this fund for recoupment of their expenses, and that that is a disposition or attempted disposition of the income whereby it would become "payable to or vested in some other person." In my opinion it is not. The clause is intended to provide that, if a tenant for life disposes or attempts to dispose of his interest so as to lose the enjoyment of it himself, or if he should become bankrupt, his life estate should cease and be given over to others. This has not happened. Seymour Mitford Tancred remained after the settlement the only person entitled to the income. The mere fact that the trustees may be entitled to have their expenses recouped to them out of the income does not make it a disposition within the clause. It is parallel to the case of a person who is going abroad and appoints somebody to collect his rents on the terms that he should be paid by deducting a commission. Neither is the appointment of the trustees to be his attorneys to recover the income an assignment. He only appointed them to act as his agents, retaining the beneficial interest himself.

Counsel for the first defendant suggested that the fees payable under sect. 148 might be treated as being on a par with remuneration to an agent, and therefore within the principle of this decision. I do not think I can accept this argument. Had the charge been for the remuneration of the receiver the argument might have been well-founded, but I think I should be straining the law too far if I were to hold that fees payable to the percentage account and applicable as part of the vote for the Supreme Court of Judicature were analogous to remuneration to an agent appointed by act of party or by statute. In the course of the hearing I raised the question whether the charge created by sect. 148 (3) could be said to be a charge in favour of a person or corporation, but counsel for the defendant intimated that he thought the Government officer entitled to receive the money must be either a person or a corporation within the meaning of the clauses under consideration.

There are two other points that I should perhaps mention : First, that as it occurred to me that the Crown might be interested in the result of this decision, by request the plaintiffs caused a communication to be sent to the Attorney-General to see if he desired to be represented. I was informed that the Attorney-General was content to rely on the argument advanced on behalf of the first defendant. The other point is that counsel for the first defendant suggested that if I were to decide the case as I have done, I should be defeating the intention of numbers of testators. I think I must construe the clause in the settlement and the sections of the Acts in accordance with their provisions. So far as this particular will and this particular testator is concerned, having regard to the fact that the first defendant was weak of intellect in the testator's lifetime, and that the result of my deciding the case differently from what I have done would be to divert the property, or so much of it as was not used for the maintenance of the lunatic, away from the testator's family to the first defendant unless he recovered, I cannot think in this particular case that I am in any way defeating the intention of the testator. But, as I have said, I do not think that can affect the conclusion to which I have come.

For the reasons I have indicated, I propose to declare that :

On the true construction of the first above-mentioned settlement [i.e., the real property settlement] and in the events which have happened the income of the property and investments now representing the proceeds of sale of the real property settled by such settlement is held by the plaintiffs as trustees of such settlement upon the discretionary trusts set forth in cl. 1 (c) of the said settlement.

I shall make corresponding declarations under paras. (2) and (3) of the summons. The costs of this application must be taxed as between solicitor and client and paid out of the estate.

Declaration accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Foster, Calvert and Marriott*, Norwich (for the plaintiffs and the second defendant); *Gilbert Samuel & Co.* (for the first defendant).

A

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

POOLE v. CLARKE & CO.

[KING'S BENCH DIVISION (Singleton, J.), July 20, 1945.]

Agency—Estate agent—Commission—Instructions to find purchaser and to apply deposit paid by purchaser, on signing of contract, towards payment of commission—Agent introduces proposed purchaser—Contract signed and deposit paid to agent—Proposed purchaser unable to complete—"Purchaser"—Agent not entitled to commission.

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The plaintiff wished to find a purchaser for his house and on Sept. 20, 1943, he signed a printed form, supplied by the defendants, instructing them "to find a purchaser" and "to receive any deposit paid by such purchaser and to apply same on the signing of the contract towards payment of" their "expenses and commission as agreed thereunder." The commission was stated thereunder to be 10 per cent. of the total purchase price. In Jan., 1944, the defendants introduced J., and on Jan. 26, 1944, a contract was signed by the plaintiff and J., for the sale of the house to J., for the sum of £1,200. The contract provided that J. should pay to the defendants, as agents for the plaintiff, a deposit of £100, which should "be accounted for by the said agents" to the plaintiff. J. paid the deposit of £100 to the defendants, but he was unable to raise sufficient money to complete the purchase. The deposit was, therefore, forfeited and the plaintiff claimed it from the defendants. The defendants contended that under the terms of the document of Sept. 20, 1943, they were entitled to retain the deposit because (i) since their instruction was "to find a purchaser," they were entitled to their commission on the signing of the contract of sale, and (ii) they had been instructed to apply any deposit paid by a purchaser on the signing of the contract towards payment of their expenses and commission:—

HELD: (i) on the true construction of the document of Sept. 20, 1943, "purchaser" meant a purchaser not only willing but also able to complete; the commission was not earned until a purchaser able and willing to complete was introduced.

(ii) there could be no application of the commission until it was earned. The defendants, therefore, were not entitled to retain the deposit, because they had not earned their commission.

James v. Smith (1) applied.

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[EDITORIAL NOTE.] This case follows the decisions in *James v. Smith* (1) and *Martin v. Perry and Daw* (2) that commission is payable to an agent on finding a purchaser only if the purchaser is ready and willing and able to complete, and not where, as in the present circumstances, he is unable to do so for lack of means. A provision in the agreement for application of the deposit does not affect this result, since it cannot come into operation until the commission is earned.

Reference may be made to *Jones v. Lowe*, [1945] 1 All E.R. 194, in which it was held that even the use of the words "introducing a purchaser" in an agreement will not give a right to commission until the conclusion of a legal and binding contract of sale.

AS TO REMUNERATION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-259, paras. 432, 433; and FOR CASES, see DIGEST, Vol. 1, pp. 512-514, Nos. 1770-1776, and Supplement.]

Cases referred to:

* (1) *James v. Smith* (1921), [1931] 2 K.B. 317, n.; Digest Supp.; 100 L.J.K.B. 585, n.; 145 L.T. 457, n.

* (2) *Martin v. Perry and Daw*, [1931] 2 K.B. 310; Digest Supp.; 100 L.J.K.B. 582; 145 L.T. 455.

* (3) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] A.C. 108; [1941] 1 All E.R. 33; 110 L.J.K.B. 131; 164 L.T. 313.

ACTION claiming the sum of £100, received by the defendants as agents for the plaintiff. The facts are fully set out in the judgment.

D. F. Brundrit for the plaintiff.

W. Harvey Moore for the defendants.

SINGLETON, J. : Percy Harold Poole, the plaintiff in this action, was at all material times the owner of a house, 1, Cedars Road, Morden, in the county of Surrey. He was anxious to sell that house. In some manner he came into touch with Clarke & Co., the defendants in this action, who on their paper describe themselves as "business transfer agents and valuers," of 3, Station Parade, Balham. Poole signed a document on Sept. 20, 1943, which is a "form for supplying particulars of business for sale." The form really deals with a business, but it was intended to cover the sale of this house for which Poole was desirous that Clarke & Co. should find a purchaser. The price is given on the form as "£1,200," with the word "offer" after it, from which I assume that an offer would be considered, and there is a description of the house and garden. Then at the bottom of the form these words appear :

I hereby instruct you to find a purchaser for my business, the particulars of which are to the best of my knowledge and belief correctly stated as above. I also instruct you to receive any deposit paid by such purchaser and to apply same on the signing of the contract, as far as possible, towards payment of your expenses and commission as agreed hereunder . . . Amount of commission and expenses : (a) Commission of ten per cent. on the total purchase price (minimum 25 guineas) and expenses.

Then there is added to the document :

The vendor agrees to pay any out of pocket expenses up to and not exceeding £10 10s.

On or about Jan. 26, 1944, the defendants introduced Jackson, a journeyman-baker, and on that date a form of agreement was drawn up in the defendants' offices, by which Poole, the vendor, so described, agreed to sell to Jack Jackson, who was thereafter called the "purchaser," the house known as 1, Cedars Road, Morden, for the sum of £1,200, of which amount the sum of 10s. was paid as part deposit to Clarke & Co., as agents for the vendor, "being part of the full deposit of £100, which shall be accounted for by the said agents to the vendor." The balance of £99 10s. was to be paid on Tuesday, Feb. 1, by noon, and the balance of the purchase money to be paid on completion. That document was signed over a 6d. stamp by the plaintiff and by Jack Jackson, who are described respectively as "vendor" and "purchaser." On Feb. 10, 1944, there was a further agreement between the plaintiff and Jack Jackson, by which the plaintiff agreed to sell the house for the sum of £1,150, and on or about that day a further £99 10s. was paid to the agents, the defendants, making £100 deposit. That £100 deposit remained with the agents, they still have it, and this action is brought by the plaintiff, the owner of the house, to recover that sum of £100 from the agents. Cl. 4 of the agreement of Feb. 10, 1944, provides :

The property is sold subject to the Law Society's conditions of sale 1934 Edn., so far as the same are applicable to a sale by private treaty and are not varied or inconsistent with these conditions.

The agreement further provided that completion was to take place on Mar. 25, 1944, at the office of the vendor's solicitor, Godfrey A. Elkin, 262, Lavender Hill.

The purchase was not completed. After the introduction of the purchaser, or proposed purchaser, both he and Poole were represented by Mr. Elkin, the solicitor, and Mr. Elkin's managing clerk visited the offices of the defendants on at least one occasion. Extra time was given for completion, but the difficulty was that the proposed purchaser was a man of straw. He found the £100 deposit. He said at one time he could find £150 more. Whether he could, I do not know. He endeavoured, and the solicitor endeavoured, to arrange a mortgage for him, but the persons who were approached would not lend sufficient money to enable completion to be brought about. The reason that there was no completion was purely and simply that the proposed purchaser had not got the money to complete and could not get it. So completion did not take place.

In those circumstances, the plaintiff went to other solicitors, and on Dec. 12, 1944, the new solicitors (who are now acting for the plaintiff) wrote to Mr.

Elkin, who had been acting for the plaintiff and was acting for the proposed purchaser, giving notice requiring completion in the usual form. That notice pointed out to the proposed purchaser that if he failed to comply with the notice within 14 days he would forfeit the deposit. Completion did not take place and the deposit was forfeited, whereupon on Mar. 21, 1945, Richard Brooks & Son, (the plaintiff's solicitors) wrote to the defendants asking for payment of the sum of £100 :

A . . . being the deposit which you received from Mr. J. Jackson in respect of the above mentioned property.

The defendants replied on Apr. 4, 1945, saying :

In reply to your letter of Mar. 21, we herewith inclose a copy of our instructions as signed by your client, from which you will see that we are authorised to apply any deposit paid to us on the signing of the contract towards payment of our expenses and commission. As the sum at which the purchaser contracted to buy was originally £1,200 and he signed a contract dated Jan. 26, 1944, to that effect, it would seem that we are entitled to commission and expenses on this sum. It was not until after this contract had been signed that your client agreed to reduce the purchase price to £1,150. In any event it would seem that we would have been entitled to commission on that sum, which would amount to £115, plus the 10 guineas agreed expenses. In these circumstances, we shall be glad to hear from you as to this by return of post.

C The plaintiff claims back that sum of £100 which is in the hands of the agent. The answer of the agent is : " I have performed that which I undertook to do. I have introduced a purchaser ; and, furthermore, under the terms of the document of Sept. 20, 1943, I am entitled to keep that deposit towards payment of the commission which I have earned." Counsel for the defendants relied upon two things in this document. The first is the instruction to find a purchaser. Upon that, counsel for the defendants submitted that the signing of the contract was the happening of the specified event and once that contract was signed the agent was entitled to his commission of 10 per cent. upon the purchase price. Secondly, counsel for the defendants submitted that the words, " I also instruct you to receive any deposit paid by such purchaser and to apply same on the signing of the contract, as far as possible, towards payment of your expenses and commission as agreed hereunder " show that the commission was agreed to be paid and applied in this particular way on the signing of the contract ; and it followed from his submission that it would not matter what happened thereafter, provided that a contract was signed.

E It is to be observed that the last words of that sentence are " as agreed hereunder " and when you come to the words thereunder you find :

Amount of commission and expenses : (a) Commission of ten per cent. on the total purchase price (minimum 25 guineas) and expenses.

F Upon what condition or specified event is it agreed that that shall be paid ? In the ordinary course I should have thought that it was fairly clear that commission upon the sale of a house or other property is not payable unless and until there is introduced a purchaser able and willing to complete. Indeed, that is borne out by the words in the judgment of *James v. Smith* (1), which was decided in 1921, though its importance was not realised until later ; it having been referred to in *Martin v. Perry and Daw* (2), a report was added thereto as a footnote. I have been referred to the judgment of BANKES, L.J., in *James v. Smith* (1), and it seems very much in point in this case, though the wording of the contract is not the same. Of course, every case must depend upon its own facts, for the right to commission can only arise on the terms of the agreement between the parties ; BANKES, L.J., in *James v. Smith* (1), in considering that case, said, at p. 318 :

H It is necessary, as I have said, to imply consideration moving from the plaintiff into the agreement to make it a complete contract, and if that consideration were written out and added to the document it would be : " In consideration of your finding for me a purchaser." What is the meaning to be attached to those words ? They mean, and must mean, a purchaser ready and willing to purchase in the sense of a purchaser able to purchase and able to complete as well ; they do not mean and cannot mean a purchaser in the sense either of a man of straw or of a man without means.

At pp. 321, 322, ATKIN, L.J., said :

In a contract of this kind, which is a contract of employment of an agent to procure a purchaser for the purchase of real estate, I do not think that the agent, in the absence

of any express contract to the contrary, performs his obligation merely by introducing a person who is willing to enter into a contract to purchase the property. In my opinion the purchaser must be willing and ready, that is to say, able up to the time he signs the contract.

That was the view adopted by CHARLES, J., in *Martin v. Perry and Daw* (2). In *Luxor (Eastbourne), Ltd. v. Cooper* (3) VISCOUNT SIMON, L.C., said, at pp. 117, 118 ([1941] 1 All E.R., at p. 39) :

The agent necessarily incurs certain risks, *e.g.*, the risk that his nominee cannot find the purchase price or will not consent to terms reasonably proposed to be inserted in the contract of sale.

I think it must be taken that in the ordinary way the meaning of " purchaser " in such a document is a purchaser who is able and willing to complete. This proposed purchaser may well have been willing to complete—he signed two contracts—but he was not able to complete. Dealing with the first point raised by counsel for the defendants, I am satisfied that when the document speaks of a purchaser, it means a purchaser not only willing but also able to complete, and in that sense no such purchaser was found by the agent.

When I come to the second point raised by counsel for the defendants, with regard to the words : " I also instruct you to receive any deposit paid by such purchaser and to apply same on the signing of the contract, as far as possible, towards payment of your expenses and commission as agreed hereunder," it seems to me that the argument for the plaintiff is right. There can be no application of the commission until the commission is earned. The commission is not earned until there is introduced a purchaser able and willing to complete. The provision on which counsel for the defendants bases his second argument is a provision as to what may be done as to the application of a deposit when commission has been earned, but this commission was not earned, because there was no purchaser, within the meaning of this document, introduced. He was a man of straw, or he was a man certainly not able to find enough money to complete the purchase. That was well known within a short space of time to the agent. The agent apparently had taken no steps whatever to discover it when he introduced him, but put these documents before the parties to sign and they signed them. In my view, it is idle to say that an agent earns his commission merely by doing that. There was no commission earned and consequently there was nothing which could be applied in the way provided on the signing of the contract. If the argument of counsel for the defendants upon that second point is right, it is indeed a strange contract, and I agree with the argument of counsel for the plaintiff that if there be doubt as to its meaning it ought most certainly to be construed against the agent who put forward a document of that kind. On the wording of this document I am constrained to hold that the agent has entirely failed to make out any right to keep this deposit. The defendants had not earned their commission.

Judgment for the plaintiff for the sum of £100 and costs.

Solicitors : *Richard Brooks & Son* (for the plaintiff) ; *Wildman Roy S. Skinner & Co.* (for the defendants).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

MERLIHAN v. A. C. POPE, LTD. AND J. W. HIBBERT
(JOHN PAGNELLO, THIRD PARTY).

[KING'S BENCH DIVISION (Birkett, J.), June 29, 1945.]

Limitation of Actions—Negligence—Joint tortfeasors—Contribution—Third-party claim against driver—Claim not made within 12 months of negligent act but made within 12 months of judgment against defendant—Third party not liable for contribution—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c)—Limitation Act, 1939 (c. 21), s. 21 (1).

On Mar. 15, 1943, the plaintiff, while a passenger in a Canadian army vehicle, was injured in a collision with a vehicle belonging to the defendants. The plaintiff brought an action against the defendants claiming damages for negligence. On June 14, 1945, the judge found that the defendants' servant had contributed to the accident by his negligence and awarded the plaintiff the agreed sum of £300 as damages against the defendants. The defendants brought third-party proceedings, under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c), against P., the driver of the Canadian vehicle, claiming contribution from him as a joint tortfeasor. The order with regard to the third-party notice was taken on Mar. 20, 1945, the actual order being made on May 15, 1945. P. claimed the protection of the Limitation Act, 1939, s. 21 (1). It was admitted that P. came within the wording of the section, but it was contended for the defendants that "the cause of action" as between them and P., only arose on June 14, 1945, the date on which they became liable for the damage to the plaintiff, and, therefore, the Limitation Act, 1939, s. 21 (1) was no bar to their claim against P., although it would have been a bar to any claim against P. by the plaintiff:—

HELD: the cause of action accrued on Mar. 15, 1943, that being the date on which the third party became a tortfeasor. Therefore, the defendants' claim for contribution under the 1935 Act against the third party failed, because the third party was protected by the Limitation Act, 1939.

[EDITORIAL NOTE. This is a new point arising out of the liability of a joint tortfeasor to make contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6. It is held that when judgment is recovered against one joint tortfeasor for negligence, and the defendant commences third-party proceedings against the other tortfeasor for contribution, the "cause of action" arises at the date of the original negligence, and the third party is entitled to the benefit of the Limitation Act if the statutory period has elapsed before the third-party proceedings are commenced.]

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6, see HALSBURY'S STATUTES, Vol. 28, p. 473.

FOR THE LIMITATION ACT, 1939, s. 21, see HALSBURY'S STATUTES, Vol. 32, p. 235.]

ACTION for damages for negligence. The court had found that the defendants had been guilty of negligence and had awarded the plaintiff the agreed sum of £300 as damages against the defendants. The report deals with the defendants' claim for contribution against a third party. The facts are set out in the judgment.

R. O. L. Armstrong-Jones for the plaintiff.

E. Ryder Richardson and R. L. Travers for the defendants.

P. M. O'Connor for the third party.

BIRKETT, J.: In this case William Leonard Merlihan brought an action against A. C. Pope, Ltd., and Jeffery William Hibbert, and the case was heard before me on June 14. The plaintiff was a passenger in a Canadian vehicle which came into collision with the vehicle of the defendants. The plaintiff claimed damages against the defendants for injuries which he sustained, as he said, owing to the negligence of the defendants' servant. The only issue in that case was whether the defendants had been guilty of negligence which contributed to the accident. After hearing the case, I came to the conclusion that the plaintiff had made out the case that the defendants' servant had contributed to this accident by his negligence and I awarded the agreed sum of £300 as damages. I expressly refrained from dealing with the case of Private

John Pagnello, the third party, (who was the driver of the Canadian vehicle) because I wanted to give counsel for Pagnello the opportunity of calling him if he so desired. I had not in fact looked at the terms of the third-party order, nor had it at that time been brought to my notice, but it occurred to me that, as the plaintiff in the action was not calling Pagnello as a witness, counsel for Pagnello might wish to have the opportunity subsequent to the trial of calling him. But after consideration it was decided not to do so.

The third-party notice in this case was ordered on Mar. 20, 1945. A statement of claim was delivered on May 16, 1945, by the defendants against the third party and a defence was made by the third party on May 29, 1945. Two matters arise. The first is whether on the facts I ought to hold that the third party, Pagnello, was guilty of contributory negligence. I was careful in the case brought by the plaintiff against the defendants to deal only with the allegation of negligence against them. I am not proposing this morning to review the evidence again. The question I now have to determine is whether there was contributory negligence on the part of Pagnello, and I hold there was. It was urged upon me that, because I had in the other case found that the defendant driver was not at all times upon his proper side of the road, I could not say there had been contributory negligence by Pagnello. I have considered the whole of the evidence and I think that the third party, Pagnello, was guilty of contributory negligence.

The important matter which was relied upon by counsel for the third party was rather a difficult matter of procedure at law. In answer to the claim for contribution made by the defendants, the third party said he was not liable by reason of the Limitation Act, 1939. The Limitation Act, 1939, s. 21 (1) says :

No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority . . .

It was conceded that Pagnello came within the wording of that section. No action, in those circumstances, shall be brought :

. . . unless it is commenced before the expiration of one year from the date on which the cause of action accrued.

In this case the accident took place on Mar. 15, 1943. That may be said to be the date of the cause of action, certainly so far as the plaintiff, the passenger, was concerned, against Pagnello. The plaintiff did not sue, and never has sued, Pagnello. The writ in the action against the defendants, A. C. Pope, Ltd., and Jeffery William Hibbert, was dated May 17, 1944. It is quite clear that the plaintiff at that date could not sue Pagnello because of this section. The twelve months had gone past and, so far as the plaintiff was concerned, Pagnello could not be sued. The order with regard to the third-party notice was taken in Mar., 1945, and the actual order made on May 15, obviously both dates beyond the twelve months.

The claim by the defendants against the third party is under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). That Act decreed, making a change in the law with regard to this matter :

6 (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

In the ordinary course, therefore, not only could the plaintiff sue the defendants, but that would not have been a bar to an action brought against Pagnello. Sect. 6 (1) (b) deals with the *quantum*, the amount of damages which can be recovered. Sect. 6 (1) (c) provides :

. . . any tortfeasor liable in respect of that damage [that is now the defendants, because they were held liable on June 14] may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage . . .

The claim here for contribution is made against Pagnello on the ground that he was another tortfeasor and was in fact equally liable, with the defendants, for the damage.

The issue, I am told, has never been determined; there is no real guidance upon it and I am left to my unaided resources to deal with it. The matter may be put in this way: the defendants are seeking contribution from this third party, Pagnello, because he is a tortfeasor who is liable to the plaintiff and, if sued, would have been liable. The answer made by the third party is that he is not liable to the plaintiff because of the Limitation Act, 1939, and, in order to make the words in the 1935 Act applicable to this case, you would have to say "who is, or if sued in time would have been, liable." But it is clear in this case that he was not sued in time. It is important to look for one moment at the ground upon which the third party's liability arises. It arises quite clearly because of his negligence on Mar. 15, 1943. That was the date upon which he became a tortfeasor and certainly, so far as the plaintiff is concerned, the cause of action arises on that date and no dispute arises about that. It was contended, therefore, that in these proceedings the third party cannot be held to be liable because on June 14, 1945, he was not liable in respect of that damage occasioned by him on Mar. 15, 1943, by reason of the Limitation Act, 1939. You ought not to import into the statute the words "if sued at any time." He would have been liable if he had been sued within the twelve months, but he is not liable because this claim made for contribution was after the twelve months. The argument on behalf of the defendants was this: so far as the defendants are concerned, as against the third party that date of Mar. 15, 1943, is really quite irrelevant. That may be the date of the cause of action as between the plaintiff and Pagnello, but the date of the cause of action as between the defendants and the third party must be taken to have been June 14. Authorities were cited to me in which the term "cause of action" had been defined. It is said here that the defendants could not bring a claim for contribution until after June 14, because that was the date and the first date upon which they became liable for the damage to the plaintiff; therefore, the Limitation Act, 1939, has no application and, whilst it may be an effective bar so far as the plaintiff is concerned, it is no bar so far as the defendants are concerned as against the third party.

The conclusion to which I have come is that it is not competent for the defendants to claim contribution from the third party. I hold that the defendants' claim for contribution under the Act of 1935 against the third party fails and I put it expressly upon the ground that the third party was protected by the Limitation Act, 1939, that the cause of action was in fact upon Mar. 15, 1943, and that this statute (which certainly made a great change in the law—but apparently this particular point had not been foreseen), as it stands, and as it is worded, ought not to have added to it "who if sued in time would have been liable." I think, therefore, for these reasons, that the defendants are not entitled to claim contribution against the third party. In those circumstances, there will be judgment for the third party against the defendants.

Judgment for the third party against the defendants, with costs.

Solicitors: *L. Bingham & Co.* (for the plaintiff); *Hewitt, Woollacott & Chown* (for the defendants); *Barlow, Lyde & Gilbert* (for the third party).

[Reported by P. J. JOHNSON, Esq., Barrister-at-Law.]

SMITH v. SMITH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), July 4, 1945.]

Divorce—Desertion by husband—Husband subsequently attempting to induce wife to sign usual separation agreement—Wife refusing to sign—Agreement amended—Agreement in final form reciting inter alia desire of husband only to live separate and apart—Agreement signed by wife—No implied consent by wife to husband's continuing to live separate and apart—Desertion over 3 years—Agreement no bar to wife's petition for dissolution.

The petitioner's husband left her early in 1941 and the parties had never lived together since. The petitioner received an allowance from her husband until Jan., 1942, when, through his solicitors, he attempted to induce her to sign a separation agreement in the usual form containing a clause whereby the husband and wife agreed to live separate and apart. The petitioner was unwilling to sign the agreement which was then amended and signed by her on July 2, 1942. The agreement, in its final form, recited that it was the desire of the husband to live separate and apart from his wife. In addition to a provision for the maintenance of the petitioner and the children of the marriage, the agreement contained the following clause: "Neither the husband nor the wife shall molest annoy or interfere with the other or any member of their respective families or any of their respective friends and neither shall they the husband nor the wife institute any proceedings for a restitution of conjugal rights." Although the petitioner had signed the agreement, she never intended to agree to live apart from her husband but had always desired him to return. On Sept. 21, 1944, the petitioner filed a petition for the dissolution of her marriage on the ground that her husband's desertion had subsisted for a period of more than 3 years:—

HELD: the provisions in the agreement did not imply any consent by the petitioner to a continued separation, or justify the husband in remaining in desertion. The petitioner, therefore, was entitled to a decree *nisi*.

[EDITORIAL NOTE.] The question here is whether an agreement between husband and wife to live apart constitutes a bar to proceedings by the wife for desertion. The agreement contained only a recital of the husband's desire to live apart and provisions for maintenance and custody, but it contained a non-molestation clause and an agreement not to commence proceedings for restitution. This last provision, it is argued, connotes the acquiescence of the wife in the separation. PILCHER, J., following the dictum of SIR JAMES HANNEN in *Marshall v. Marshall* (2) holds that a suit for restitution has always been an artificial process instituted for some purpose other than return to cohabitation, and that the presence of such a clause is, therefore, no bar to a petition for desertion.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-969; and FOR CASES, see DIGEST, Vol. 27, pp. 306-319, Nos. 2837-2977.]

Cases referred to:

- * (1) *Long (of Wrazall) (Viscount) v. Long (of Wrazall) (Viscountess)*, [1940] 4 All E.R. 230; Digest Supp.
- (2) *Marshall v. Marshall* (1879), 5 P.D. 19; 27 Digest 278, 2492; 48 L.J.P. 49; 39 L.T. 640.

PETITION by a wife for the dissolution of her marriage on the ground of her husband's desertion for over three years. The facts are fully set out in the judgment.

D. F. Brundrit for the petitioner.

PILCHER, J.: This is a wife's petition for divorce grounded on her husband's alleged desertion. The parties were married in 1931. They apparently lived reasonably happy until the spring of 1941 when the husband told his wife that he had found someone else and that he did not ever propose to live with her again. Since then he has constantly refused to live with her. From the time when he left her until Jan., 1942, he paid her an allowance.

In Jan., 1942, through his solicitors, the husband attempted to induce his wife to sign a separation agreement in the usual form containing a clause whereby the husband and wife agreed to live separate and apart. The wife was unwilling to sign this separation agreement and during the ensuing months certain correspondence took place between the solicitors to the parties.

Eventually, at the instance of the wife's solicitors, the draft agreement was amended by striking out the clause whereby the parties agreed to live separate

and apart. Ultimately the agreement was signed on July 2, 1942. The agreement, in its final form, recited that it was the desire of the husband to live separate and apart from his wife and the remainder of the deed was concerned with the amount of maintenance which the husband was to pay to the wife and children of the marriage and also with provisions as to the custody of the children. The only clause in the agreement, to which I need refer, was cl. 1 which is in the following terms :

A Neither the husband nor the wife shall molest annoy or interfere with the other or any member of their respective families or any of their respective friends and neither shall they the husband nor the wife institute any proceedings for a restitution of conjugal rights.

The husband has paid the sum provided by the deed in respect of the maintenance but has never returned to his wife. The wife has been unable to obtain any evidence of the husband's adultery but has always desired that he should return. The wife's petition is dated Sept. 21, 1944, so that more than three years elapsed since the husband first left his wife early in 1941. The wife is, therefore, entitled to the decree which she seeks unless it can be said that cl. 1 of the deed to which I have referred must be so interpreted as to show that in July, 1942, the wife agreed to live separate and apart from her husband so that the separation of the spouses was thereafter of such a consensual character as to defeat the wife's petition based on her husband's alleged desertion. In so far as it may be material or relevant I am satisfied that in signing the deed the wife never intended to agree to live apart from her husband. The deed does not in terms provide that she shall do so but it does recite that the husband is desirous of living separate and apart and it does provide that the wife shall not molest her husband or institute proceedings for restitution of conjugal rights.

D It is well settled that when husband and wife execute a deed which is in fact a separation deed and which contains the usual clause that the spouses agree thereafter to live separate and apart such deed, so long as it remains effective, is conclusive that the separation is consensual, and this is so even if it be clear on the facts that the deed was signed by one party under a misapprehension as to its effect. In this connection see *Lord Long of Wraxhall v. Lady Long of Wraxall* (1), where the deed under consideration recited that the wife had deserted the husband but included the clause usual in separation deeds that the parties thereby agreed to live separate and apart. It was held by the Court of Appeal, affirming the judgment of SIR BOYD MERRIMAN, P., that the husband's petition founded on alleged desertion failed. The deed in that case also contained the usual clause whereby the parties agreed not to institute proceedings for restitution of conjugal rights.

F It was argued in the present case that the deed which I have to consider was really a deed to secure the maintenance of the wife and children and to regulate the conditions under which the wife should have the custody of the children of the marriage, subject to reasonable access by the husband. As SIR WILFRID GREENE, M.R., pointed out in the case of *Lord Long of Wraxall* (1) it is not open to a husband, who, by deed executed in formal and solemn manner, has agreed to live separate and apart from his wife, to allege that he never so agreed.

G In the case before me whilst the deed with which I am concerned contains no such express provision that the parties shall live separate and apart it does contain the two provisions to which I have referred and which are usual in separation deeds, namely, the non-molestation clause and the agreement not to institute proceedings for restitution of conjugal rights. The retention in the agreement of the non-molestation clause does not cause me any difficulty, as it does not seem to me to be in any way inconsistent with the wife's expressed wish that her husband should return to her, or to afford the husband any excuse for continuing to refuse to return.

H At first sight the agreement not to institute proceedings for restitution of conjugal rights would appear to connote an acquiescence by the wife in the existing state of affairs. On closer examination I am not, however, satisfied that this is so. Whilst it might be argued that a wife, who undertakes not to bring proceedings for restitution of conjugal rights against her husband, impliedly assents to his continuing to live apart from her, it is clear that she does not by such a clause do so expressly. She merely undertakes not to avail herself

of a remedy. It is, moreover, common-knowledge that petitioners in restitution suits have seldom, if ever, entertained any hope that the party in alleged default would obey the order made and return to cohabitation. As early as 1879 SIR JAMES HANNEN in *Marshall v. Marshall* (2), at p. 23 said :

And I must further observe that so far are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand.

From 1884 until 1923 restitution suits were principally instituted to establish a state of desertion which, coupled with adultery, gave the wife a right to a decree of dissolution.

At the present time the purpose of most restitution suits instituted by wives is to obtain, during the period of desertion, periodical payments in excess of the maximum of £2 a week obtainable under a magistrate's order. In this connection it is to be observed that the payments secured by the deed under consideration in this case were substantially in excess of the maximum sum of £2 a week which could have been obtained under a magistrate's order.

A suit for restitution has thus always been a somewhat artificial procedure aimed not so much at procuring the return of the deserting spouse as obtaining some ulterior benefit and I am therefore not satisfied that it would be proper to say that the petitioner in the present case by agreeing not to bring such a suit must be taken to have assented to her husband's continuing to live separate and apart from her. Nor do I think that the provision in the deed under consideration justified the husband in continuing to refuse to return to his wife.

I accordingly find that none of the provisions of this particular deed imply any consent by the wife to a continued separation or justify the husband in remaining in desertion. The husband's desertion has persisted over the necessary period and the petitioner is, therefore, in my view entitled to the decree *nisi* which she seeks together with custody of the two children of the marriage and costs.

Decree nisi with costs.

Solicitors : *Douglas Wiseman & Co.* (for the petitioner).

[Reported by R. HENDRY WHITE, Esq., *Barrister-at-Law.*]

R. v GEORGE DARRY.

[COURT OF CRIMINAL APPEAL (Humphreys, Oliver and Birkett, JJ.), May 16, 1945.]

Criminal Law—Practice—Sentence—Consecutive sentences of imprisonment with hard labour amounting to 3 years—Penal servitude for 3 years substituted—Penal Servitude Act, 1926 (c. 58), s. 1.

The appellant had been convicted of three separate offences : (i) house-breaking and stealing ; (ii) attempted housebreaking ; and (iii) assaulting a police constable in the execution of his duty. He was sentenced to 18 months' imprisonment with hard labour for the first offence, and 9 months' imprisonment with hard labour for each of the two other offences, the sentences thus amounting to 3 years' imprisonment with hard labour. The appellant contended that the sentences were improper and/or excessive in that they aggregated a term of more than 2 years' imprisonment with hard labour :—

HELD : although there was nothing illegal in passing a sentence of more than 2 years' imprisonment with hard labour, for many years it had not been the practice to do so. A sentence of 3 years' penal servitude would be substituted, under the Penal Servitude Act, 1926, for the sentences passed on the appellant, since in the circumstances of the case, 3 years' detention was not excessive.

[EDITORIAL NOTE. The court here exercises its power under the Penal Servitude Act, 1926, to substitute a sentence of three years penal servitude for sentences of hard labour amounting in the aggregate to three years, in view of the nature of the offences and the record of the prisoner.

AS TO PENAL SERVITUDE IN LIEU OF IMPRISONMENT, see HALSBURY, Hailsham Edn., Vol. 9, p. 226 para. 318 ; and FOR THE PENAL SERVITUDE ACT, 1926, see HALSBURY'S STATUTES, Vol. 4, p. 852.

AS TO CONSECUTIVE SENTENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp.

228, 229, para. 321; and FOR CASES, see DIGEST, Vol. 14, pp. 476, 477, Nos. 5171-5192, and Supplement, Criminal Law, 5175a.]

Case referred to:

*(1) *R. v. Morriss* (1926), 19 Cr. App. Rep. 75; Digest Supp.; *sub nom. R. v. Roberts and Morriss*, 134 L.T. 635.

APPEAL against a conviction at the Oxfordshire Quarter Sessions. The facts are set out in the judgment of the court delivered by HUMPHREYS, J.

R. E. Seaton for the appellant.

A

HUMPHREYS, J. [delivering the judgment of the court]: This is an appeal against sentence as a result of leave granted by the judge. The appellant was convicted at the Oxfordshire quarter sessions of three separate offences, housebreaking, attempted housebreaking and assaulting a police constable in the execution of his duty. On the first count he was sentenced to 18 months imprisonment with hard labour on the charge of housebreaking and stealing an attache case. He was further sentenced on the third count (*i.e.*, attempted housebreaking with intent to steal) to 9 months imprisonment with hard labour; and on the fourth count he was charged with assaulting a police officer contrary to the Offences against the Person Act, 1861, s. 38, *i.e.*, striking a police officer in the execution of his duty, and on that he was sentenced to be imprisoned for 9 months with hard labour.

B

C

He was given leave to appeal to this court upon his application, based upon this statement:

The said sentences passed upon me were improper and/or excessive in that they aggregated a term of more than 2 years' imprisonment with hard labour, to wit, 3 years.

D

Without saying for a moment—indeed, our view is clearly to the contrary—that there is anything illegal in passing a sentence of more than 2 years' imprisonment with hard labour, it is not the practice to do so, and it has not been the practice for many years. In *R. v. Morriss* (1) which came before this court, the matter was very carefully considered, and it was laid down that what was done in that case was perfectly proper, that is to say, a sentence of imprisonment with hard labour for 2 years to be followed by a sentence of imprisonment for 12 months without hard labour. In this case, the court might take that view and might make these two sentences of 9 months to be served without hard labour, in which case it would be precisely on all fours with *R. v. Morriss* (1). But owing, or partly owing, to the observations of the court in that case, the Penal Servitude Act, 1926, was passed, which provides that in such a case as this, the court may substitute for the sentences of imprisonment a sentence or sentences of penal servitude which will result in the same number of years' incarceration as were imposed by the trial judge.

E

F

G

We propose in this case to exercise our power, and for this reason: In our opinion, the chairman of quarter sessions was perfectly right when he took the view that this was a very bad case which ought to be followed by a very severe penalty. Not only had the appellant committed those offences which I have read out from the indictment, and not only was the assault upon the constable a very bad one, but he is a man with a shocking record. In 1934 he was sentenced to 2 years' imprisonment with hard labour for two robberies with violence and nine other offences were taken into consideration. He was released in 1936. It is said that he did no more regular work until Mar., 1939, when he was sentenced to 7 years' penal servitude for five cases of shop-breaking or office-breaking and for possessing explosives while engaged in that nefarious occupation. He was released from that sentence in June, 1944, with a *remand* to serve, and his story was that he had been earning £20 a week as a bookmaker working one afternoon a week at a greyhound track. In our view, 3 years' detention is by no means excessive for a man of that class convicted of offences of which this person was convicted. We shall substitute for the sentences passed by the chairman of quarter sessions a sentence of 3 years penal servitude under the terms of the Penal Servitude Act, 1926, but, since the appellant has been given leave to appeal, the time during which he has been detained as an appellant will count towards his sentence.

H

Sentence of three years' penal servitude substituted for the sentences amounting to three years' imprisonment with hard labour.

Solicitor: *Phillips & Phillips* (for the appellant).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

R. v. RICHARD HAMID.

[COURT OF CRIMINAL APPEAL (Wrottesley, Croom-Johnson and Birkett, JJ.),
July 9, 1945.]

Criminal Law—"Dealing in securities" without a licence—Transactions relating to company not yet formed—Operation of Act not confined to existing companies—*Prevention of Fraud (Investments) Act, 1939 (c. 16), ss. 1 (1) (a), 26 (1).*

The applicant was convicted under the Prevention of Fraud (Investments) Act, 1939, s. 1, of carrying on the business of dealing in securities without having obtained a licence under the Act, as required by subsect. (1) (a). Three of the four transactions on account of which the applicant was convicted related to companies not yet formed. It was contended on behalf of the applicant that, upon the true construction of the language in sect. 26 (1) of the Act (the interpretation section), the operation of the Act was confined to companies already in existence:—

HELD: upon the true construction of the Act, the operation of the Act was not confined to existing companies.

[EDITORIAL NOTE. It is held in this case that the offence of unlawfully carrying on the business of dealing in securities contrary to the Prevention of Fraud (Investments) Act, 1939, applies to an invitation to subscribe to the shares of companies not yet in existence, there being no justification for limiting the Act to existing companies.

FOR THE PREVENTION OF FRAUD (INVESTMENTS) ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 119.]

APPLICATION for leave to extend the time for appealing against a conviction at the London Sessions, on Feb. 22, 1945, on a charge of unlawfully carrying on the business of dealing in securities contrary to the Prevention of Fraud (Investments) Act, 1939, s. 1 (1) (a). On hearing the application, the court decided to consider the points of law to be raised on behalf of the applicant, in the event of the application being granted. The facts and the relevant sections of the Act are set out in the judgment of the court delivered by WROTTESELEY, J.

H. Lester for the applicant.

WROTTESELEY, J. [delivering the judgment of the court]: The applicant, Richard Hamid, was convicted at the London Sessions in Feb., 1945, of unlawfully carrying on the business of dealing in securities contrary to the Prevention of Fraud (Investments) Act, 1939, s. 1 (1) (a), i.e., of carrying on that business without having obtained a principal's licence. He was convicted and fined £300. He was convicted on Feb. 22, but sentence was not pronounced until Apr. 11, and his application is, therefore, out of time unless the court should extend the time. In form, therefore, this is an application to extend the time for appeal, and the court thought it right to listen to the merits of the points of law raised by the applicant's counsel on his behalf.

The offence was that he had infringed sect. 1 of this Act which is to provide for "regulating the business of dealing in securities." The scheme of the Act is that "after the appointed day"—and there is no question but that the transactions here were after the appointed day—a person shall not:

... carry on or purport to carry on the business of dealing in securities except under the authority of a principal's licence . . .

It is not in dispute that the applicant had not got a licence.

The conviction of the applicant rested upon four different transactions or letters issued by him. With regard to three of them it is perfectly true to say that they were invitations to the persons to whom the letters were addressed to subscribe, in some shape or form, money towards the share capital of companies to be formed. The fourth was an invitation to subscribe money, directly or indirectly, in the form of new capital which was to be created in the case of a company already in existence. The point of law adumbrated by counsel for the applicant was this: since in each of the first three cases the invitation related to a company not yet formed, the transactions were not covered by the Act of Parliament under which the indictment was framed, because the language in certain definitions in sect. 26 (1) of the Act shows that the restrictions imposed, and the offences created, by that Act were confined to companies already in existence. If that had been so, it would have been somewhat remarkable,

because the obvious scope and intention of this Act is to protect the public by ensuring that persons who invite them to part with their money, for the purpose "of dealing in securities," should be persons of substance; and it is just as desirable—or even more desirable—that only persons of substance should do such business, if the transaction is in relation to a company not even registered.

A Counsel for the applicant pointed out that this is a criminal matter, and if the language should lead to such a technical conclusion the court would be bound by it. The language in question amounts to this: The charge is "carrying on the business of dealing in securities," and "dealing in securities," as defined in sect. 26 (1), the definition section of the Act, means:

... doing any of the following things (whether as a principal or as an agent), that is to say, making or offering to make with any person, or inducing or attempting to induce any person to enter into or offer to enter into (a) any agreement for, or with a view to acquiring, disposing of, subscribing for or underwriting securities . . .

B That language sufficiently indicates the scope of the Act. The word "securities" is also defined, and the result of the definition is to be incorporated alongside the definition I have read. The definition of "securities" is:

(a) shares or debentures, or rights or interests (described whether as units or otherwise) in any shares or debentures . . .

The word "shares" is defined as meaning:

C . . . shares in the share capital of a corporation or stock of a corporation . . .

From that, counsel asked us to conclude that this Act is confined to dealing in shares of an existing corporation. It would be surprising, having regard to what is the obvious mischief to be cured by this Act, if any such limitation had to be read into it; but, looking at the definition of "dealing in securities," we see that it is extended to include:

D . . . making or offering to make with any person, or inducing or attempting to induce any person to enter into or offer to enter into (a) any agreement for or with a view to acquiring, disposing of, subscribing for or underwriting securities . . .

It is clear that no intention was in the mind of the draftsman of this Act, or the legislature, to confine the operation of this Act to carrying on business which related to existing companies only or, for the matter of that, to existing securities.

E In our opinion, there is nothing to support the suggestion that this Act is to be read in the confined sense argued for on behalf of the applicant, and we feel that there are no matters which would justify the court in extending the time for appeal. The application to extend the time is, therefore, not granted.

F There is also an application with regard to the sentence—i.e., "that in the peculiar circumstances of this case the sentence of a fine of £300 and payment of costs was too harsh a punishment." It is obvious from the shorthand note of the proceedings that this offence was committed because the applicant rather unwisely decided to challenge the authority of the Board of Trade, although he must have known that what he was doing was contrary to a most important law, passed for the protection of the public. But we do observe that there was nothing clandestine about it, and on that ground we think the justice of the case would be met if the fine should be £100 and not £300. We do not interfere with that part of the judgment which ordered the applicant to pay the costs of the prosecution.

G *Application dismissed. The fine imposed on the applicant to be reduced from £300 to £100.*

Solicitors: *Bein & Lawrence* (for the applicant).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

FISHER v. RUISLIP-NORTHWOOD URBAN DISTRICT
COUNCIL AND COUNTY COUNCIL OF MIDDLESEX.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon, L.J., and Uthwatt, J.),
January 30, February 20, July 16, 1945.]

Highways—Obstructions—Air-raid shelter erected in roadway by local authority—Statutory authority to erect and maintain shelter—Lighting—Shelter sometimes illuminated—Trap—Car colliding with shelter—Duty to take care not expressly imposed upon local authority—Whether local authority under duty to give warning of danger—Public Health Act, 1875 (c. 55), s. 161—Civil Defence Act, 1939 (c. 31), s. 9 (1).

On July 21, 1942, during the hours of darkness, the appellant was driving a motor car in Fore Street, Ruislip, in the county of Middlesex. He was driving with due care and was on his proper side of the road. There was, unknown to him, a surface air-raid shelter standing in the roadway directly in his path, and his car came into collision with it, as a result of which the appellant sustained injuries. The shelter, which had been erected by the second respondents under the powers contained in the Civil Defence Act, 1939, was under the management of the first respondents. The shelter was equipped with an external lighting system, consisting of red danger lamps which were controlled by a switch inside the shelter. It was the duty of the air-raid wardens, in whose area the shelter was situated, to see that the light was duly turned on at the appropriate time. At the time of the accident the lights were not in operation. On appeal, the question for the determination of the court was whether the respondents owed a duty to the appellant, as a member of the public lawfully using the highway, to take reasonable steps, by lighting or otherwise, to warn him of the danger:—

HELD: (i) the Civil Defence Act, 1939, did not impose a duty on the undertakers to exercise care in respect of the construction or maintenance of shelters erected by them. If the legislature authorised the construction and maintenance of a work which would be safe or dangerous to the public according as to whether reasonable care was taken or not in its construction or maintenance, the fact that no duty to take such care was expressly imposed by statute could not be relied on as showing that no such duty existed.

Great Central Ry. Co. v. Hewlett (3) distinguished.

Sheppard v. Glossop Corpn. (6) and *Morrison v. Sheffield Corpn.* (4) applied.

Baldock v. Westminster City Council (12) not followed.

(ii) there was no distinction between a statutory power and a common law power where all that the statute did was to authorise in general terms the construction of an obstacle on the highway which would be a danger to the public unless precautions were taken. The undertakers in each case, by exercising a power, whether statutory or common law, placed themselves in a relationship to the public which from its very nature imported a duty to take care.

(iii) it was a misconception to treat a duty to take care as a duty to light the obstruction. The duty was to take reasonable steps to prevent the obstruction becoming a danger to the public and to give the public due warning of its existence both by night and day.

(iv) *Wodehouse's* case (11), *Lyus's* case (8) and *Fox's* case (2) could not be reconciled with *Morrison's* case (4), *Polkinghorn's* case (13), or *Foster's* case (5). Since the Court of Appeal was free to choose between conflicting decisions of its own, the first named three cases would not be followed.

Young v. Bristol Aeroplane Co., Ltd. (1) applied.

(v) in the circumstances, the respondents were liable to the appellant.
Decision of MacNaghten, J. ([1944] 2 All E.R. 149) reversed.

[EDITORIAL NOTE. In *Foster v. Gillingham Corpn.* (5) GODDARD, L.J., observed that it was "desirable that the cases decided during the present war relating to collisions with street refuges, sand-bins and the like during the hours of black-out should receive further consideration." In this case GREENE, M.R., makes an exhaustive examination of the cases and arrives at the conclusion that the true duty of undertakers is to take reasonable steps to ensure that an obstruction created by them under statutory powers will not become a danger to the public. This being the test, the question ceases to be

one of lighting, which is only one method of giving warning, and a method, moreover, which does not apply to daytime. Viewing the matter from this angle it no longer becomes material to consider whether the obstruction is in a district in which there is a duty to light the streets or not. Nor is the time of erection material: if the obstruction is created while the streets are properly lit and street lighting is subsequently suppressed, some other method of warning may be necessary, e.g., white paint, while if the black-out is in existence when the obstruction is created, steps must still be taken to protect the public if the duty upon the undertakers is to be fulfilled.

The court holds that the cases on this question cannot be reconciled and in laying down the foregoing test it follows the decision in *Young v. Bristol Aeroplane Co.* (1), which permits a court of appeal to select such of conflicting earlier decisions as it considers correct. In the result the judgment of MACNAGHTEN, J., in the court below is reversed.

AS TO INDICATING OBSTRUCTIONS ON THE HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and FOR CASES, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to:

- * (1) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 1 K.B. 718; [1944] 2 All E.R. 293; 171 L.T. 113.
- * (2) *Fox v. Newcastle-upon-Tyne City Council*, [1941] 2 K.B. 120; [1941] 2 All E.R. 563; 165 L.T. 90.
- * (3) *Great Central Ry. Co. v. Hewlett*, [1916] 2 A.C. 511; 26 Digest 419, 1383; 85 L.J.K.B. 1705; 115 L.T. 349; *revsg.* S.C. *sub nom.* *Hewlett v. Great Central Ry. Co.*, 114 L.T. 713.
- * (4) *Morrison v. Sheffield Corpn.*, [1917] 2 K.B. 866; 26 Digest 445, 1623; 86 L.J.K.B. 1456; 117 L.T. 520.
- * (5) *Foster v. Gillingham Corpn.*, [1942] 1 All E.R. 304; 111 L.J.K.B. 364.
- * (6) *Sheppard v. Glossop Corpn.*, [1921] 3 K.B. 132; 26 Digest 393, 1197; 90 L.J.K.B. 994; 125 L.T. 520.
- * (7) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430; 43 Digest 1075, 116.
- * (8) *Lyus v. Steyne Borough Council*, [1940] 2 K.B. 662; [1940] 4 All E.R. 75; Digest Supp.; 163 L.T. 328; *revsd.* [1941] 1 K.B. 134; [1940] 4 All E.R. 463; 164 L.T. 195.
- * (9) *Lamley v. East Retford Corpn.* (1891), 55 J.P. 133; 26 Digest 390, 1171.
- * (10) *Greenwood v. Central Service Co., Ltd.*, [1940] 2 K.B. 447; [1940] 3 All E.R. 389; Digest Supp.; 109 L.J.K.B. 799; 163 L.T. 414.
- * (11) *Wodehouse v. Levy*, [1940] 2 K.B. 298; [1940] 3 All E.R. 137; *on appeal revsd.* [1940] 2 K.B. 561; [1940] 4 All E.R. 14; Digest Supp.; 109 L.J.K.B. 807; 163 L.T. 227.
- * (12) *Baldock v. Westminster City Council* (1918), 88 L.J.K.B. 502; 26 Digest 392, 1190; 120 L.T. 470.
- * (13) *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E.R. 339; Digest Supp.; 158 L.T. 127.
- (14) *Penny v. Wimbledon Urban Council*, [1899] 2 Q.B. 72; 26 Digest 410, 1308; 68 L.J.Q.B. 704; 80 L.T. 615; *affg.*, [1898] 2 Q.B. 212.
- (15) *Knight v. Sheffield Corpn.*, [1942] 2 All E.R. 411; 167 L.T. 203.
- (16) *Smith v. South Eastern Ry. Co.*, [1896] 1 Q.B. 178; 36 Digest 79, 518; 65 L.J.Q.B. 219; 73 L.T. 614.
- * (17) *East Suffolk Rivers Catchment Board v. Kent*, [1941] A.C. 74; [1940] 4 All E.R. 527; 165 L.T. 65.

APPEAL by the plaintiff from a decision of MACNAGHTEN, J., dated June 12, 1944, and reported [1944] 2 All E.R. 149. The appeal was heard on Jan. 30, 31, 1945, when judgment was reserved. On Feb. 20, 1945, the appeal was allowed and leave to appeal to the House of Lords was granted (see [1945] 1 All E.R. 287). No reasons were then given owing to the illness of the Master of the Rolls. The relevant facts and arguments are set out in the judgment of LORD GREENE, M.R.

A. S. Comyns Carr, K.C., and G. H. Oliver for the appellant, plaintiff in the court below.

Harold B. Williams for the respondents, defendants in the court below.

Cur. adv. vult.

LORD GREENE, M.R.: On July 21, 1942, during the hours of darkness, the appellant was driving a motor car in Fore Street, Ruislip, in the county of Middlesex. It is not now suggested that he was driving otherwise than with due care, and he was on his proper side of the road. There was, unknown to him, a surface air-raid shelter standing in the roadway directly in his path, and his car came into collision with it. As a result he suffered personal injuries and loss of earnings for which the sum of £199 6s. 0d. has been agreed.

The shelter was equipped with a suitable external lighting system consisting of red danger lamps. These lamps were controlled by a switch inside the shelter, and it was the duty of the air raid wardens, in whose area the shelter was situated to see that the light was duly turned on at the appropriate time. It is not necessary to go into the precise arrangements in force with regard to the control of the lights and the custody of the key of the shelter, or to inquire how it came about, on the occasion in question, that the lights were not in operation. For they were not in operation, and it is not now disputed that this was the real cause of the accident. Nor is it disputed that if there was a duty upon the respondents, who were responsible for the shelter, to take reasonable steps to warn the public of its existence by lighting or otherwise, that duty was not performed. Whether this was due to lack of due care in persons for whom the respondents were responsible, or to lack of a proper system of management and supervision, or to both, the liability of the respondents is not put in issue by them, save upon the one essential question, namely, was there, in the circumstances, a duty towards the appellant, as a member of the public lawfully using the highway, to take reasonable steps to warn him of the danger?

During the last war, and during this present war, and in the interval between them, the question of liability for accidents caused by unlighted objects or structures on roadways or footpaths has come up for decision upon a number of occasions. During the present war there have been several decisions of this court which (or, at any rate, one of which) if binding upon this court, must compel us to decide this appeal in favour of the respondents. But it is argued, on behalf of the appellant, that these cases (or, at any rate, the one referred to) were wrongly decided, that the decisions are inconsistent with at least one previous decision of this court, and with principles laid down by the House of Lords, and that in accordance with our decision in *Young v. The Bristol Aeroplane Co.* (1) it is open to us to review the earlier decisions and, if they are found to conflict, to select that which, in our opinion, is correct. The task to which we are thus invited to address ourselves is one which might more suitably have been performed by a fuller court. But circumstances made this impossible. We have unanimously come to the conclusion that the appellant is in the right, and judgment to that effect has been given. It only remains to give our reasons.

The shelter was provided by the respondents, the Middlesex county council, and was constructed upon the highway under the powers contained in the Civil Defence Act, 1939. That Act, so far as relevant, provides as follows, sect. 9 (1):

Subject to the provisions of this section, the local authority may provide a public air-raid shelter on any highway, and may for that purpose construct works in or on the highway . . .

The provisions to which the power is made subject have no relevance to the present case.

The management of the shelter, on behalf of the Middlesex county council had been undertaken by the respondents, the Ruislip-Northwood urban district council. If a duty existed to take reasonable care to ensure that the shelter should not be a source of danger to persons lawfully using the highway, and that duty was not performed, both respondents are admittedly liable to the appellant. MACNAGHTEN, J., held that, according to authorities binding upon him, there was no duty either under the Civil Defence Act, 1939, or under any other statute, or by common law, to light the shelter. He relied particularly upon the decision of this court in *Fox v. Newcastle-upon-Tyne Corpn.* (2). The argument on behalf of the appellant was a simple one. *Fox's* case (2), it was said, and certain observations in other cases decided in this court during the course of the present war, were based on a misapprehension of the decision of the House of Lords in *Great Central Ry. v. Hewlett* (3), and were inconsistent with principles long established by other decisions of the House of Lords, and with at least one decision of this court, *Morrison v. Sheffield Corpn.* (4). An examination of the authorities confirms the view expressed by GODDARD, L.J., (as he then was) in *Foster v. Gillingham Corpn.* (5), at p. 306, that it was:

. . . desirable that the cases decided during the present war relating to collisions with street refuges, sand-bins and the like during the hours of black-out should receive further consideration . . .

The duty of undertakers in respect of the safety of works executed under

statutory powers has been considered on many occasions. Statutes conferring such powers do not as a rule in terms impose a duty on the undertakers to exercise care in the construction or maintenance of the works. No such duty was imposed by the Civil Defence Act, 1939, in respect of shelters constructed under its powers. Nevertheless, it is quite clearly established that undertakers entrusted with statutory powers are not in general entitled in exercising them to disregard the safety of others. The nature of the power must, of course, be examined before it can be said that a duty to take care exists, and, if so, how far the duty extends in any given circumstances. If the legislature authorises the construction of works which are in their nature likely to be a source of danger and which no precaution can render safe, it cannot be said that the undertakers must either refrain from constructing the works or be struck with liability for accidents which may happen to third persons; so to hold would make nonsense of the statute. If, on the other hand, the legislature authorises the construction and maintenance of a work which will be safe or dangerous to the public according as reasonable care is or is not taken in its construction or maintenance, as the case may be, the fact that no duty to take such care is expressly imposed by the statute cannot be relied on as showing that no such duty exists. It is not to be expected that the legislature will go out of its way to impose express obligations or restrictions in respect of matters which every reasonably minded citizen would take for granted. If, for instance, in an area where there is no obligation to light the streets—and the area in question here is one—a local authority is empowered to erect a pedestrian refuge in the middle of the highway, but no express obligation is imposed to take reasonable steps to ensure that it will not be a source of danger, it would violate one's sense of good citizenship to hold that the authority could erect a refuge in an unlighted street and take no steps to warn the public of its existence, *Sheppard v. Glossop Corpn.* (6). As will be seen, some confusion has been introduced into the cases by treating the alleged duty as a duty to light the obstruction. This appears to me to be a misconception. Lighting in such a case is no doubt the obvious and simplest measure of precaution during the hours of darkness. But the duty, if it exists, is, as I see it, not a duty to light (unless that be, in the circumstances, the only possible effective precaution) but a duty to take reasonable steps to prevent the obstruction becoming a danger to the public. In a given case there may be other steps which can be taken which would be as effective as lighting, or which a jury might hold to be sufficient. Moreover, the duty, if it exists, must exist in the daytime as well as at night, since certain kinds of obstruction may be dangerous in the daytime unless suitable warning is given of their existence. Thus an obstruction might be placed at a blind corner in such a position that a person driving with reasonable care would be likely to run into it. In such a case the duty, if it exists, would not be merely a duty to light the obstruction at night—it would be a duty to take reasonable steps to give the public due warning of its existence both at night and during the day.

I will now proceed to examine the relevant authorities upon which reliance was placed by counsel on the one side or the other.

In *Geddis v.-Proprietors of Bann Reservoir* (7) the undertakers were empowered by statute to construct a reservoir for the purpose of maintaining a steady flow of water in the river Bann. For this purpose they diverted water from the river Muddock into the reservoir, and sent the water from the reservoir into the channel of the river Muddock at a lower point and so into the river Bann. Owing to failure to cleanse this part of the channel of the Muddock, water overflowed and damaged the plaintiff's land. The principal question debated in the House of Lords was whether the undertakers had power under the statute to cleanse the channel of the Muddock. It was held that they had. The position, therefore, was that the undertakers, having the power (but not in terms the duty) to take the necessary steps to prevent their operations becoming a danger to their neighbours, omitted to take those steps. It is sufficient to quote two passages. LORD HATHERLEY said, at p. 450 :

... in carrying it [*sc.* the object of the Act] into effect, where the means exist of providing against injurious consequences to others, I apprehend, that the true construction of all such powers given to companies is this : You *may* carry out your work to its full extent, and in some cases you *must* carry it out to its fullest extent, in the

manner provided by the Act, but in so doing you shall not create any needless injury—you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if we find that in carrying out your powers damage has been done by you, the law will say that the powers which you can exercise shall be exercised for the prevention of mischief.

LORD BLACKBURN, said, at p. 455 :

For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone ; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.

The conclusion followed necessarily once it was held that the power to cleanse the channel of the Muddock existed. In the present case the power to take reasonable steps to prevent the shelter becoming a danger existed without the necessity of an enactment to that effect such as was required in the *Bann Reservoir* case (7) where, apart from statute, the undertakers had no power to cleanse the bed of the Muddock.

The cause of action is based on negligence. As LORD BLACKBURN said, at p. 456 :

... an action does lie for doing that which the legislature has authorised, if it be done negligently.

Negligence is the breach of a duty to take care. That duty arises by reason of a relationship in which one person stands to another. Such a relationship may arise in a variety of circumstances. It will, to take a simple instance, arise when a person exercises his common law right to use the highway—by doing so he places himself in a relationship to other users of the highway which imposes upon him a duty to take care. Similarly, if the right which is being exercised is not a common law right but a statutory right, a duty to use care in its exercise arises, unless, on the true construction of the statute, it is possible to say that the duty is excluded. If, for instance, the statute expressly authorises the doing of a specific act in a defined manner, no liability arises if the act is done in the manner defined, even if by taking some additional precaution a greater degree of safety could be attained. The question, therefore, in any given case appears to resolve itself into this—does the statute, on its true construction, in authorising the act in question, exclude the duty of taking care in its performance ? An example of cases where the duty is excluded is to be found in *Great Central Ry. Co. v. Hewlett* (3). In that case the railway company without any authority erected gate posts in the highway which constituted an obstruction. Later the company obtained an Act which empowered them to "maintain" the posts and to replace them when necessary on the same site. During the first world war the street was darkened in compliance with the lighting regulations then in force, but the company took no steps to warn the public of the existence of the posts either by means of red lights (which would have been permitted under the regulations) or in any other manner. A taxicab collided with one of the posts and was damaged. It was held that the driver of the cab had no remedy. LORD PARKER OF WADDINGTON stated the general principle in the following terms, at p. 519 :

My Lords, it is undoubtedly a well settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered.

He then pointed out that the only statutory power which the company could be said to be exercising was the power to maintain the posts or rather the negative element in that power by which the company was relieved of the obligation of removing them. The company, therefore, had done nothing since they had merely refrained from removing the posts. LORD PARKER OF WADDINGTON said, at p. 519, that the risk arose not from something which the company was doing (since *ex hypothesi* they were doing nothing) but :

. . . from the existence of the gate posts legalised by the Act coupled with the diminution of light necessitated by the exigencies of the war.

He then said this, at p. 520 :

It is reasonably certain that the legislature was, under the circumstances which prevailed when the Act was passed, satisfied that there was no appreciable risk to the public ; otherwise the legalization of the obstruction without expressly providing precautions to obviate the risk would be inexplicable. The change of circumstances cannot be relevant on any question of construction . . .

- A In other words, if I follow rightly, the Act must be construed with regard to the circumstances existing when it was passed, *i.e.*, the normal conditions of obligatory street lighting ; and if, in those conditions, on the true interpretation of the statute no obligation to light the obstruction arose, the fact that street lighting was subsequently restricted under the lighting regulations could not impose such an obligation. I hope that I shall not be thought guilty of disrespect if I say that I find some of this reasoning a little difficult to follow.
- B In the first place, the posts were situated in the metropolitan area where street lighting was at the date of the Act compulsory : if they had been in an area where street lighting was optional under the Public Health Act, 1875, s. 161 (as is the case in the area where the shelter now in question was situated) the result might apparently have been different, since the Act would then have had to be construed with reference to the fact that the local authority could at any moment have discontinued the lighting of the streets. Moreover, the emphasis which is laid on the absence of any action by the railway company would have been out of place if the company had exercised its powers to replace the posts. In that case it could not have been said that the company had "done nothing at all" since it would have exercised a positive power. It would apparently follow that if, as a result of Hewlett's unfortunate accident, the post had been
- C knocked down and the company had replaced it by a new post, and another taxicab had collided with the new post, the driver could have recovered. However this may be, the decision is, of course, binding upon this court. But I cannot regard it as laying down any new principle. It turned on the construction which the House found it possible to place upon a very special statutory provision in circumstances widely different from those in the present case.
- D In the present case the power exercised was the positive power to erect a shelter in the highway, and it would, I think, be playing with words to say that at the time of the accident all that the respondents were doing was to exercise the negative right not to pull it down. Moreover, at the date when the shelter was erected, not only was there no obligation on the local authority or anyone else to light the street, but lighting regulations were in force similar to those which applied in *Great Central Ry. Co. v. Hewlett* (3). These facts are, in my opinion,
- E sufficient to distinguish the present case from *Hewlett's* case (3) which stands in a class by itself.
- F

LORD SUMNER, at p. 523, treated the case as :

- . . . one in which one party lawfully maintains in a highway something which is capable of becoming dangerous to the public unless another party [*sc.* the lighting authority] takes steps to avert that danger, but where those steps have not been taken . . . whether . . . the danger becomes operative through negligent omission by the
- G party who ought to have averted it, or, as here, it becomes operative under circumstances that excuse or justify that omission [*sc.* the lighting regulations] cannot be material to the obligations of the party who lawfully maintains the structures in the highway.

- He then proceeds to distinguish (among other cases) *Geddis v. Proprietors of Bann Reservoir* (7) on two grounds, *viz.*, that in those cases first the legislature had authorised undertakers to do overt acts which, in the natural course of
- H things, were likely to prejudice members of the public, and, secondly, "the authority is given in general terms," from which fact it was reasonable to infer that the legislature meant them to exercise their authority with reasonable care and not without it. In the case before him, LORD SUMNER said, at p. 524 :

. . . the authority is specific and precise : the thing authorised is not an activity at all ; the section leaves the railway company no selection or choice. It tells them to let things alone . . .

I hope that I shall not be thought hypercritical if I respectfully suggest that for once there is an inaccuracy in the language used by LORD SUMNER. He says

that the section left the company "no selection or choice. It tells them to let things alone." The section surely did not tell the company to do anything; it merely empowered them to leave the posts alone. The statute, I should have thought, did leave the company a choice, *viz.*, the choice between exercising and not exercising this power. Whether unaided by this authority, I should have come to the same conclusion is, of course, immaterial, but I may perhaps point out that the distinction between doing nothing as the result of a deliberate act of volition and doing something might, in the circumstances, be thought to be a rather fine one. It might even have been thought that by exercising its choice in favour of leaving the posts standing, the company was deliberately placing itself in a relationship to the public from which there arose a duty to take care. I only make these observations in order to emphasise my view that the decision turned upon a very narrow point and cannot be regarded as making an inroad upon the general principle. This is important, in view of the interpretation which has been placed upon the decision by cases decided in this court during the present war. LORD WRENBURY, at p. 525, again based his judgment on the proposition that :

... if the duty or authority be simply not to do an act—merely to leave things as they are—it is impossible to be negligent in not doing anything.

Great Central Ry. Co. v. Hewlett (3) was distinguished in *Morrison v. Sheffield Corpn.* (4), a decision of this court upon which the present appellant mainly relies. There the local authority had exercised its power of planting trees in the highway and protecting them by guards under the Public Health Acts Amendment Act, 1890, s. 43. The section provided that the power should not be exercised so as to hinder the reasonable use of the highway by the public. The district in question was presumably one in which street lighting (in ordinary times) was not compulsory as it is in the Metropolis. The corporation had planted trees and surrounded each tree with an iron spiked guard. After the coming into force of an order that all street lights were to be extinguished at a certain hour, the plaintiff in the darkness came into contact with one of the guards and suffered serious injury. The accident took place 17 days after the coming into force of the order, and (as this court pointed out) it might well have been held that, in the circumstances, the duty to warn the public had not yet arisen. But the jury thought otherwise since they found that the defendants ought, if they exercised reasonable foresight and took reasonable measures, to have neutralised the danger before the date of the accident. The case, therefore, was a simple one, in which the defendants had erected and were maintaining an obstruction in the highway which, in the circumstances, was a danger to the public, and had not done what the jury said they could and ought to have done, *viz.*, taken steps to neutralise the danger. The substantial argument for the defendants was that, when the guard was erected, it was reasonably safe, and that no further duty was imposed upon them when, by order, the city lights were extinguished; and *Hewlett's* case (3) was particularly relied on. It was held that there was a continuing duty to keep the guards in a reasonably safe condition, and that this duty was not, in the circumstances, and in view of the jury's finding, abrogated by the lighting order. PICKFORD, L.J., put the point concisely, at p. 872, where he said :

I think there was an obligation on the defendants to take reasonable care to see that it [the guard] was not a danger under the altered conditions.

In answer to the argument that the decision would impose an obligation on local authorities to paint every post and kerb, he said, at p. 872 :

... but in truth it only imposes an obligation to take reasonable care that what they have put in the roadway shall not become a nuisance and a danger under altered conditions.

This decision, and the reasoning on which it was based were, in my opinion, manifestly right and in accordance with the principles laid down in a number of cases. I respectfully do not agree with the view expressed in *Lytus v. Stepney Borough Council* (8) that the decision cannot stand with that of the House of Lords in *Hewlett's* case (3).

The next case to be mentioned is *Sheppard v. Glossop Corpn.* (6), decided in this court. The decision is important for present purposes, not because it is directly in point, but for the reasoning upon which it was based and the

distinctions which were drawn in the judgments. The place in question was one where (as in the present case) the local authority's position in the matter of street lighting was governed by the Public Health Act, 1875, s. 161, *i.e.*, they merely had the power to light at their discretion. They adopted the practice of extinguishing the street lamps about 9 p.m. The particular peril which led to the accident after the lamps were extinguished was not of the local authority's making, nor were they in any way responsible for it. On these facts the conclusion was clear that they were not liable; they could only have been held liable by treating their power to light the streets as being, in the circumstances, equivalent to a duty which it obviously was not. But all three members of the court were careful to distinguish the case from those where the danger is created by the local authority itself. Thus BANKES, L.J., said, at p. 140:

A And I think it will be found that wherever a plaintiff has succeeded in establishing a liability it has been not for merely omitting to light a part of the district but for making it dangerous unless it is sufficiently lighted . . .

SCRUTTON, L.J., observed, at p. 144:

It is clear that if they had placed in a highway an obstruction which might cause damage in the dark to the public using the highway, then they would be required either by lighting or other proper warning to give notice of the obstruction.

Again, at p. 145, he said:

C It is left to their discretion to light or not to light; therefore they need not light at all; if for a time they light they may discontinue either wholly or partially in point of time or in point of space, and the mere discontinuance is no breach of duty. That is, of course, subject to this; that if they place an obstruction in the highway they must by lighting or warning, or by watchmen or fences or other reasonable means, guard against the danger they have themselves created.

D In speaking of the case of *Lamley v. East Retford Corpn.* (9), where LORD ESHER, M.R., as reported, made some observations with which the court in *Sheppard's* case (6) disagreed. SCRUTTON, L.J., said, at p. 146:

A post had been placed in a public footway; it had been there for six weeks; no warning was given of its presence, and a man in the dark lawfully using the footway came into collision with it and was injured. That was amply sufficient ground for the decision.

E As to *Hewlett's* case (3), he observed, at p. 148, that it decided:

. . . no more than this, that where the legislature expressly authorises the existence of a particular obstacle in a highway it does not impose any obligation to light it.

In summing up his views, he again said, at p. 149, that in cases governed by the Public Health Act, 1875, the local authority, although under no obligation to light the streets, would be liable for:

F . . . negligence in putting posts in a highway without warning, and negligence in placing traps and dangers in the streets and not lighting them at night.

ATKIN, L.J., after pointing out that in the case before him the local authority "did not cause the danger; it was already in existence," said, at p. 151, that:

G All the cases in which liability for not lighting has been established against corporations regulated by [the Public Health Act, 1875] can be explained upon the footing that the corporation in question created the danger by which the plaintiff was injured.

These observations as to the existence of liability in cases where the local authority has itself created the danger are, of course, *dicta*. But not only are they weighty in themselves, but, in my respectful opinion, they embody a correct statement of the law and are based on an accurate view of the previous authorities both in the House of Lords and in this court.

H I will now turn to a consideration of the recent cases. In *Greenwood v. Central Service Co.* (10), the plaintiff, a passenger in a taxicab, was injured when the cab collided with an unlighted street refuge in the black-out. The accident took place in Goodge Street where (as was the case in *Hewlett's* case (3)) street lighting is compulsory under the Metropolis Management Act, 1855, s. 130. This duty was suspended, and street lighting was prohibited by para. 1 of the Lighting (Restriction) Order, 1939, which, however (as in *Hewlett's* case (3)) permitted the use of lights up to a specified maximum candle power for the purpose of indicating obstructions upon or near the carriageway of any road. It is clear, therefore, that if there was a duty on the local authority to take

reasonable steps to warn the public, the lighting restrictions did nothing to prevent their carrying out that duty by placing a suitable lamp upon the refuge. They had in fact placed a hurricane lamp upon it, but at the time of the accident it had gone out. It is important to have the facts in mind. The duty, if it existed, was not an absolute duty to maintain a warning system (by lamps or otherwise) but only a duty to take reasonable steps to prevent danger to the public. The local authority had an elaborate system of patrolling the streets with a lorry for the purpose of replacing any lamps which (as they knew was liable to happen) might have gone out, and they had officers on duty attending the extinguished lights. The county court judge held that the authority had employed reasonable means to keep the lights going, and this finding of fact was sufficient to dispose of the case, since it negatived the proposition that the authority had failed to take reasonable steps to warn the public. The argument for the injured passenger followed a different line. It was said that the Metropolis Management Act imposed a duty to light the streets, and that in normal times the performance of that duty made it unnecessary to put a special light upon the refuge. It was then said that the Lighting (Restriction) Order, by empowering the authority to place a warning lamp on the refuge, did to that extent leave the compulsory lighting provisions of the Metropolis Management Act unaffected, and that in failing to exercise that power the authority committed a breach of the duty imposed upon it by the Act. **MACKINNON, L.J.**, dealt with this argument by holding that any duty imposed by sect. 130 of the Metropolis Management Act disappeared when the Lighting (Restrictions) Order was issued. He also held that, assuming that the local authority was bound to use reasonable diligence to render the obstacle safe and innocuous, the finding of fact of the county court judge was conclusive. **LUXMOORE, L.J.**, agreed that the finding of the county court judge was conclusive on the issue of negligence. He also agreed with **MACKINNON, L.J.**, that there was no absolute duty to light the refuge. **TUCKER, J.**, concurred. If I may respectfully say so, I find myself in complete agreement with these conclusions which in no way affect the present question.

The next case is *Wodehouse v. Levy* (11). That was an appeal from a judgment of **CASSELS, J.**, and was in some respects a similar case to that of *Greenwood* (10). **CASSELS, J.**, held that, notwithstanding the Lighting (Restrictions) Order, the absolute duty of lighting the streets imposed by the Metropolis Management Act remained to the extent permitted by the Order. This part of his judgment was overruled by this court in *Greenwood v. Central Service Co.* (10). He also held, however, that the local authority had been guilty of a breach of duty at common law "in failing on the night in question to light this obstruction on the road." He appears to have regarded the common law duty which he postulated as being an absolute duty, since he did not discuss the question whether the local authority had taken reasonable steps to make the shelter safe. The authority had pleaded, at p. 298, that they :

... had placed on the refuge such lights as were allowed by law, but that they had been extinguished or removed or stolen through no fault of theirs.

This allegation, if established, would clearly have been sufficient to support a finding that reasonable care had been exercised. When the case came before this court, the first of the above findings by **CASSELS, J.**, was necessarily reversed. But, in dealing with the second finding, the court negatived the existence of any common law duty to take care. **MACKINNON, L.J.**, who had said (by way of *dictum*) in *Greenwood's* case (10) that there was a common law obligation on the local authority to use reasonable care to prevent the obstruction from being a danger to persons using the highway, pointed out that this was *dictum* only, and said that, having reconsidered the point, he was of opinion that it was wrong. His reasoning is contained in the following passage, at p. 564 ([1940] 4 All E.R., at p. 16) :

It was wrong because as it seems to me the right of the borough council to erect this obstacle in the highway is given them by the Metropolis Management Act, 1855, s. 108. They are given the right to put the refuge in the middle of the highway ; and, if there is any obligation to light it, that also must be discovered from some statute. In normal times of peace that obligation exists under sect. 130 of the same Act ; but, as has been pointed out, sect. 130 has now been temporarily repealed. In the absence of any provision similar to sect. 130, inasmuch as the council are given by statute

the right to erect the obstruction in the highway, there is no statutory and no common law duty to light it. That that is so is shown by two cases. The first is *Great Central Ry. Co. v. Hewlett* (3), and the second is the judgment of BANKES, L.J., in *Baldock v. Westminster City Council* (12).

With the utmost respect, I cannot agree with this. The proposition that :

... they are given the right to put the refuge in the middle of the highway ; and, if there is any obligation to light it, that also must be discovered from some statute.

- A appears to me, with all respect, to run counter to the authorities relating to the duty to take care in the exercise of statutory powers. He relied on *Hewlett's* case (3), and the judgment of BANKES, L.J., in *Baldock v. Westminster City Council* (12) in support of his proposition. My reasons for thinking that *Hewlett's* case (3) does not support the proposition appear from what I have already said in discussing that decision. I find no support for it in the judgment in *Baldock's* case (12) to which I shall refer in a later part of this judgment.
- B My brother went on to say that, assuming a duty to have existed, he could not make out that there was any lack of reasonable care on the part of the borough council. If this had formed the basis of his judgment it would, of course, have put it on all fours with the decision in *Greenwood's* case (10). I do not see how the fact that the obligation to light the streets and the power to erect the refuge are found in the same Act had any bearing on the question : they
- C are two distinct subject-matters, and the duty to light does not condition or affect the power to erect. The suggested connection arises, I think, from regarding the duty whose existence is in question as a duty to light. In truth, as I have already said, it is not—it is a duty to take care. Lighting may or may not be the appropriate or most suitable method of exercising the necessary care. It cannot be the only one since, as I have said, the duty arises in the daytime as well as during darkness ; and, even if all lighting (including the use of warning
- D lights) were to be prohibited, it would not necessarily follow that the undertakers responsible for an obstruction would be entitled to do nothing. If there was a useful, but only partly effective, method of warning the public of the danger, e.g., by the use of white paint, the undertakers would, as it seems to me, be under a duty to make use of it if the duty to take care exists. Whether or not failure to do so would amount to negligence would be a question for the jury. This may be illustrated by the case of obstructions on the pavement,
- E such as sand-bins. If the view were taken by a tribunal of fact (and I could well understand it) that it would be unreasonable to expect a local authority to light every obstruction on the footpath, this would not necessarily justify inaction. A jury might well—and probably would—hold that it was negligent not to do what was possible by, e.g., the use of white paint. The lighting of obstructions in the roadway and the use of white paint upon obstructions on
- F the pavement are the means by which local authorities have in practice interpreted their obligations to the public. It is sometimes surprising to the lawyer to find how often the practice of reasonably-minded men marches in conformity with their legal obligations.

- But I must return to *Wodehouse v. Levy* (11). LUXMOORE, L.J., was also of opinion that to hold that there was a common law obligation to light the obstruction in question would be contrary to the decision in *Hewlett's* case (3) and the
- G *Baldock* case (12), and that if certain observations of SCOTT, L.J., in an earlier case in this court (*Polkinghorn v. Lambeth Borough Council* (13)) meant that there was such a duty he (LUXMOORE, L.J.) would be unable to follow them. He said, at p. 568 ([1940] 4 All E.R., at p. 18), that *Polkinghorn's* case (13) was justified by the fact that there the borough council :

- ... had become subject to a self-imposed duty to illuminate the particular obstruction in the same way as the Westminster City Council had become liable in the
- H *Baldock* case (12).

Polkinghorn v. Lambeth Borough Council (13) was not a war-time case, and compulsory street lighting under sect. 130 of the Metropolis Management Act, 1885, was in full force. The plaintiff's car ran into a street refuge which normally carried a warning light, but the light was for some unexplained reason not working at the time of the accident. There does not appear to have been any evidence as to the length of time which had elapsed since its extinction. SLESSER, L.J., did not refer in his judgment to sect. 130, and he does not appear to have

placed any reliance upon it. He said that the defendants, having utilised their statutory power to place the refuge in the roadway, were bound to exercise reasonable care to prevent injury to others. They had failed in their obligation, and there was no explanation to excuse their non-performance of it. SCOTT, L.J., said that it was the duty of the defendants, under their statutory obligation to light the street, to see that the refuge was sufficiently lighted. He added that whether the case was regarded from the point of view of statutory duty or from that of common law duty, the failure to maintain the light was all that it was necessary for the plaintiff to prove unless the defendants gave evidence to displace the onus by showing that they had been guilty of no fault. The case, he thought, was a simple one and, *prima facie*, was a case of negligence and breach of statutory duty, no answer being attempted to displace that onus. FARWELL, J., preferred to deal with the case as one of negligence and he expressed no opinion as to statutory duty. He held that the onus lay on the defendants to show that the extinction of the light was not due to any negligence of theirs.

All three members of the court, therefore, held that the case should be decided on the ground of negligence; only SCOTT, L.J., thought that it could also be rested on breach of the statutory obligation to light the streets. In *Wodehouse v. Levy* (11) LUXMOORE, L.J., treated the view that the case was one of negligence as being that of SCOTT, L.J., alone; but with all respect, this was not so. Nor do I think that LUXMOORE, L.J., was entitled to regard *Polkinghorn's case* (13) as justified on the principle of a trap enunciated in *Baldock's case* (12). No member of the court in *Polkinghorn's case* (13) relied on any such principle. I must also respectfully disagree with the further opinion of LUXMOORE, L.J., that, if *Polkinghorn's case* (13) meant that there was a common law duty, it was contrary to the decisions in *Hewlett's case* (3), and *Baldock's case* (12). In the later case of *Lys v. Stepney Borough Council* (8), to which I am about to refer, SCOTT, L.J., was a member of the court. *Polkinghorn's case* (13) was not referred to.

I feel bound to point out that if the view expressed in *Wodehouse's case* (11) were correct and local authorities in the metropolitan area had acted upon it (which happily they did not) the streets of London would have been littered with smashed vehicles and the bodies of their occupants. Moreover, the argument is quite inapplicable in a case (such as the present) lying outside the area of compulsory street lighting. Is it to be said that if a local authority outside that area chooses not to exercise the permissive power of lighting its streets it is entitled to leave street refuges unlighted? If so, it would be sheer murder. If, on the other hand, the local authority in such a case is under a duty to take reasonable precautions and lighting the refuges is the only reasonable precaution to take, what becomes of the argument that there can be no duty to light them unless the statute imposes it? It would appear that the distinction between the metropolitan area where street lighting is compulsory and other areas where it is optional cannot have been present to the mind of the court: and it is most unfortunate that *Morrison's case* (4) was not cited.

GODDARD, L.J. (as he then was) the third member of the court in *Wodehouse's case* (11) agreed. He said, at p. 568 ([1940] 4 All E.R., at p. 19), that:

Parliament having authorised the local authority to put a refuge in the street and not having imposed upon the authority the duty of putting a light on the obstruction itself, it follows that the local authority are committing no breach of statutory duty if they put a refuge in the street and do not put a light on that refuge

He, therefore, like MACKINNON, L.J., was taking the view that no duty could exist unless it were imposed by the statute. He went on to say:

. . . but that in no way lessens the obligation of the borough council or other local authority to provide an adequate system of street lighting, and the system would not be adequate if it did not cause a reflection or light to show the position of obstructions in the streets.

And at p. 569 ([1940] 4 All E.R., at p. 19), he concluded by saying:

I can find no duty on the council after that regulation [see the Lighting (Restrictions) Order] came into force under which they were bound to light the obstruction because, as my Lords have pointed out, the provision in para. 4 of the Order that the Order shall not apply to a certain class of lights is only permissive; it takes out of the prohibition, and allows certain lights to be maintained, which otherwise would be an offence,

but it does not seem to me to increase the authority's obligation in any way. I can find no obligation in this case to light a refuge apart from the general obligation to provide an adequate system of street lighting. That became illegal and it follows that the council committed no breach of their duty and the appeal should be allowed.

He, therefore, like the other two members of the court, is finding in the statutory obligation to light the streets the limit of the local authority's duty in respect of giving to the public warning of the existence of the refuge.

A There is another difficulty raised by this decision. Suppose that in peacetime by interruption of the supply in a metropolitan area the lighting were to fail and remain out of action for several days. The local authority would clearly be under no liability if a collision with a shelter took place before it had a reasonable opportunity of lighting it. But could it leave the shelter without a warning light after such a reasonable opportunity had arisen? A local authority would indeed be callous if it took so limited a view of its obligations to the public.

B The next case was that of *Lyus v. the Stepney Borough Council* (8), decided at first instance by HUMPHREYS, J., In that case during the black-out the plaintiff, a pedestrian, was injured by colliding with a sand-bin placed by the defendants on the footpath under their statutory powers. No warning was given to the public, either by lighting or whitening the sand-bin or otherwise rendering it visible to the public. HUMPHREYS, J., decided in favour of the plaintiff. He quoted the statement of general principle enunciated by LORD PARKER in *Hewlett's case* (3), which I have already set out. He pointed out that when the sand-bin was erected in 1936 it was unnecessary for the local authority to take any new precaution to show where it was since they were performing their statutory duty of lighting the streets. The coming into force of the Lighting (Restrictions) Order did not, in his view, absolve them from their duty to take reasonable precautions which he thought would have been fulfilled by painting the sand-bin white. This, in my opinion, was correct. HUMPHREYS, J., regarded the obligation to light the streets, not as the limit of the local authority's duty in respect of making the sand-bin conspicuous, but as something which so long as it was performed, made it unnecessary to take any special steps to perform that duty. Once the street lighting was suppressed, the duty called for the taking of such special steps—not necessarily by lighting the sand-bin. This reasoning is in exact accordance with my own view. HUMPHREYS, J., then dealt with the decision of this court in *Wodehouse v. Levy* (11). He referred to the passage in the judgment of GODDARD, L.J., first quoted above, and said, at p. 655 ([1940] 4 All E.R., at p. 78), that everyone agreed that the local authority are committing no breach of statutory duty in not lighting the obstruction "... so long as the street itself is lighted." He went on to point out that the question of some alternative means of warning such as white paint was not considered. Here again I think that HUMPHREYS, J., was right in thinking that the duty is a duty to take care and not specifically a duty to light. He considered that the case before him was covered by the decision of this court in *Morrison's case* (4) and stated his own view in the following words, at p. 667 ([1940] 4 All E.R., at p. 79):

G "... the mere fact that a corporation are absolved from the duty of lighting the streets does not absolve them from the duty, which the common law imposes on them, to see that persons using the highway are not unduly inconvenienced or injured by any carelessness on the part of the authority.

I agree with this. The rest of the judgment deals with the facts.

On appeal to this court the decision was reversed. The court consisted of my brethren SCOTT, MACKINNON and LUXMOORE, L.JJ., and the judgment of the court was delivered by LUXMOORE, L.J.

H In the judgment it was pointed out that *Morrison's case* (4) was not cited either in *Greenwood's case* (10), or in *Wodehouse v. Levy* (11), and the court addressed itself to the question whether the two latter cases were consistent with *Morrison's case* (4). It examined the decision of the House of Lords in *Hewlett's case* (3) at length and found in that decision a basis for distinguishing *Morrison's case* (4). That basis apparently was that the local authority had two statutory powers, the first to erect the sand-bin, and the second to maintain it. This, with all respect, appears to me to disregard the essential fact which governed the decision in *Hewlett's case* (3), viz., that the statute merely authorised

the maintenance of a post already in existence. The view that undertakers, having power to erect and maintain an obstruction in the highway, can say, once they have erected it, that while thereafter maintaining it they are not engaging in "any active operation" (at p. 150, [1940] 4 All E.R., at p. 470), and therefore cannot be said to be in breach of a duty to take precautions appears to me to lead to the most remarkable consequences. *Hewlett's case* (3) is far from laying down any such proposition and it was in fact negatived in *Morrison's case* (4). The court said that it was "not easy to understand some passages in the various judgments in *Morrison's case* (4)", which, I venture to think, is only true if the reasoning in *Wodehouse v. Levy* (11) is assumed to be correct. But that is the very point: and, again with the utmost respect, I cannot think that it was legitimate, as the judgment proceeds to do, at p. 152 ([1940] 4 All E.R., at p. 471), to explain away these passages by assuming that they were based:

... on the fact that the guards with spikes, which were reasonably safe while street lighting was maintained, were not, by reason of the existence of the spikes, guards authorised by the statute.

I cannot find any suggestion in the judgments in *Morrison's case* (4) that such a view was taken by the court. Nor do I think that any such view ought to be read into the judgment by reason of observations by SCRUTTON, L.J., in *Sheppard's case* (6), observations which, moreover, in my humble judgment, do not carry the meaning imputed to them. The judgment then proceeded to say, at p. 152 ([1940] 4 All E.R., at p. 471):

If, however, *Morrison v. Sheffield Corpn.* (4) is not properly distinguishable from the other cases on the grounds suggested and is in conflict with them, we think that this court is bound in this case, as it was in *Greenwood v. Central Service Co.* (10), and in *Wodehouse v. Levy* (11) to follow the decision of the House of Lords in *Great Central Ry. Co. v. Hewlett* (3).

After most careful and respectful consideration, I find myself forced to the conclusions (i) that in *Lyus' case* (8) this court was wrong in thinking that *Wodehouse v. Levy* was not in conflict with *Morrison's case* (4); (ii) that it was wrong in thinking that it was bound by *Hewlett's case* (3) to decide *Wodehouse v. Levy* (11) and *Lyus v. Stepney Borough Council* (8) as it did. *Greenwood's case* (10) is not concerned in the controversy as it was decided on a matter of fact.

The next case is *Fox v. Newcastle-upon-Tyne Corpn.* (2). This case is admittedly indistinguishable from the present case, save that the accident took place on the evening of the day when the shelter was finished, a distinction which is of no importance in view of the fact that the county court judge found the corporation to have been negligent in not lighting the shelter. The decision, if we are compelled to follow it, is decisive of the present case and it negatives a suggested distinction between the present case and *Wodehouse's* (11) and *Lyus' case* (8) cases, namely, that in those two cases the obstruction was erected before, while in *Fox's case* (2) and the present case it was erected after the Lighting (Restrictions) Order came into force. Quite apart from the decision in *Fox's case* (2), such a distinction appears to me to be incapable of support. I see no principle which could justify it and it would lead to the most remarkable results. A motorist who was prudent enough to select as his objective a shelter erected after the restrictions came into force could recover, while his less prudent brother could not. The spectacle of a local authority carefully lighting the one set of shelters and refraining from lighting the other (as on the argument it would be entitled to do) would not be an edifying one; and here again it is fortunate that local authorities have taken a stricter view of their obligations to the public. The distinction was, however, relied on in argument. My brother MACKINNON, L.J., re-affirmed his opinion as to the correctness of the decisions in *Wodehouse's case* (11) and *Lyus' case* (8), and rejected the suggested distinction based on the date of erection, saying, at p. 124 ([1941] 2 All E.R., at p. 565):

I cannot think that that distinction can make any difference and if it were so it would have startling consequences.

An observation with which I respectfully agree. LUXMOORE, L.J., agreed with this view.

My brother DU PARCQ, L.J., dissented. He thought that the case was con-

cluded by the county court judge's finding of fact that, at p. 127 ([1940] 2 All E.R., at p. 568):

A . . . the shelter had, for the reasonable safety of the public, to be painted when completed; it had been completed; it had not been painted owing to the bad weather, and this seems to me to be an occasion when any reasonable official of the corporation in charge of the erection would have thought it, not only proper and advisable, but essential, that the power to light allowed under the Lighting (Restrictions) Order should be exercised, especially as this obstruction had been erected in a street of some importance.

B DU PARCQ, L.J., referred to *Geddis'* case (7) and thought that it was applicable to the facts of the case before him. He also referred to the distinction between authority given in general terms and authority to do a precise thing, and considered that *Hewlett's* case (3) was an example of the latter. In the case before him he thought that Parliament in saying: "You may construct an air-raid shelter" was saying it in general terms, and that it was: "reasonable to infer that the legislature meant the undertakers to exercise their authority with reasonable care." But my brother DU PARCQ, L.J., was confronted with the decisions in *Wodehouse's* case (11) and *Lyus'* case (8), the correctness of which he felt constrained to accept. While respectfully agreeing with his reasoning down to this point, I find it impossible to accept the distinction which he draws if I rightly understand it. The gist of the decision in the two earlier cases he finds to be that the obstructions had been erected when there were no lighting restrictions and that the local authorities did not come under a new duty, either by statute or at common law, when those restrictions came into force; in the conditions prevailing at the time of their erection the obstructions had been put up with all reasonable care. In the case before him, however, he thought that Parliament, in authorising the erection of an "air-raid shelter on a highway" must have intended that a building should be erected which could safely be used as an air-raid shelter and which would not cause any unnecessary danger to the King's subjects when they were using the highway: and, at p. 132, ([1941] 2 All E.R., at p. 571), he approved the view taken by the county court judge that:

E . . . if a shelter is being constructed on a highway, which must go on existing during a time when there will be no light . . . it is a mere matter of reasonable common sense that it must be made as visible as possible.

The reasoning so far appears to be based upon the fact that what Parliament had authorised was the construction of an "air-raid shelter." If I am right in so thinking I do not find myself able to extract such a particular force from the expression. But my brother's final view is to be found on p. 134 ([1941] 2 All E.R., at p. 572), where he says:

F I should not myself have been alarmed by the consequences which my Lord has pointed out might follow, that the town clerk and the surveyor would be in a difficulty because they might have to light some obstructions and not others. The point I am endeavouring to make is that you must look at the date when the building is constructed. If when the building is being constructed or has just been constructed, it is found that in the then existing circumstances there has been some failure to do what any reasonable person would have known he ought to do, then in my view the undertakers can be held liable; and I cannot see that this places any greater burden upon a local authority than the burden of [showing reasonable intelligence, which I am sure is not more than one ought to be entitled to demand from them.

G This appears to draw the distinction referred to above between shelters erected before and those erected after the Lighting Regulations came into force, unless, indeed, it be meant that an air-raid shelter must, in its very nature, whenever it is erected, be intended to exist during a black-out which everyone would suppose would be in force when the shelter came to be used. But the true view, in my opinion, is that the date of the erection of an obstruction and the purposes for which it is intended to be used are (apart from some special circumstances or some special language in the statute) both immaterial; that the duty to take reasonable care to prevent danger to the public is present throughout: that so long as the streets are properly lit the duty is *ipso facto* performed: but that when the street lighting is suspended, either as the result of lighting restrictions or (in cases where street lighting is optional) as the result of the local authority's decision to extinguish the street lamps or as the result of a break-

down in the lighting system it becomes the duty of the local authority to take such steps to safeguard the public by special danger lights or otherwise, as in the circumstances of the case are reasonably possible. This, in my opinion, is the effect of the decision in *Morrison's case* (4), it was the clear and unanimous opinion of this court in *Sheppard's case* (6), and correctly applies the principles laid down in many authorities in the House of Lords.

The court in *Fox's case* (2) does not appear to have had present to its mind the distinction between the Metropolis and other parts of the country where (apart possibly from some private Act) lighting is not compulsory. It appears to have been assumed that street lighting was in normal times compulsory in Newcastle-upon-Tyne and, indeed, Mr. Berryman, in his argument (at p. 121), refers to "the previously existing obligation of the local authority to keep streets lighted." No private Act imposing this obligation in Newcastle-upon-Tyne was referred to and the case in this respect was treated as being on all fours with *Wodehouse's case* (11) and *Lyus' case* (8) which, in the absence of such an Act, it was not.

The last case is *Foster v. Gillingham Corpn.* (5), also in this court. The court consisted of MAC KINNON and GODDARD, L.J.J., and myself. The defendant corporation had erected a barrier across the highway near a bomb crater. It provided hurricane lamps which, on the night in question, had been blown out by wind. An employee, whose duty it was to attend to the lights, failed to visit them on that night. The plaintiff, when riding his bicycle in the dark, collided with the barrier and was injured. The county court judge held that the defendants were liable, their employee having failed in his duty. MAC KINNON, L.J., thought the case a clear one, falling within the well-known decision in *Penny v. Wimbledon Urban Council* (14). He distinguished *Wodehouse's case* (11) and *Fox's case* (2), saying, at p. 305 :

There is an essential difference between those cases and the present one. In each of those cases the authority concerned was empowered by statute to erect the specific obstruction in question. In each of those cases the authority was given direct statutory authority to erect an obstacle in the highway. The question involved was whether, having such statutory authority to erect the particular obstacle, they were under a duty to light it after dark. I thought, and still think, they were not, and that chiefly because of the decision of the House of Lords in *Great Central Ry. Co. v. Hewlett* (3). In the present case the defendants put an obstruction on the highway without having in any sense the authority of Parliament to put it there. That seems to me to be the essential difference between this case and *Hewlett's case* (3), and, as a consequence, between this case and the cases to which I have referred.

GODDARD, L.J., with whose judgment I expressed my agreement, said that although it was stated that the council was acting under statutory powers, the court had not been told on what statute reliance was placed. He thought, however, that the alleged statutory power was to be found in sect. 83 of the Towns Improvement Clauses Act, 1847. He said, at p. 306 :

Had this accident happened before the war no one would have thought of contending that it was not the duty of the council to light this barrier, and, as their duties are unaffected by the Lighting Regulations and Orders, it follows that the only question is whether they were guilty of negligence in this respect.

While expressing the opinion already referred to as to the desirability of a further consideration of the recent cases, he thought it unnecessary to deal with them as the case was of a class familiar before the war.

It will be noticed that the majority of the court thought that the council had acted under statutory powers and, accordingly, that the distinction drawn by MAC KINNON, L.J., between that case and *Wodehouse's case* (11) and *Fox's case* (2) did not exist. I thought at the time, as did GODDARD, L.J., that the case before us could, in spite of the absence of that distinction, be differentiated from *Wodehouse's case* (11) and *Fox's case* (2). Having had the advantage of a fuller argument in the present case, I have come to the conclusion that I was wrong in so thinking. The result is that the *Gillingham case* (5) is, in my view, inconsistent with those cases. It was suggested to us that GODDARD, L.J., and I were wrong in thinking the the Towns Improvement Clauses Act applied, and that the council was in fact exercising a common law power vested in it as the highway authority. This may be so. But it does not alter the fact that our decision was based on the view that the power exercised was a statutory one. In any case, I think that the suggested distinction between a statutory power and

a common law power does not exist where all that the statute does is to authorise in general terms the construction of an obstacle on the highway which will be a danger to the public unless precautions are taken. To repeat what I ventured to say earlier in this judgment, the undertakers in each case, by exercising a power, in the one case statutory, and in the other at common law, place themselves in a relationship to the public which from its very nature imports a duty to take care. I prefer this way of putting it to saying that a duty to take care is implied in the statute—I do not much like the idea of implying duties which the legislature could have imposed by express language. The result, however, appears to be the same and the question is, on the view that I favour, has the legislature on the true construction of the statute manifested an intention that the relationship created should not import a duty to take care? and, on the other view, does the statute on its true construction negative the existence of an implied duty?

A to the suggested distinction between the power to erect and the power to maintain. It would be a curious result if the undertakers, while constructing the obstacle, were under a duty to take care by lighting or otherwise in respect of a stack of bricks left in the highway and were absolved from any such duty when the bricks had been assembled in the form of a completed shelter. Yet this would apparently be the result if the undertakers could say that in “maintaining” the shelter they were in fact performing no positive act.

C An alternative argument was put forward on behalf of the appellant to the effect that the respondents had taken upon themselves a duty towards the appellant in that they had adopted the practice of lighting shelters in their area; and reliance was placed on *Baldock v. Westminster City Council* (12), a decision of this court. This case as I have already said, was relied on by both MAC-KINNON, L.J., and LUXMOORE, L.J., in *Wodehouse v. Levy* (11), and linked D with *Hewlett's* case (3) as authority for the proposition that there was no statutory or common law duty to light the shelter. The accident in *Baldock's* case (12) took place in the metropolitan area during the currency of the Lighting Restrictions in the last war. A taxicab ran into an unlighted street refuge the lighting of which was erratic owing to the difficulty of maintaining pressure. The jury found that the accident was due to negligence on the part of the defendants in omitting to maintain a danger lamp on the refuge, but that there was no E conclusive evidence to show what caused the lamp to go out on that particular occasion. On these findings, the deputy county court judge entered judgment for the defendants, holding that there was no evidence upon which the jury could find negligence. The divisional court (LUSH, J., and BAILLACHE, J.) held that there was evidence that the lamps generally were liable to go out owing to low pressure and that there was need for guarding against that danger and that was a question of fact for the jury. They allowed the appeal. The F duty they found to exist by reason of the fact that the defendants had recognised the existence of a duty to light the refuge and had accordingly “undertaken to perform it.” On appeal to this court BANKES, L.J., declined to express any opinion as to the right of the local authority to extinguish the lights on all their refuges but agreed with the view that they had taken a duty upon themselves. This he explained by treating the intermittent lighting of the refuge as in the nature of a trap because, as he said, at p. 503:

G . . . the public are allowed to believe that the shelters are lighted, and to the knowledge of the local authority they are sometimes lighted and sometimes not. WARRINGTON, L.J., agreed. SCRUTTON, L.J., referred to *Morrison's* case (4), the problem in which he said was very similar. He made no mention of a self-imposed duty or of a trap and held that the finding of the jury being supported by evidence was conclusive.

H In *Knight v. Sheffield Corp'n.* (15) HILBERY, J., expressed the opinion that the view taken by BANKES, L.J., was an application of a principle followed in several earlier cases, notably *Smith v. South Eastern Ry.* (16). Whether or not the evidence in *Baldock's* case (12) was sufficient to justify the application of any such principle I need not enquire, nor is it necessary to express any view as to the suggested principle itself.

In the present case MACNAGHTEN, J., held that the argument based on *Baldock's* case (12) failed since the evidence was insufficient to show that the appellant was the victim of a trap. I do not find it necessary to say whether in my opinion

the view of MACNAGHTEN, J., as to the inapplicability of *Baldock's* case (12) was right. But I am bound respectfully to state my view that *Baldock's* case (12) is no authority for the proposition as to the absence of a duty to take care, for which it was cited in *Wodehouse v. Levy* (11): The question was not discussed, nor was any view with regard to it expressed either by BANKES, L.J., or by WARRINGTON, L.J., while SCRUTTON, L.J., by his reference to *Morrison's* case (4), appears to me to have, by implication, answered the question in the way in which, in my humble judgment, it ought to be answered.

In the result, I am of opinion that the three cases, *Wodehouse's* case (11), *Lyus's* case (8), and *Fox's* case (2), cannot be reconciled with *Morrison's* case (4), nor, indeed, with *Polkinghorn's* case (13), or *Foster's* case (5), if my remarks upon these two cases are correct. In these circumstances, as I am entitled to select between the conflicting authorities in this court, I unhesitatingly prefer not to follow the three cases in question.

Since writing the above I have been reminded of the decision of the House of Lords in *East Suffolk Rivers Catchment Board v. Kent* (17). That was a case where the flooding was not caused, as in *Geddis's* case (7), by the exercise of a statutory power (namely, the power to construct a reservoir and to divert waters). As VISCOUNT SIMON, L.C., said, at p. 85 ([1940] 4 All E.R., at p. 531):

In the present case the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskillfully, were endeavouring to counteract.

In view of this the actual decision is not in point. But a clear distinction was drawn between the case then before the House and cases where the authority itself creates the danger. VISCOUNT SIMON, L.C., said, at p. 87 ([1940] 4 All E.R., at p. 533):

On the other hand, if the public body by its unskillful intervention created new dangers or traps, it would be liable for its negligence to those who suffered thereby. And he quoted with approval the observations of SCRUTTON, L.J., in *Sheppard's* case (6) as to the liability for negligence in putting posts in a highway without warning and in placing traps and dangers in the streets and not lighting them at night. Again, LORD ROMER, at p. 99 ([1940] 4 All E.R., at p. 541), said that in *Geddis's* case (7) the damage complained of:

... was damage that he would not have sustained had the statutory authority refrained from exercising its powers. It was damage inflicted upon him by reason of the fact that the authority did exercise its powers.

He, too, approved of the distinction drawn in *Sheppard's* case (6) between dangers created by the local authority and dangers which they had not created. LORD PORTER also approved of this distinction. As he said, at p. 106 ([1940] 4 All E.R., at p. 546):

It is damage caused by negligently doing the act authorised, not damage which is not prevented because the act has not been done or has not been done efficiently or in time which is under consideration.

I find in these observations strong support for the view which I have taken.

MACKINNON, L.J.: I have read with respectful admiration the elaborate judgment of LORD GREENE, M.R.,. If I express, as I do, my concurrence with his reasoning, and with the conclusion at which he has arrived, that is equivalent to saying, in the circumstances, "*Peccavi*." I believe I have never allowed any false pride to make me hesitate in such an avowal when it has been necessary. Nor do I feel any consolation in reflecting that if I have erred I have done so in good company.

The only passage in the judgment that has just been read that I do not find convincing is the attempt to explain the *ratio decidendi* of *Great Central Ry. Co. v. Hewlett* (3), in the House of Lords. The decision of that case in this court, in favour of the taxi driver, is not reported. But it is stated in *Great Central Ry. Co. v. Hewlett* (3), at p. 514, that it was so decided upon the principle of *Geddis v. Bann Reservoir* (7)—that is, as enunciated by LORD BLACKBURN, at p. 455:

... no action will lie for doing that which the legislature has authorised, if it be done without negligence ... but an action does lie for doing that which the legislature has authorised if it be done negligently.

The legislature having authorised the railway company not only "to maintain" but also "to renew and replace" the obstacle, I confess myself unable to under-

stand the proposition that when it said, "You may maintain" it did not authorise the company to do anything; but that when it said, "You may renew and replace" it did authorise the company to do something, so that the principle of *Geddis v. Bann Reservoir* (7) became applicable, in favour of any subsequent taxi driver when the company had repaired the effects of Hewlett's collision.

I mention this not from any desire to renew the discussion, but only because I believe that the error to which, in company with several of my brethren, I have pleaded guilty, arose from our effort to give effect to the paramount decision of the House of Lords, as we tried to understand it, in *Hewlett's case* (3).

UTHWATT, J.: I agree with the judgment of LORD GREENE, M.R. The circumstance that the works were built and are kept standing in a highway in due exercise of statutory powers precludes liability on the ground of nuisance attaching to the undertakers responsible for their erection and maintenance, but user by virtue of a statute of the highway—for the place remains a highway—stands, in my view, in no different position from user finding its justification in a common law right. The common law duty owed to other users to take reasonable care in the use of the highway attaches unless that duty is expressly or impliedly negated by some statute. That, I think, is clear on the cases.

The fact that some authority is under a general duty to light the highway, or possesses a power so to do, if it be right to treat the existence of that power or duty merely as one of the facts in the case, is irrelevant to the existence of the undertakers' duty to take care. Performance of that duty or exercise of that power by the authority may, in practice, if properly carried out, relieve the undertakers of the necessity of taking any steps themselves to indicate the dangers arising from the obstruction for which they are responsible—the duty to take reasonable care not in this case demanding action on their part—and any sudden breakdown of the arrangements made by that authority is relevant on the question of fact whether reasonable care has in any particular circumstances been shown by the undertakers—the undertakers being entitled to take facts as they find them.

But it may well be that the existence of a power or duty to light in some authority ought not to be treated merely as one of the facts of the case, but ought to be treated as part of the general frame within which the powers given to the undertakers are to take effect when the statute conferring a power or imposing the duty is in operation at the date of the passing of the undertakers' statute. That is essentially a matter of construction of the statute governing the operations of the undertakers. Where a power is concerned, there appears to be no logical reason why, if treated as part of the general frame, the obligation of the undertakers to take due care should be affected. The power may or may not be exercised, or may be exercised only partially. Its existence, therefore, is no reason for reading into the statute an implied exemption from the duty to take care.

Where there is a duty, the case is somewhat different. But a conclusion that the existence of the authority's duty to light absolves the undertakers from an obligation to take due care seems logically to involve that, as a matter of construction of the undertakers' statute, they are authorised to proceed on two assumptions, first, that the duty will be performed, and, second, that it will be performed in such a way that the lighting given in performance of that duty will properly protect other users of the highway, whatever works the undertakers may lawfully carry out in the exercise of their powers. That second assumption might well be contrary to reasonable expectation, when general powers are given to undertakers, or where lighting may not in all circumstances be the only precaution necessary to give effectual warning to other users of the highway. It is unnecessary in this case to pursue this question further, for one is here concerned only with the existence of a statute giving a power to light. I do not see, as a matter of construction of the undertakers' statute relevant here, that the existence of that power affected the duty of the undertakers to take due care.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Pattinson & Brewer* (for the appellants, plaintiff in the court below); *C. W. Radcliffe*, clerk to the Middlesex County Council (for the respondents, defendants in the court below.)

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re HIPWELL, HIPWELL v. HEWITT.[COURT OF APPEAL (Lord Greene, M.R., du Parcq and Morton, L.J.J.),
July 2, 1945.]

Wills—Construction—Ultimate gift of daughter's settled fund—If daughter should die without leaving any child, fund to be divided between the other daughters of testator living at her death and "the issue then living of any who shall have previously died leaving issue such issue to take their parent's share"—"Issue"—"Parent's share"—Rule in Sibley v. Perry displaced by context of will—"Issue" intended to include grandchildren. A

By his will the testator gave each of his daughters a life interest in a settled fund and provided that on the death of each daughter the principal should be held in trust for "the children of the respective daughter or the issue of any such child" as the daughter should by will or codicil appoint. The testator further provided that in default of appointment the fund should be held in trust for the daughter's children who should attain 21, and "in case there shall not be any such child of such respective daughter then upon trust for the others or other of my daughters who shall be living at her death and the issue then living of any of them who shall have previously died leaving issue such issue to take their parent's share." In dealing with the interests of his sons, the testator referred to the powers of appointment "provided for such of my daughters and their children and issue" and later referred to "any child or issue of such son." F.M.H., one of the testator's daughters, had died without issue, and the question to be determined was whether, on the true construction of the testator's will, the word "issue" in the ultimate gift of that daughter's settled fund included grandchildren as well as children. The appellant was the grandson of Mrs. T., another of the testator's daughters. The appellant's mother would have been entitled to a share of F.M.H.'s settled fund, if she had survived her mother, Mrs. T.; but she had died before Mrs. T. The appellant claimed that he was entitled to a share of the fund. He contended that the word "issue," in the ultimate gift, included grandchildren as well as children because, by using the two different expressions "children" and "issue" in the same phrase, the testator had intended to distinguish between children and remoter issue. The respondent contended that the ultimate gift must be construed in accordance with the rule in *Sibley v. Perry* (2) and a daughter's grandchildren were, therefore, excluded, because the words "the parent's share" restricted the gift to "issue" to children of the parent:— B C D E

HELD: (i) upon the true construction of the will, the rule in *Sibley v. Perry* (2) was displaced by the context. By deliberately using the two different words "children" and "issue" in the same phrase, the testator meant the word "issue" to have its primary meaning, *i.e.*, to include descendants of every degree. F

(ii) the appellant was entitled to a share of F.M.H.'s settled fund, because the word "issue" in the ultimate gift included grandchildren.

[EDITORIAL NOTE.] This case considers the rule in *Sibley v. Perry* (2), which is set out in *HAWKINS ON WILLS* as follows: "Where the 'parent' of 'issue' is spoken of, the word 'issue' is *prima facie* restricted to children of the parent." DU PARCQ, L.J., here suggests that the latter part of the rule would be better expressed as: "the word 'issue' may in its context be restricted to children of the parent." With regard to the will under consideration it is held that the rule in *Sibley v. Perry* (2) is displaced by the context, particularly by the use by the testator of the words "issue" and "children" in the same phrase, from which the court concludes that he was thinking of a wider class than children when he used the word "issue." G

As to **ISSUE**, see *HALSBURY*, Hailsham Edn., Vol. 34, pp. 313-316, paras. 362, 363; and for **CASES**, see *DIGEST*, Vol. 44, pp. 851-859, Nos. 7051-7138.] H

Cases referred to:

* (1) *Ralph v. Carrick* (1879), 11 Ch.D. 873; 44 Digest 853, 7081; 48 L.J.Ch. 801; 40 L.T. 505.

* (2) *Sibley v. Perry* (1802), 7 Ves. 522; 44 Digest 856, 7113.

* (3) *Re Timson, Smiles v. Timson*, [1916] 2 Ch. 362; 44 Digest 859, 7136; 85 L.J.Ch. 561; 115 L.T. 55.

* (4) *Re Burnham, Carrick v. Carrick*, [1918] 2 Ch. 196; 44 Digest 854, 7085; 87 L.J.Ch. 617; 119 L.T. 299.

(5) *Ross v. Ross* (1855), 20 Beav. 645; 44 Digest 857, 7119.

(6) *Re Embury, Page v. Bowyer* (1913), 109 L.T. 511; 44 Digest 859, 7135.

(7) *Re Johnson, Pitt v. Johnson* (1914), 111 L.T. 130; 44 Digest 768, 6265.

APPEAL by a great-grandson of the testator from a decision of UTHWATT, J., dated Mar. 2, 1945. The appellant claimed to be entitled, under the testator's will, to a share in the settled fund of Florence May Hipwell, a daughter of the testator who died without issue. The facts and relevant clauses of the will are set out in the judgment of LORD GREENE, M.R.

R. Gwyn Rees for the appellant.

L. M. Jopling for the trustee of the settled fund.

C. Montgomery White for the other respondents.

LORD GREENE, M.R.: In *Ralph v. Carrick* (1) decided by this court in 1879, BRETT, L.J., said that he had no objection to be present at the funeral of *Sibley v. Perry* (2). I do not think it is possible to say that that long awaited event has yet taken place. At any rate, it is not necessary for us to decide that matter. It may be truer, perhaps, to say that the body of the so-called rule in *Sibley v. Perry* (2) has reached the stage when only strong application of artificial respiration will keep it alive. I think for present purposes I can assume that *Sibley v. Perry* (2) lays down a rule of construction, but that it is a rule of construction which, like all other rules of construction, must yield to a sufficient context. The courts nowadays are not astute to extract rules of construction from earlier decisions and that is a thing much to be rejoiced at. As late as 1916, in *Re Timson* (3), this court appeared to have given a blessing to the rule provided the case was a suitable one for its application. The rule, as stated in HAWKINS ON WILLS, 3rd Edn., p. 114, in terms which met the approval of LORD COZENS-HARDY, M.R., in *Re Timson* (3), is as follows:

Where the "parent" of "issue" is spoken of, the word "issue" is *prima facie* restricted to children of the parent.

As so stated, it is open to what is a fair criticism, that it rather induces one to construe wills in, so to speak, watertight compartments and, having found the word "parent" in conjunction with the word "issue," leads one to say: "Now that puts the rule in *Sibley v. Perry* (2) in the saddle. Our next task is to see whether we can find something further in the will to knock it out of the saddle."

I have always thought that the proper way to construe a will, like any other written document, is to construe the whole of the document, and not to place *prima facie* meanings on particular words but to place a final and definitive meaning upon the words arrived at by an examination of the document as a whole. However, I need not take up time with these considerations, because I will accept for the purpose of this case that that is a rule of construction and that it is correctly stated; but it is perfectly clear from a number of authorities that, if the context is sufficient, the use of the word "parent" in connection with "issue," does not necessarily have the effect of cutting down the word "issue" so as to mean "children." As SARGANT, J., put it in *Re Burnham* (4) at p. 204:

... such a clause is quite susceptible of being construed so as to provide for representation in each successive generation ...

In other words, the reference to "parent's share" can, if the context is sufficient, be construed as merely a stirpital direction and not as assuming that the parent in question would necessarily have to take a share.

I need not go into the details of the various cases which have dealt with these matters. They are *Ross v. Ross* (5); *Re Burnham* (4) which I have just referred to; another case of SARGANT, J.'s, *Re Embury* (6); and, to the same effect or with the same idea, *Re Johnson* (7), in this court. I, therefore, have to set myself the task of seeing whether the case is one where the rule in *Sibley v. Perry* (2) applies as UTHWATT, J., thought, or whether the context here excludes the rule.

The relevant provisions in the will concern the settled funds which the testator settled upon his daughters. After giving each daughter a life interest in a settled fund, he provides that upon her death the principal is to be held:

... in trust for all and every or any of the children of the respective daughter or the issue of any such child respectively ... as the respective daughter ... shall by will or codicil appoint give or bequeath the same.

It is said on behalf of the appellant that in that clause the testator has used two quite different expressions, "children" on the one hand and "issue" on the other. It is said that when talking of rules of construction, it is natural to expect that the testator in using those two different expressions meant two different things. Whether he did or did not, like everything else, must depend on the construction of the will as a whole. But down to this point I am disposed to assume, like other sensible people, that this testator when he drew a distinction between "children" and "issue" was intending to draw a real distinction. Counsel for the respondents (other than the trustee of the settled fund) suggested that the testator used the word "issue" in this clause because he thought there might be some confusion if he had used the word "children." He had already referred to the "children of the daughter" and then goes on to deal with the "issue of any such child" which counsel for the respondents says simply means "the children of any such child," the word "issue" having been preferred to the word "children" in order to avoid a possible ambiguity. What that ambiguity was, or why the testator should have been afraid of it, I am afraid I quite fail to see. It seems to me if, when he came to the point where he writes the word "issue," he had been thinking of children of a child of a daughter, he would have said so.

That, I think, is confirmed by a reference to two other passages in the will in which the testator refers back to and describes in concise language what he had done in the case of his daughters' shares. In dealing with the interests of his sons, he directs that those interests:

... shall be held upon the same or the like trusts for his or their children or child and with the same or the like power of appointment as are hereinbefore declared with regard to the sums of £3,500 provided for such of my daughters and their children and issue as aforesaid.

There the testator is saying "In the case of my daughters I have given a power of appointment to them in favour of their children and issue": *i.e.*, the daughters' issue. That is his method of describing what he had in fact said in respect of the daughters, where the power of appointment was in favour of the children of the daughters or the issue of any such child. He treats that as being in effect a power of appointment among the children or issue of the daughters. Therefore, in that referential clause, in spite of the fact that UTHWATT, J., seems to have thought otherwise, he would appear to be using the phrase "children and issue" in reference to his daughters as signifying two quite different classes of relationship. There is a similar reference later in the will, when the testator, still dealing with the sons' shares says:

... in default of any child or issue of such son being in favour of my other sons who shall be living at the death of such respective son and the issue then living of such of them as shall have died leaving such issue to take their parent's share.

That raises the same point as we have to deal with here in the case of the daughter.

In saying what I do about the meaning of the word "issue" in this part of the gift, I am in no way suggesting that it necessarily bears the meaning which the mind at first sight would be more naturally prepared to attribute to it. We must look and see whether there is anything to alter it, or to lead us to the view that in using the word "issue" in the very same clause as he used the word "children" the testator is really using two different words to describe one and the same thing. The part of the clause under which the question arises is the disposition in default of appointment. It is as follows:

In default of any such appointment gift or bequest and so far as any such appointment shall not extend then in trust for all and every her children or child who shall live to attain the age of twenty-one years if more than one equally share and share alike and in case there shall not be any such child of such respective daughter then upon trust for the others or other of my daughters who shall be living at her death and the issue then living of any of them who shall have previously died leaving issue such issue to take their parent's share but as between themselves to take as tenants in common.

There, it is said, is the case for the application of the rule in *Sibley v. Perry* (2). You have a gift to issue and reference to their parent's share.

The first point to notice is that, if that be the true result—and I am not suggesting this is the least bit conclusive—the class of beneficiaries to take under the gift in default of appointment is smaller than the class which would take under an exercise of the power of appointment because, even on Mr. Montgomery

White's own view a great-grandchild of the testator could take by appointment, whereas, he says, under the gift in default of appointment, a great-grandchild would be excluded. The present appellant, who is the grandson of Mrs. Talbot, one of the testator's daughters, would be excluded upon that view. His mother was Mrs. Harpur and she died before Mrs. Talbot. If Mrs. Harpur had survived Mrs. Talbot, of course Mrs. Harpur would have taken a share. But, it is said, the great-grandchild, the present appellant, does not take.

A It is pointed out by counsel for the respondents that if the words "their parent's share" have not the force of excluding great-grandchildren, the result might be that a great-grandchild would be taking a share which his parent never could have taken, because, if the parent of that parent had been alive at the moment indicated, that parent of that parent would, of course, have taken, and the great-grandchild's parent would never have had a share. That is a perfectly just observation. But again, whether or not the words are to be construed in that sense must, in my opinion, depend upon the context, in the sense that if there is a sufficient context to displace that construction (and there is no rule of construction to the contrary) it is permissible to construe them in the sense in which SARGANT, J., construed similar words in the passage to which I have referred.

C Mr. Montgomery White, faced with the difficulty of the use of both words "children" and "issue" in the clause containing the power of appointment, suggested, as I have said, that the word "issue" was used not as meaning something different from "children," but with a view to avoiding some supposed possibility of confusion; he then wishes to have that construction of his confirmed by a reference to the word "issue" in the clause in default of appointment, as construed in accordance with the rule in *Sibley v. Perry* (2). But I cannot deal with the construction of this part of the will in that way. Indeed, the very question is whether, on the construction of the will as a whole, the rule in *Sibley v. Perry* (2) applies at all; and in answering that question, one is bound to give full weight to anything which one finds in the will which appears to have a sufficiently clear meaning and to indicate that the testator is really in his mind thinking of a different class when he uses the word "issue" from that of which he is thinking when he uses the word "children," and I cannot use the rule in *Sibley v. Perry* (2) to force me to construe the use of the word "issue" in the appointment clause as meaning "children." I adhere to the view that the meaning of that word to which the mind naturally inclines is the correct one, and that it would be properly construing this will to read that and the gift in default of appointment together and then to decide what is the meaning of the word "issue." The word must have the same meaning in both clauses. It cannot mean "children" in one and "issue" in the other. Which is the right one? I venture to think that the prevailing consideration in this particular will is that you find the testator definitely using two words where one would do.

F I do not think that there is anything else in the will which helps, but in my judgment, assuming and accepting the existence of the rule in *Sibley v. Perry* (2), and regarding it like all other rules of construction as one which only applies where the context does not exclude it, I have come to the conclusion, with great respect to UTHWATT, J., and, as I am differing from him, I must say with a little hesitation, that the context here excludes the rule and that accordingly the appropriate declaration should now be made.

G DU PARCQ, L.J. : In *Sibley v. Perry* (2) LORD ELDON said that the construction of the will was to be furnished from all the different parts of the will, and the design and tenor of it as manifested by its contents. That, as everyone will agree, is the paramount rule of construction of wills and, indeed, of other documents, and all other rules which have been formulated must be understood as being subsidiary to it.

H My Lord has referred to the statement of the rule on which the respondents rely in *HAWKINS ON WILLS*, at p. 114. That statement may perhaps be said to be accurate if—but only if—much stress is laid on the qualifying words "*prima facie*." I should prefer to state the latter part of the rule a little differently and to say not "the word 'issue' is *prima facie* restricted to children of the parent," but "the word 'issue' may in its context be restricted to children of the parent."

For the reasons which my Lord has given, I agree that UTHWATT, J., did not

correctly construe this will. I say it with the greatest respect to him and with proper diffidence. I agree that the appeal should be allowed.

MORTON, L.J. : I agree that this appeal should be allowed and I have very little that I desire to add. BRETT, L.J., in *Ralph v. Carrick* (1), at p. 884, said :

... I should have no objection to be present at the funeral of *Sibley v. Perry* (2)

For my part, I should be very glad to be present on that occasion. But assuming that the time has not yet come for the burial of *Sibley v. Perry* (2) I agree that the rule here, if it be applied, is displaced by the context to be found in the will. The will seems to be a carefully drawn document and in several places, to which my Lord has called attention, the testator used, as it seems, the word "children" as a word of different meaning from the word "issue." He refers in the power of appointment to "the children of the respective daughter or the issue of any such child." Later he refers to the power of appointment "provided for such of my daughters and their children and issue." Later he refers to "child or issue of such son," and so on. It seems to me that this is a testator who said "issue" when he meant "issue"—i.e., when he meant issue to have its primary meaning, with all descendants of every degree ; and he used the word "children" when he meant "children."

Appeal allowed. Costs of all parties as between solicitor and client out of the settled fund.

Solicitors : *Ingledew, Brown, Bennison & Garrett*, agents for *Ingledew & Sons*, Cardiff (for the appellant) ; *Hyde, Mahon & Pascall*, agents for *W. B. & W. R. Bull*, Newport Pagnell, Bucks (for the trustee of the settled fund) ; *Clifford-Turner & Co.* (for the other respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Considered. DALE v. I.R. COMRS.
[1951] 2 All E.R. 517.

HEARN (INSPECTOR OF TAXES) v. MORGAN. PRITCHARD (INSPECTOR OF TAXES) v. HARDING LATHOM-BROWNE.

[KING'S BENCH DIVISION (Macnaghten, J.), July 17, 1945.]

Income Tax—Annual payment—Annual sum paid to trustees of settlement as "remuneration for services"—"Annual payment . . . wholly out of profits or gains brought into charge"—Remuneration arising under order of court—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 19.

The respondents Morgan and Harding Lathom-Browne are the present trustees of a marriage settlement, dated Sept. 18, 1892. In 1909 the then sole trustee of the settlement died and, by order of the court, two new trustees, A. and L.-B., were appointed. Since the estate comprised by the trust fund was very large, the court ordered further that the new trustees were to be remunerated by a fixed annual sum payable out of the trust income. On Aug. 12, 1913, A. died and, by another order of the court, dated Jan. 26, 1914, the respondent Morgan was appointed trustee in A.'s place. On Aug. 6, 1928, L.-B. died. In exercise of a power conferred upon her by the settlement, the beneficiary, on Jan. 15, 1929, appointed the second respondent to be a trustee in the place of L.-B. By deed of appointment she covenanted with the second respondent that he should, during so much of her life as he would continue to act as a trustee to the settlement, be entitled, by way of remuneration, to such a sum in every year as, after deduction of income tax at the standard rate for the time being in force payable in respect thereof, would leave a clear yearly sum of £400. The whole of the trust income was received under deduction of tax at the source. The question for the determination of the court was whether the respondents were assessable to income tax in respect of all remuneration received by them in their character as trustees of the settlement :—

Held : the remuneration received by the trustees was an annual payment "payable wholly out of profits and gains brought into charge to tax" within the All Schedules Rules, r. 19, and the trustees were, therefore, not assessable in respect thereof.

Baxendale v. Murphy (1) applied.

[EDITORIAL NOTE. It was decided in *Baxendale v. Murphy* (1) that the remuneration of a trustee payable under the terms of the settlement was an "annual payment" within s. 19 of the All Schedules Rules, and was therefore not the subject of direct assessment upon the trustee. It is here held, in relation to the sum payable to a trustee appointed by court, that this decision applies equally to remuneration payable by order of court; it is as if the settlor had originally provided that one of the trusts of the settlement was to pay the remuneration.

A AS TO TRUSTEES ENTITLED TO FIXED ANNUAL SUM OUT OF TRUST INCOME FOR SERVICES, see *HALSBURY*, *Hailsham Edn.*, Vol. 17, p. 177, para. 369; and FOR CASES, see *DIGEST*, Vol. 28, p. 87, No. 497.]

Case referred to:

**(1) Baxendale v. Murphy*, [1924] 2 K.B. 494; 28 Digest 87, 497; 93 L.J.K.B. 974; 132 L.T. 490; 9 Tax Cas. 76.

B CASE STATED under the Income Tax Act, 1918, s. 149 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. On appeals by T. H. Morgan (the first respondent) against an assessment in the sum of £1,043, and by Major Harding Lathom-Browne (the second respondent) against an assessment in the sum of £695 10s. 0d., made upon them respectively under Sched. E for the year 1941-1942, the following facts were found by the commissioners:

C The said assessment was made on Morgan in respect of remuneration received by him as a trustee of a settlement. . .

D On Sept. 15, 1892, a settlement was made in contemplation of the marriage between Lord Binning and Miss Katherine Salting. Under the marriage settlement William Salting, the father of the said Katherine Salting, covenanted to pay to trustees the sum of £100,000 on trusts for the benefit of Lord and Lady Binning and their issue. It was also provided that the property to which Lady Binning should be, or become, entitled should, subject to certain exceptions, be brought into the marriage settlement. The original trustees of the marriage settlement were Sir Charles Hall and Wickham Flower. **E** The power to appoint new trustees was vested in Lord and Lady Binning and in the survivor of them . . . William Salting died on June 23, 1905. Provision was made for the trustees to reimburse themselves for expenses. They were to be at liberty to employ a solicitor or other agent and were to be entitled to an allowance of all charges and expenses so incurred. No provision . . . was made in the marriage settlement for giving to the trustees any remuneration or annual payment for their services as such trustees.

E The first original trustee, Sir Charles Hall, died on Mar. 9, 1900, and George Salting was appointed in his place by deed of appointment on May 25, 1900, Wickham Flower, the second original trustee died on Sept. 19, 1904, and George Salting died on Dec. 12, 1909. The marriage settlement was then left without trustees until an application was made to the Chancery Court, and by an order of that court, dated July 24, 1911, and hereinafter referred to as the 1911 Order, W. J. Adams, the Revd. R. C. Lathom-Browne and Lord Binning were appointed trustees. . . Under the terms of the 1911 Order it was ordered "That the said W. J. Adams be allowed £600 per annum and the Revd. R. C. Lathom-Browne £400 per annum out of the income of the trust estate (in addition to their costs, charges and expenses) as remuneration for their acting as trustees so long as they shall respectively continue so to act." There had previously been no authority for the payment of any remuneration to trustees, and there is no trace of any such remuneration having in fact been previously paid.

F W. J. Adams died on Aug. 23, 1913. Lord Binning . . . applied to the Chancery Court, and the court made an order dated Jan. 26, 1914, and hereinafter referred to as the 1914 Order, appointing T. H. Morgan . . . a trustee in place of the said W. J. Adams, deceased.

G . . . Under the terms of the 1914 Order it was ordered "That the said T. H. Morgan so long as he shall act as such trustee be allowed £600 a year out of the income of the funds subject to the trusts of the said settlement (in addition to his costs, charges and expenses) as remuneration for his acting as such trustee."

H Lord Binning died on Jan. 12, 1917. The then surviving trustees of the marriage settlement were the Rev. R. C. Lathom-Browne and Morgan . . .

On the application of Lady Binning an order was made by the Chancery Court dated Apr. 12, 1922, and hereinafter referred to as the 1922 Order . . . A question had arisen as to income tax on the sums received by the trustees as remuneration. The 1922 Order determined this question in the following terms: "It is ordered that the total annual remuneration payable to the trustees of the said settlement under the said orders dated respectively July 24, 1911, and Jan. 26, 1914, during the lifetime of . . . Lady Binning be firstly the annual sum of £1,000 and secondly such further annual sum as after deducting from the aggregate of both the said annual sums the amount or amounts payable for income tax . . . in respect of such aggregate will leave the net annual sum of £1,000."

On a further application the Chancery Court made an order dated July 6, 1925, and hereinafter referred to as the 1925 Order . . . The order appointed F. G. Binney an additional trustee on terms that he "be allowed by way of remuneration for his acting as such trustee and so long as he shall continue so to act during the life of the plaintiff (Lady Binning) such a sum in every year as after the deduction of income tax at the standard rate for the time being in force will leave a clear yearly sum of £400 out of the income of the trust estate such sum to be in addition to his costs charges and expenses."

The Rev. R. C. Lathom-Browne died on Aug. 6, 1928, and of the two surviving trustees, *viz.*, Morgan and F. G. Binney, the latter desired to be discharged. On Jan. 15, 1929, Lady Binning by deed of appointment, hereinafter referred to as the 1929 appointment appointed Harding Lathom-Browne a trustee in place of F. G. Binney . . . Under cl. 3 of the 1929 appointment Lady Binning covenanted to pay him remuneration in the following terms "Lady Binning hereby covenants with the said Harding Lathom-Browne that she, Lady Binning, during so much of her life as he, the said Harding Lathom-Browne, shall continue to act as a trustee of the settlement will pay to him by way of remuneration for so acting such a sum in every year as after deduction of the income tax at the standard rate for the time being in force payable in respect thereof will leave a clear yearly sum of £400 which yearly sum shall commence as from Jan. 1, 1929 . . . And it is hereby declared that the said yearly sum is to be additional to any costs, charges and expenses which the said Harding Lathom-Browne may from time to time be entitled to be paid as a trustee of the settlement and the expression income tax as used herein does not include sur-tax."

. . . On July 31, 1931, Lady Binning by deed of appointment hereinafter referred to as the 1931 appointment appointed G. E. H. Fell as a trustee of the marriage settlement in addition to Morgan and Harding Lathom-Browne . . .

The decision of the commissioners which covered the appeals of all three trustees was in the following terms :

In our opinion a person who at any time becomes a trustee under a private will or settlement is not the holder of an office, or engaged in the employment of his co-trustees or of any beneficiary so as to be assessable under Sched. E in respect of any remuneration paid to him as trustee.

Nor do we think in this case the remuneration is assessable under Case VI of Sched. D any more than under Case II. A person who agrees to become a trustee performing non-professional or non-commercial services may, we think, be recompensed by an "annual payment," and on a consideration of the court orders and the deed of appointment we are of opinion that this is a true form and quality of the payments in the present case.

The commissioners held, therefore, that the appeals succeeded and they discharged the several assessments.

D. L. Jenkins, K.C., J. H. Stamp and Reginald P. Hills for the appellants.

J. S. Scrimgeour, K.C. for the respondents.

MACNAGHTEN, J. : The respondents in these appeals, T. H. Morgan and Major Harding Lathom-Browne, together with G. E. H. Fell, are the present trustees of a marriage settlement dated Sept. 18, 1892, which was made by the late William Severin Salting on the occasion of the marriage of his only child, Katherine Salting, to Lord Binning. The question at issue on the appeals is whether or no the respondents are assessable to income tax in respect of remuneration received by them in their character as trustees of the settlement. Salting brought into the settlement the sum of £100,000, and by the settlement Sir Charles Hall and Wickham Flower, were appointed trustees. The trusts of the settlement were of the usual character ; the income of the trust fund was payable to Lady Binning for her life ; during her coverture she was restrained from anticipation. Sir Charles Hall died on Mar. 9, 1900, and George Salting was appointed trustee in his place. Wickham Flower died four years later on Sept. 19, 1904, leaving George Salting the sole trustee of the settlement. George Salting died on Dec. 12, 1909, with the result that his legal personal representatives became the trustees of the settlement. It was in these circumstances that Lord and Lady Binning issued an originating summons in the Chancery Division, requesting the court to appoint new trustees. The settlor, William Severin Salting, had died in 1905 ; and by an order of WARRINGTON, J., dated July 24, 1911, W. J. Adams, the Rev. Robert Charles Lathom-Browne and Lord Binning were appointed trustees. Substantial as the trust fund was to start with, it had by that time become very much larger, because Lady Binning had inherited a very considerable fortune, and the settlement contained a covenant by her to bring

into settlement after-acquired property. The case states that the income of the trust fund was over £40,000 a year. It was in those circumstances that the judge thought fit to provide that the new trustees, W. J. Adams and the Rev. Robert Charles Lathom-Browne, should be remunerated for their services in taking care of so large an estate, and the order of the court provided that William James Adams should be :

A . . . allowed £600 per annum and the Rev. Robert Charles Lathom-Browne £400 per annum out of the income of the trust estate (in addition to their costs, charges and expenses) as remuneration for their acting as trustees so long as they respectively continued so to act.

From that time onwards, those trustees received those sums.

On Aug. 23, 1913, W. J. Adams died, and by another order of the court, dated Jan. 26, 1914, T. H. Morgan, the respondent of the first of these appeals was appointed to be a trustee in the place of Adams. On Jan. 12, 1917, Lord Binning died. On Apr. 12, 1922, a further order of the court was made with regard to the trustees ; it was made on the application of Lady Binning and with her consent, and it provided that in addition to the £1,000 payable under the previous order to the trustees a further additional sum should be paid, so that the £1,000 payable to the trustees, £600 to the one and £400 to the other, should be not the gross sum liable to tax but should be a net sum ; to use a common expression, the £600 and the £400 were to be paid out of the income of the trust estate "free of tax." There was a further order on July 6, 1925, appointing one Binney as additional trustee, and giving him £400 a year net. Three years later, on Aug. 6, 1928, the Rev. Robert Charles Lathom-Browne died, leaving Morgan and Binney the two trustees of the settlement. On Jan. 15, 1929, Lady Binning, who was entitled to the whole of the income of the trust fund, and who, by this time, was a widow, and therefore free from the restraint on anticipation contained in the marriage settlement, appointed Major Harding Lathom-Browne to be a trustee in the place of Binney, who desired to retire from the trust. She appointed him in exercise of a power conferred upon her by the marriage settlement. By the deed of appointment she covenanted with Major Harding Lathom-Browne that she, during so much of her life as he, Major Lathom-Browne should continue to act as trustee of the settlement, should pay him, by way of remuneration for so acting, such a sum in every year as, after deduction of income tax at the standard rate for the time being in force payable in respect thereof, would leave a clear yearly sum of £400, which yearly sum was to commence on Jan. 1, 1929, and should be deemed to accrue from day to day and payable quarterly on the usual quarter days. By the same deed Lady Binning authorised and directed the trustees or trustee for the time being of the settlement to retain such quarterly instalments of the said yearly sum out of the income of the trust property and to pay the same to the said Harding Lathom-Browne. That payment was to be in addition to the costs, charges and expenses properly incurred by him in the execution of the trusts of the settlement.

It was the practice of the trustees, from the time that the provision was made for the payment of remuneration free of tax to pay to each of them the gross sum which after deduction of tax therefrom would leave the annual sum to which they were entitled ; and while that practice continued, the Revenue without any objection, assessed the trustees to income tax on the sums so received by each of them. This practice was not right. The payments made to the trustees should have been the net amounts to which they were severally entitled and they are accountable to the trust fund for the excess that they received. In the year 1941-42 the respondents were assessed, as they had been assessed in previous years, to income tax under Sched. E in respect of the gross sums which they received by way of remuneration as trustees of the settlement. They then for the first time objected that they were not assessable on the ground that the sums payable to them were "annual payments" payable out of profits or gains brought into charge to tax within the meaning of r. 19 of the All Schedules Rules. The Special Commissioners have upheld the contention of the respondents. Hence this appeal to the court.

R. 19 provides that :

Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property

of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods,) is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due.

Lady Binning is entitled to the whole of the income of the trust fund and the whole of it is subject to tax by way of deduction at source. In those circumstances it was the duty of the trustees to deduct the tax on making the net payments to which they were severally entitled, and the Inland Revenue Commissioners are prohibited by r. 19 from assessing the trustees. The question came before ROWLATT, J., twenty years ago in *Baxendale v. Murphy* (1). In that case the remuneration for the services of trustees of a settlement arose not as in the case of Morgan, under the order of the court, or as in the case of Major Harding Lathom-Browne under the covenant of the tenant for life, but under the terms of the original settlement, and it is suggested that, as far as the case of Morgan is concerned, a distinction ought to be drawn between the present case and *Baxendale v. Murphy* (1) because Morgan's remuneration is not derived from what is called "the bounty of the settlor." It seems to me that r. 19 is equally applicable in the case of Morgan as it would have been if the settlor, Salting, had originally provided in the settlement for the payment of remuneration to the trustees. As far as the remuneration of Major Lathom-Browne is concerned, that is paid under the covenant of Lady Binning, and it continues for her life and so long as Major Lathom-Browne continues to be a trustee. It is, therefore, a covenant of which it cannot be predicated that it must terminate within six years, and in those circumstances I do not see how it could be contended that she is not entitled to deduct the tax—indeed, that is what she covenanted to do. She has covenanted to pay the net sum, not the gross sum. In my opinion, therefore, the Special Commissioners arrived at a right conclusion in discharging the assessments which had been made upon the respondents.

There is a third trustee now, because by a further deed dated July 31, 1931, Lady Binning appointed G. E. H. Fell to be an additional trustee, and covenanted with him in the same terms as she had covenanted in the case of Major Lathom-Browne to pay him the net sum of £400 a year. In his case, as in the case of Major Lathom-Browne, she directed the trustees of the settlement to make those payments out of the income to which she was entitled.

Appeals dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Carleton-Holmes & Co.* (for the respondents).

[*Reported by P. J. JOHNSON, Esq., Barrister-at-Law.*]

Re HOUSING ACT, 1936, AND *Re* THE LONDON COUNTY COUNCIL (RILEY STREET, CHELSEA, No. 1) ORDER, 1938. [KING'S BENCH DIVISION (Croom-Johnson, J.), July 11, 1945.]

Public Health—Housing—Clearance area—Compulsory purchase order—Person aggrieved—Jurisdiction of High Court to review order—Housing Act, 1936 (c. 51), ss. 25, 29 (2), (3), 42, 188 (4)—R.S.C., Ord. 55B, r. 71.

Certain premises were found to be unfit for human habitation and were made the subject of a compulsory purchase order under the Housing Act, 1936, s. 25. After considering the objections and all the evidence before him together with the report of the inspector who held the inquiry, the Minister confirmed the order. On an application to the High Court under the Housing Act, 1936, Sched. II, para. 2 by the lessee of those premises as a person aggrieved by the order to question its validity:—

Held: the court could only look into the evidence before the Minister

for the purpose of deciding whether the order was within the powers of the Act. On the particular facts here, there was evidence justifying the Minister in confirming the order.

[EDITORIAL NOTE.] This is an appeal to the High Court from the order of the Minister confirming a compulsory purchase order under the Housing Act, 1936. The only ground of appeal applicable is that it is not within the powers of the Act, and the court holds that its only power is to look into the evidence to decide if there was any at all upon which an order could be made. The court has no power to consider the weight of the evidence or the reasons of the Minister for acting upon it.

AS TO QUASHING OF ORDERS, see HALSBURY Edn., Vol. 26, pp. 537, 538, para. 1139; and FOR CASES, see DIGEST, Supp., Public Health, No. 502 j.

FOR THE HOUSING ACT, 1936, see HALSBURY'S STATUTES, Vol. 29, p. 565.]

Cases referred to :

- (1) *Summers v. Salford Corpn.*, [1943] A.C. 283; [1943] 1 All E.R. 68; 112 L.J.K.B. 65; 168 L.T. 97; *reusg. S.C.* [1941] 2 K.B. 218; [1941] 2 All E.R. 237; 165 L.T. 164; *affg. S.C.* [1941] 1 All E.R. 153.
- (2) *Re Ripon (Highfield) Housing Order, 1938, White & Collins v. Minister of Health*, [1939] 2 K.B. 838; Digest Supp.; 108 L.J.K.B. 768; 161 L.T. 109; *sub nom. Re Ripon (Highfield) Housing Order, 1938, White & Collins Application*, [1939] 3 All E.R. 548.
- (3) *Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, [1932] 2 K.B. 621; Digest Supp.; 101 L.J.K.B. 798; 147 L.T. 150.
- (4) *Fulham Borough Council (The Avenues No. 1, Order, 1937)*, unreported.

APPLICATION by the lessee of property for an order quashing the London County Council (Riley Street, Chelsea, No. 1) Housing Confirmation Order, 1939, which confirmed an order made by the London County Council on Dec. 2, 1938. The facts are fully set out in the judgment.

W. E. Watson for the applicant.

Hon. H. L. Parker for the respondent.

CROOM-JOHNSON, J. : This is a motion in the matter of the Housing Act, 1936, by John Sainsbury Gilbert, the lessee of certain premises, Nos. 21 and 22, Riley Street, Chelsea. He says that he has been aggrieved by an order made under the Act by the Minister of Health in the matter of the London County Council (Riley Street, Chelsea, No. 1) Order, 1938, and he specifies in his notice of motion certain grounds upon which he desires to challenge the order. The matter comes before the court pursuant to the Second Schedule to the Act, and pursuant to the second paragraph of that Schedule, which seems to lay down the limits of this court's jurisdiction when this procedure is adopted.

I think before I indicate the grounds, or grapple with the difficulties that have arisen, it is desirable that I should indicate what is the scheme of the Act relating to these matters, prefacing what I have to say by this, that the Act is one which provides for the sweeping away of houses, amongst other things, in particular areas and, subject to a later section of the Act to which I will also refer hereafter, without compensation to the owner of the houses swept away, other than a right to have the compensation assessed upon the basis of the site value of the premises.

The particular procedure which is in question here arises out of Part III of the Act, and sect. 25 (1) is in the following terms :

- Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district (a) that the houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, [that seems to be one of the many conditions precedent to the exercise of the powers that follow] or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and (b) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area; the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass [that is, the authority shall pass] a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the subsequent provisions of this Part of this Act.

On Apr. 7, 1938, a medical officer of health of the London County Council, Dr. Fawcett, made in writing an official representation to the London County

Council that in his opinion "within the areas coloured pink on the map hereto annexed and within the meaning of sect. 25, Part III of the Housing Act, 1936, the dwelling houses which," and he then cites word for word the provisions of para. (a) of sect. 25 (1). Upon that official representation being made to the London County Council, at a meeting of that body held on June 28, 1938, they passed a resolution declaring each of the areas on the map so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions of the Housing Act, 1936, s. 25. By a formal order of the council made on Dec. 2, 1938, the council again cited the important words of para. (a) of sect. 25 (1), and recited that the most satisfactory method of dealing with the conditions in the area "is the demolition of all buildings in the area," so satisfying para. (b) of the same subsection, and referring to a resolution of the council of June 28, by which the council determined "to proceed to secure the clearance of the area by purchasing the land . . . and itself undertaking or otherwise securing the demolition of the buildings thereon" and ordered that they were authorised to purchase the lands "in the schedule hereto," and gave such other directions as might be needed. Within the clearance area scheduled, Part I, were these two houses, 21 and 22 Riley Street, the applicant's name being put in as the lessee, and a Frank Stovold being put in as the owner or reputed owner, that meaning to say he was the ground landlord.

On Nov. 17, 1938, the department of the medical officer of health made a schedule in detail of 21, Riley Street, and another schedule in detail of 22, Riley Street. Later on there was a further detailed schedule summarising the condition which was alleged to exist. Thereupon, the next step was that under sect. 29 (2), where an order has been made authorising the compulsory purchase of land comprised in a clearance area, it has to be submitted to the Minister within six months, and :

An order authorising the compulsory purchase of land . . . surrounded by or adjoining a clearance area shall be submitted to the Minister within twelve months, after the date of the resolution declaring the area to be a clearance area, or within such longer period as the Minister may, in the circumstances of the particular case, allow.

Sect. 29 (3) says :

The provisions of the Second Schedule to this Act shall have effect with respect to the validity and date of operation of a compulsory purchase order made under this section.

Under the terms of the Second Schedule, I should have said that the local authority, after the terms of the compulsory purchase order have been confirmed by the Minister,

. . . shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed, and naming a place where a copy of the order as confirmed and of the map referred to therein may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the Minister of his objection to the order, appeared at the public local inquiry in support of his objection.

The power to the Minister to direct the public inquiry comes out of the First Schedule to the Act. I need not read many of the paragraphs of that first section, but there is one at least which is of importance ; it is para. 3 :

Before submitting the order to the Minister for his approval, the local authority shall (a) publish in one or more newspapers circulating within their district a notice in the prescribed form stating the fact of such an order having been made and describing the area comprised therein and naming a place where a copy of the order and of the map referred to therein may be seen at all reasonable hours ; (b) serve on every owner, lessee and occupier . . . of any land to which the order relates a notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation and specifying the time within and the manner in which objections thereto can be made.

Upon this order being submitted to the Minister, the local authority did those things, and the present applicant, amongst other people, made objections to the confirmation of the order in the manner set out in the notice which was so given. Thereupon, it became the duty of the Minister under para. 4 of the First Schedule, if he thought fit, to confirm the order with or without modification in the circumstances specified, which are not this case, but "in any other case," and I quote the paragraph :

... he shall, before confirming the order, cause a public local inquiry to be held, and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order either with or without modification.

There is a proviso that the Minister may require any person who has made an objection to state the grounds thereof, but that again, I think, does not matter for the purposes of this case.

A Objection having been made, the Minister did direct a public inquiry, and it was opened on Mar. 13, 1939, at the Chelsea Town Hall, by an inspector of the Minister of Health, who received evidence in support of the order being confirmed. Witnesses were examined, cross-examined and re-examined, and evidence was also given for, amongst other people, the present applicant, and that evidence was examined, cross-examined and re-examined. The inspector had put in before him, as is now admitted, the schedules prepared by the medical officer of health, the two long schedules and the two summary schedules, which were all part of the B matters which had led to the making of the original order by the London County Council. Then the inspector listened to speeches of counsel, and then, as is admitted, he went to inspect the premises.

C Following upon that, on June 20, 1939, the Minister made an order which is to be cited as the London County Council (Riley Street, Chelsea, No. 1) Housing Confirmation Order, 1939, in which he confirmed the order as modified in a certain particular which is not relevant to the present inquiry, and the original order of 1938 thereupon became operative. On July 21, 1939, the applicant applied in writing to the Minister to be supplied with a statement of the reasons for deciding that his premises were unfit for human habitation, that request being sent pursuant to sect. 41 (2) of the Act.

On July 31, 1939, the Minister by his deputy gave this answer :

D After carefully considering the objections and all the evidence before him and the report of his inspector who held the local inquiry and inspected the property concerned, and having regard to the provisions of the Housing Act, 1936, ss. 25 and 188 (4) and para. 2 of the Third Schedule thereto, the Minister decided that the properties were unfit for human habitation and properly included in the clearance area. This decision was reached because the result of the Minister's investigations was that the condition of the properties was correctly represented in the statement of the facts alleged by the London County Council, as the principal grounds for being satisfied that the buildings are unfit for habitation.

E The rest of the letter for the moment I do not propose to read.

Sect. 188 (4) to which the Minister refers, is this :

F In determining for the purposes of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any byelaws in operation in the district or of any enactment in any local Act in operation in the district dealing with the construction and drainage of new buildings and the laying out and construction of new streets or of the general standard of housing accommodation for working classes in the district.

The Minister says that he considered that, and it is not really suggested now at the Bar that he did not.

G Notice of motion of Aug. 16, 1939, was then given, and the matter has stood over by agreement between the parties because of the intervention of the European war. But during that time it has been explained to me that the clearance of this area has been effected by reason of enemy action, and the only reason that the controversy survives is that the London County Council in pursuance of their housing drive, are wishful now of making use of their powers under the order of 1938 and the Minister's confirmation order of 1939 ; the question is on what basis the applicant's compensation is to be assessed. Is it to be the site value as provided in the Act, or is it to be something more than H the site value as provided in another section, or is it to be compensation of the sort which was familiar to those of us who, before the Act, had to deal with cases for compensation when property had been compulsorily acquired by a local authority for any public purpose ?

The first thing I have to determine is : What precisely is the jurisdiction of this court ? To what extent is it empowered to examine into a matter of local administration which has been deputed to be dealt with by the local authority subject only to confirmation by the Minister under the safeguards to which I have already briefly directed attention ? That depends upon the

proper construction of the language of para. 2 of the Second Schedule to the Act, which says this, so far as it is necessary to read it :

If any person aggrieved by such an order [in this case a compulsory purchase order] as aforesaid, or by the Minister's approval of a re-development plan or of a new plan, desires to question the validity thereof . . . he may, within six weeks after the publication of the notice of confirmation of the order, or of the approval of the plan, make an application for the purpose to the High Court . . .

By Ord. 55B, r. 71, and following, provision is made for the method of hearing such an appeal. But the grounds, and the only grounds, upon which such an appeal lies, according to the paragraph are : “ (i) That it is not within the powers of this Act ; or (ii) That any requirement of this Act has not been complied with.” That is all. In the present case it is not suggested that any requirement of the Act has not been complied with. If that is a reference, and a reference only, to the machinery by which the orders are to be brought into existence, the notices given to the parties are sufficient, and the only ground that has been argued before me is the first ground, that it is not within the powers of this Act, and the way in which that particular ground has been put before me is a little different from the grounds stated in the notice of motion. That being so, I think I had better call attention to what the notice of motion says, firstly, as a ground :

That the interests of the applicant have been substantially prejudiced by the failure of the said Minister to give directions for the making by the said Council of a payment under sect. 42 of the said Act . . . in spite of the fact that evidence which was not contradicted was given on behalf of the applicant at the local inquiry held in the matter that the said properties, notwithstanding their sanitary defects, had been well-maintained.

That seems to be a complete misunderstanding of sect. 42, which says :

Where, as respects a house which is made the subject of a compulsory purchase order under this Part of this Act as being unfit for human habitation . . . the Minister is satisfied, after causing the house to be inspected by an officer of the Ministry of Health, that, notwithstanding its sanitary defects, it has been well maintained, the Minister may give directions for the making by the local authority of a payment under this section in respect of the house.

That is not, it will be observed, a provision which says that in making a confirmation order the Minister may as a condition of confirming the order make it a term that with regard to certain property a direction for a payment under this section of the Act which is a rather higher rate of compensation than the site value may be given. It is not that at all. It is a mere power in the Minister as a part of ministerial responsibility to tell the local authority that in the circumstances it may, as it were, temper the harshness of the rule about site value being the test of compensation by making a special direction in a certain case ; and from that direction, or the withholding of that direction, there is nothing in the Schedule or the Act giving anybody a right to appeal against the Minister's decision, neither the local authority to whom the direction is given, nor the person who has asked for it, nor the person who has got it. As I read sect. 42, there is no right of appeal to the court about it at all. The Minister did refuse in this case to make any such direction, he did refuse to grant any compensation or give any direction under sect. 42, and I can see nothing in para. 2 of the Second Schedule which enables that decision of his to be challenged or called in question by the procedure which is available to the applicant in these proceedings. I do not mean by that that he has not raised it ; he has raised it, but I think if he has any rights, as to which I express no opinion, they are not raisable by way of direct appeal under para. 2 of the Second Schedule.

The second ground is :

The Minister's reasons for deciding that the said properties were unfit for human habitation are in conflict with the evidence given at the local inquiry held in the matter. I have not heard any argument in support of that one, and indeed for reasons which I will state in a minute or two, it seems to me that it is not accurate. The third ground is :

There was no evidence on which the inspector could report or the Minister find, contrary to the applicant's contention, that the said properties were unfit for human habitation.

That is really the one on which the whole of this case has been argued on behalf

of the applicant. All I can say about it is that I am not concerned with the question as to whether upon the facts as set out in the documents and in the evidence on the one side or the other, I should have come to the same conclusion or not. I bear in mind that the House of Lords in *Summers v. Salford Corpn.* (1) has decided that a house with a broken sash cord is unfit for human habitation after, as the trial judge, I had come to a different conclusion and two members out of three in the Court of Appeal had supported my view.

- A Apparently, therefore, very little evidence may justify a finding, which I suppose is a finding of fact, that a house is unfit for human habitation and, looking at what the medical officer of health, Dr. Fawcett, said at the public inquiry, and looking at the evidence and the documents which were put before the inspector, I find it quite impossible to say that there was no evidence to support the finding that the properties were unfit for human habitation.
- B After all, an inspection of the premises may very often be a great deal better in conveying to the mind of the person responsible what is their state and condition than a schedule. Things are apt to look a little cold and unconvincing sometimes on paper. There was undoubted evidence on which the inspecting officer could have reported to the Minister, if he had thought proper, that these premises were, as stated by the applicant's witnesses, in really very good condition altogether, but the court is not engaged in the task of coming to a conclusion as to which set of facts is the more convincing.
- C This court is engaged simply in looking to see, if it is allowed to do so, about which I will say something in a moment or two, whether there is evidence in law to support the view apparently expressed by the inspecting officer, and by everybody else who has had to deal with this matter, except the applicant's surveyor, that these premises were unfit for human habitation. To me, it seems impossible to argue that there is no evidence. Quite what weight I should have given to it, I do not know, because I did not see the people, but on paper, which is all I have to guide me,
- D I think it is absolutely impossible for anybody successfully to contend that there is not abundant evidence to support the finding. I ought to add, before I leave ground (3), that the Minister has stated in the letter of July 31, 1939, which naturally everybody accepts, that having the report of the inspector before him, and all the evidence, he came to the conclusion to which he did come. Therefore, he had before him all the evidence which the inspector had, and,
- E therefore, when the ground says that the Minister had no evidence before him, it follows that if the inspector had, the Minister had, and that is an end of it.

Fourthly :

The Minister in confirming the said order has come to an erroneous conclusion in law upon the materials before him.

- F That seems to be based upon the notion that the Minister had left out of consideration sect. 188 (4), and all the byelaws and things which are referred to, and again I call attention to the terms of the letter of July 31, 1939, which says what the Minister did pay attention to. He does not seem to have left out of consideration any matter proper for him to consider or to have considered any matter which it was improper for him to consider.

The last reason is an omnibus reason :

- G For the reasons aforesaid the said order is not within the powers of the said Act and the interests of the applicant have been substantially prejudiced by the requirements of the said Act not having been complied with.

As to the latter part, I have heard nothing as to which requirement of the Act has not been complied with ; and as to the former part, the only way in which it is said the order is not within the powers of the Act is because it is said there was no evidence upon which the Minister or the inspector or the County Council, or apparently anybody, could find that the premises came within that long clause in sect. 25 (1), the most important element of which is that the houses were unfit for human habitation.

- H I have assumed, without deciding it, that it is open to this court to examine and see whether there is evidence, or whether there was evidence before the Minister when he made the order, upon this theory, as I understand it, that if there was no evidence entitling the Minister to come to the conclusion that the houses were in the condition indicated in the section, therefore, the order made thereupon was not within the powers of the Act. Except upon that basis, I do not see how this question of evidence or no evidence is raisable before

this court under para. 2 of the Second Schedule at all.

Counsel for the applicant, has argued that this point is concluded in his favour by the decision of the Court of Appeal in *Re Ripon (Highfield) Housing Confirmation Order, 1938, White and Collins v. Minister of Health* (2). I do not find it necessary for the purposes of this judgment to examine into the matter in any more detail because of the conclusion at which I have arrived, but it seems to me that all the Court of Appeal were doing in that case was to examine and see, for the purpose of acquiring land compulsorily under sect. 74 of the Act for the provision of houses for the working classes, whether the provisions of sect. 75 exempting from their powers land forming part of any park, garden or pleasure ground whether otherwise required for the amenities or convenience of any houses applied; and there being a question as to whether a piece of property which was the subject of the order in question was part of the park of a house called Highfield, it would seem it was necessary for the court to examine into the evidence about that, because if the court came to a particular conclusion, namely, that it was part of the park of Highfield, then a condition precedent to the exercise of the powers under sect. 74, namely, that laid down in sect. 75, had not been performed and, if it had not been performed, what the local authority was purporting to do was something which was not within their powers under that particular section. Para. 2 of the second Schedule applies to such a case, and although the court did look at the evidence, it was not looking at the evidence for the purpose of examining into the reasons for the Minister's decision, or whether there was evidence one way or the other. It was looking into the evidence for the purpose of deciding the preliminary question whether the order which had been made was within the powers of the Act. For that purpose, it seems to me, with respect to the judgment of the Court of Appeal, when such a preliminary question of fact arises under this paragraph, the court is bound to look at the evidence. But that is very far from saying that the court is obliged to do it in a case like the present. I have done it as I have said already without deciding the question of jurisdiction and I have come to a perfectly clear and firm conclusion upon it, namely, that the applicant has wholly failed to satisfy me of any want of evidence, whatever the result of that may be.

I have been referred to two other cases. There is the decision of SWIFT, J. in *Re Bowman* (3). That was a case under the Housing Act, 1930, where there was a similar provision to that of para. 2 of the Second Schedule, expressed in exactly the same words, and the judge in the course of his judgment laid emphasis upon the very narrow grounds permitted by that section and, as I think, permitted by the present paragraph, upon which to found an appeal to this court. It is not necessary that I should cite that case any further but, if I may say so with deep respect to the memory of that judge, I concur and agree with the observations which he made at pp. 633 to 635 of the report.

The other is an unreported case which came before DU PARCQ, J., on Mar. 10, 1938, the *Fulham Borough Council (The Avenues No. 1, Order 1937)* (4), in which the judge made some observations as to what were the powers of the court. I do not think there is any inconsistency between his judgment and the judgment of the Court of Appeal and the generality of the observations of SWIFT, J. DU PARCQ, J., did not deal with the question as to whether an appeal from a decision by the Minister under sect. 42, if indeed "decision" is the right word to use at all, was one from which there was a right of appeal. He reserved, as I have reserved, the question whether there is power in this court to look at all into the evidence upon which the Minister has acted. As I have said, the view which I am inclined to form about it is that the only power of this court to look into the evidence before the Minister is for the purpose of seeing, and only for the purpose of seeing, whether the order that has been made is, having regard to its subject matter, within the powers given to the Minister and the chain, so to speak, behind him under the Act.

For these reasons, I am of opinion that this motion fails and must be dismissed with costs.

Application dismissed with costs.

Solicitors: *Birkbeck, Julius, Edwards & Co.* (for the applicant); *Solicitor to the Ministry of Health* (for the respondents).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

PERKS v. PERKS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Denning, J.), July 3, 1945.]

Husband and Wife—Cruelty—Desertion by wife—Separation order with non-cohabitation clause granted to wife—Appeal by husband—Degree of cruelty—Deletion of non-cohabitation clause from order—Wife's refusal to return to husband—Order discharged—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 10.

The parties were married in Aug., 1942, and lived with the wife's parents. At the end of July, 1943, they moved into their own house where they lived together for about three weeks when the wife left her husband. On Sept. 24, 1943, the wife was granted a separation order against her husband on the ground of persistent cruelty. The order contained a non-cohabitation clause and stated the amount of weekly allowance payable by the husband to his wife. When the husband appealed to the Divisional Court the non-cohabitation clause was deleted by common consent and the weekly payments for maintenance reduced in order to enable the parties to become reconciled. The husband tried to persuade his wife to return to him but she consistently refused as a result of which he took out a summons before a court of summary jurisdiction to have the order discharged. The justices did not grant the order asked for but, by the Summary Jurisdiction (Married Women) Act, 1895, s. 10, the summons was transferred to the High Court, the justices being of the opinion that it could be more conveniently dealt with there :—

HELD : (i) a court of summary jurisdiction sometimes acted on a lesser degree of cruelty than that required by the High Court since the relief granted might be temporary only and could be discharged subsequently upon cause being shown.

(ii) on the facts there was a lesser degree of cruelty which was also found by the Divisional Court when the order was varied by deletion of the non-cohabitation clause. Therefore the order of the justices for maintenance should be discharged.

[**EDITORIAL NOTE.** The chief matter of interest here is the consideration given to the degree of cruelty by a husband upon which the High Court or a court of summary jurisdiction will act.]

The husband's application to discharge a separation order here was transferred to the High Court, as the Summary Jurisdiction (Married Women) Act, 1895, s. 10, gives power to refuse to make an order when the matter is more suitable for the High Court. The High Court discharges the order on proof that the cruelty was not of an aggravated kind, and that the husband was sincerely repentant.

AS TO THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 10, see HALSBURY'S STATUTES, Vol. 9, p. 408.]

SUMMONS taken out by the husband before the Wolverhampton justices to have a separation order granted to his wife discharged on the ground of her refusal to return to him. No order was made but the summons was transferred to the High Court under the Summary Jurisdiction (Married Women) Act, 1895, s. 10, the justices being of the opinion that it could be more conveniently dealt with there.

P. R. Hollins for the husband.

D. A. Fairweather for the wife.

DENNING, J. : In this case the application is to discharge an order made by the magistrates and affirmed by the Divisional Court. The power to discharge an order is given by the Summary Jurisdiction (Married Women) Act, 1895, s. 7, which must now be read with the Criminal Justice (Administration) Act, 1914, s. 30 (3), and the Money Payments (Justices Procedure) Act, 1935, s. 9 ; and the result of those statutes is that the court, normally the court of summary jurisdiction, but in this case the High Court, upon cause being shown, may discharge the order, or vary it, if it so pleases ; and there is no restriction in the statutes of that power to discharge the order other than that cause must be shown.

I can understand the difficulty felt by the stipendiary magistrate in this case, because if a wife comes to the High Court in a divorce suit or a suit for judicial separation, and proves that the husband has treated her with cruelty, the wife is entitled to a decree, and no offer to resume cohabitation, no repentance, can affect her right. Why then, he might ask, should the position be different under the Summary Jurisdiction Acts, when the wife has proved that the husband has been guilty of persistent cruelty to her? I think the difference is this. When the High Court is dealing with the matter, in view of the serious consequences which ensue on a finding of cruelty, the High Court does not find cruelty proved unless the causes are grave and weighty, and are such as to show an absolute impossibility that the duties of married life can be discharged. Speaking generally, the husband must be guilty of conduct which shows a predominant purpose of inflicting injury on the wife or pain or misery on her. That must be the predominant purpose. The conduct must be unprovoked by her, or it must be out of all proportion to any provocation he may receive from her. Further, the conduct must be so persistent, or so intense, or so aggravated by other mis-doing, that the effect is to make it dangerous to the wife's health, in body or mind, for her to continue to live with her husband. Mis-doing such as associating with other women, or drunkenness, is not sufficient, even if it injures her health, so long as it is not accompanied by malevolent conduct towards her. Those, as I understand them, are the principles upon which the High Court acts.

The court of summary jurisdiction is dealing in its orders with a different matter. It may decline to make a separation order; it may only make an order, for instance, for a weekly payment, and after it has made the order it may revoke it and discharge it, with or without fresh evidence, if cause is shown. So the court of summary jurisdiction is dealing, so to speak, with temporary relief whereas the High Court is dealing with permanent relief, and this difference does sometimes result in a court of summary jurisdiction acting on a lesser degree of cruelty than the High Court would. This case is a good illustration. In it the justices found cruelty was proved for two days. Now let me explain what that means. These parties were married on Aug. 15, 1942. A child was born on Feb. 9, 1943. The wife left her husband on Aug. 16, 1943. They had lived with the wife's parents nearly the whole of that time, and, as does happen, the husband was not very happy there. Then at the end of July, 1943, they found rooms elsewhere, and went there. After a fortnight or three weeks there were differences between the parties. The result of those differences was the events of these two days in respect of which the justices found that cruelty was proved. What happened in respect of those two days? I have the note taken at the hearing before the magistrates, and what happened was that the wife said she was going home to her parents. The husband caught hold of her and shook her to stop her going. He did not want her to go. No doubt she was bruised in the course of that shaking. That night, or the next night, when they were in bed, she fell out of bed. She says that he pushed her out. He says, "She got into the wrong place in the bed and she fell out." There was some evidence of threats which the wife alleged and which the husband denied. After those two days, the wife left the husband and went back to her people. There was also some evidence about the husband grumbling about food and shouting at her during her pregnancy, but that was some months before. So the wife went back to her home, and, notwithstanding the requests of the husband, refused to join him, and the matter came before the magistrates. They, as I have said, found that cruelty was proved for the two days and that the conduct of the husband towards her during the pregnancy was also cruel. They made a separation order, gave the wife the custody of the child, and ordered the husband to pay her 30s. a week, and 10s. a week for the child.

When the matter came before the Divisional Court the separation order was by consent struck out. LORD MERRIMAN, P., said in his judgment:

There has been an adjournment in this case, and it has been very useful. In the first place, it has enabled us to get rid, as we thought was right, of the separation order, because we thought that whatever has happened in the past no unnecessary impediment should be put in the way of these young people coming together again, assuming always that the husband will behave himself properly, and not repeat any of the conduct which has been complained of.

The amount for maintenance was reduced from 30s. to 20s., but the finding was otherwise not disturbed.

It is quite plain that after the order in the magistrates' court the husband wrote letters, which are to my mind quite genuine, showing how devoted he was to his small child and to the wife. He repented of anything he had done wrong, and was most anxious for a reconciliation. He wrote to her saying:

A You know as well as I do that I never wilfully hurt you in all our married life . . . I really can't make it out, Beryl, our quarrel didn't last for an hour, and yet you bring all kinds of charges against me, you do remember when we got married both you and I made solemn vows.

B He also wrote, after the judgment of LORD MERRIMAN, P., a letter which rings with its genuineness all the way through, offering to set up a home again and saying, "I am writing to see if we cannot live together again," and he refers again with great affection to the child. That is on Feb. 20, 1944, and what did the wife do? She wrote back a postcard in these terms:

Please do not annoy me, by writing letters, I have finished with you for good, never want to see you as long as I live.

The husband's solicitors took the matter up, referring to what LORD MERRIMAN, P., had said, and the reply from her solicitors was:

C She is quite definite in her statement that she cannot agree to resume cohabitation with her husband. In our view it is quite useless trying to effect a reconciliation here.

He tried to see his child at least, and on one occasion his wife's mother slammed the door in his face and said to him, "Don't you ever come here again"; and indeed he told me he has not seen his child since Aug., 1944.

D What is the position? A separation order has not been made. Deliberately the Divisional Court said it was right that it should be struck out. I do not propose to make this order operate as though there had been a separation order in it. It was struck out because the Divisional Court realised it was right that these parties should be reconciled, if that were possible. Further, there are cases in the books under the head of constructive desertion where a wife leaves her husband on the ground of his cruelty, and in which the courts have said, that if he makes a genuine offer to resume cohabitation, showing a sincere repentance for any misconduct and a genuine desire to live with her again, he can put the matter right, and that the constructive desertion is terminated. I see no reason why that same principle should not apply in a case where the only finding is that of persistent cruelty, and there is no separation order. It seems to me, especially when the cruelty may not be of a grave character, when it may be produced, as this certainly was in part produced, by the wife's desire to go back to her parents and not stay with her husband, when one finds cruelty in those circumstances, which I do not regard in any way as of an aggravated kind, which the High Court, I venture to think, would not necessarily act upon, it is only right that if the husband is sincerely repentant for anything he has done wrong, and makes a genuine offer to resume cohabitation, the court has power to discharge the order. Otherwise the position would be intolerable. It would mean that the husband, on account of his conduct lasting for perhaps only one or two days when the parties quarrelled, would be saddled with paying his wife for her life in effect a pension, with no hope of ever being able to cancel out that payment, however, repentant he was or however much he sought to make a home together with her.

G I do not think that that is the law. I am satisfied that this cruelty was not of an aggravated kind; it was one of a very much lesser degree, and that is certainly evidenced by the fact that the Divisional Court struck out the separation order, and although I do not overrule the finding of cruelty by the magistrates, nevertheless when I find that the husband has been sincerely repentant and has made this genuine offer to make a home for his wife and child, the circumstances in my opinion justify me in discharging, as I do, this order of the magistrates which was originally made.

H I desire to add that in these cases, on the wording of the statutes, I see no reason why the courts of summary jurisdiction should not require cruelty to be proved of the same gravity and degree as the High Court does. Indeed, the High Court relies on these findings of the magistrates often in subsequent divorce suits, because the evidence before the magistrates is taken nearer to

the time of the alleged offences, and often with both parties being there, and the findings of the magistrates are of the greatest value to the High Court; and I see, therefore, no reason why the same degree of gravity should not be required there as here.

This procedure under sect. 10, whereby the matter comes before this court, must necessarily be rare and exceptional. It would only be in the most exceptional cases, I venture to think, that the magistrates would not exercise their jurisdiction but the matter having come before me now, and having reviewed all the evidence, I discharge the order which was made by the magistrates on Sept. 24, 1943.

Order discharged.

Solicitors: *Stafford Clark & Co.*, agents for *O. L. Bergendorff*, Dudley (for the husband); *Amery-Parkes & Co.*, agents for *Haden Kendrick & Williams*, Wolverhampton (for the wife).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

EMANUEL v. EMANUEL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Denning, J.), **June 7, July 6, 1945.**]

Divorce—Collusion—Wife's petition based on cruelty—Undertaking by wife not to claim alimony if husband withdraws defence—Case proceeding as defended case—Husband withdrawing defence before trial—Whether collusive understanding affected proceedings—Burden of proof—Presumption of innocence provisional—Suspicion of collusion counterbalancing presumption.

The parties were married on Sept. 15, 1935, and separated on Sept. 18, 1944. On Oct. 12, 1944, the wife filed a petition for divorce charging her husband with cruelty and on Jan. 31, 1945, the husband filed an answer denying the charge. The parties met subsequently on various occasions, on one of which the respondent informed the petitioner that the question of alimony was the only reason why he defended the case. The petitioner assured him that she would not claim any alimony and, at the respondent's dictation, she wrote and signed an undertaking in these terms: "I . . . swear that, if my husband . . . withdraws his defence and my divorce goes through undefended, I shall at no time claim any alimony from him . . ." The respondent did not, however, withdraw his defence immediately, and the case proceeded as a defended case, the respondent filing an affidavit of documents which included the undertaking. A few days before the date set down for hearing the respondent, by his solicitors, announced his intention of no longer defending the case. It was contended for the petitioner that the parties did not act upon the undertaking and that the proceedings were not tainted by collusion since the case had gone on as a defended case for several months:—

HELD: the presumption of innocence was provisional only, and not compelling. If it was counterbalanced by circumstances leading to a suspicion of collusion, the legal burden of negating such collusion rested on the petitioner. In the particular circumstances here, the doubt remained as to whether the proceedings were affected by the collusive undertaking so that it was not possible to say that the petition was not prosecuted in collusion with the respondent.

[**EDITORIAL NOTE.** This case considers the implications of the recent decision of the Court of Appeal in *Churchman v. Churchman* (6) as to the effect upon the presumption against connivance or collusion of the Matrimonial Causes Act, 1937, which places upon the petitioner the burden of satisfying the court of his innocence. In order to discharge this burden the petitioner is entitled to rely on the presumption of innocence, but in the *Churchman* case (6) LORD MERRIMAN, P., said, at p. 195, that "the same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences." DENNING, J., here points out that the effect of this would be to reverse the statutory legal burden, and he reconciles the conflict by holding that the presumption of innocence is "provisional" only, "provisional" being distinguished from "compelling."

AS TO COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 677, 678, paras. 1000-1003; and FOR CASES, see DIGEST, Vol. 27, pp. 333, 334, Nos. 3133-3144, DIGEST Supp., Husband and Wife, Nos. 3135a-3156a.

SEE ALSO BUTTERWORTH'S WORDS AND PHRASES, Vol. I, Collusion [1236], p. 462.

AS TO PRESUMPTIONS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 626-637, paras. 696-705; and FOR CASES, see DIGEST, Vol. 22, pp. 160, 161, Nos. 1365-1367.]

Cases referred to:

- A (1) *Fender v. St. John-Mildmay*, [1938] A.C. 1; Digest Supp.; *sub nom. Fender v. Mildmay*, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340.
- (2) *Beattie v. Beattie*, [1937] 3 C.B.N.S. 87; [1938] 2 All E.R. 74; Digest Supp.; 107 L.J.P. 45; 159 L.T. 69.
- (3) *Jones v. Waite* (1842), 9 Cl. & Fin. 101; 27 Digest 219, 1901; 4 Man. & G. 1104; 5 Scott, N.R. 951; 6 Jur. 653; 8 E.R. 353; *affg.* (1839), 5 Bing. N.C. 341.
- (4) *Thorne v. Motor Trade Assocn.*, [1937] A.C. 797; [1937] 3 All E.R. 157; Digest Supp.; 106 L.J.K.B. 495; 157 L.T. 399; 26 Cr. App. Rep. 51.
- B (5) *Churchward v. Churchward and Holliday*, [1895] P. 7; 27 Digest 334, 3143; 64 L.J.P. 18; 71 L.T. 782.
- * (6) *Churchman v. Churchman*, [1945] 2 All E.R. 190.
- (7) *Sutton v. Sadler* (1857), 3 C.B.N.S. 87; 33 Digest 141, 193; 26 L.J.C.P. 284; 30 L.T.O.S. 65; *subsequent proceedings, sub nom., Sutton v. Devonport*, 27 L.J.C.P. 54.
- (8) *Pickup v. Thames Insurance Co.*, (1878) 3 Q.B.D. 594; 22 Digest 23, 36; 47 L.J.Q.B. 749; 39 L.T. 341.
- C (9) *Easson v. London & North Eastern Ry. Co.*, [1944] 1 K.B. 421; [1944] 2 All E.R. 425; 113 L.J.K.B. 449; 170 L.T. 234.
- (10) *Woolmington v. Public Prosecutions Director*, [1935] A.C. 462; Digest Supp.; 104 L.J.K.B. 433; 153 L.T. 232; 25 Cr. App. Rep. 72; 30 Cox, C.C. 234; *revg. S.C. sub nom. R. v. Woolmington*, 179 L.T.Jo. 256.

PETITION by the wife for the dissolution of her marriage on the ground of her husband's cruelty. The facts are fully set out in the judgment.

Geoffrey Howard for the petitioner.

Victor Russell for the respondent.

Cur. adv. vult.

DENNING, J.: This case is one of several I have tried recently which raise the question as to what is collusion and on whom the burden of proof rests in respect of it. I propose to state the principles as I understand them on these points before I deal with the particular facts of this case.

In order to secure the proper administration of the divorce law, the court requires that every petitioner must have received a real injury and genuinely seek relief, and that he shall deal with the court with the utmost good faith. He must disclose to the court every material fact, that is, every fact whether for or against him, which may influence the court in deciding to grant or refuse a divorce: and he must not bring or carry on the suit in collusion with the respondent, that is, he must not be a party to any arrangement which perverts or tends to pervert the course of justice. Divorce by mutual consent is not allowed. This does not mean that, after a matrimonial offence has been committed or is believed to have been committed, the parties may not discuss the problems created by it. The law favours reconciliation and permits separation agreements. It cannot prevent the parties from considering the remaining alternative of divorce. If reconciliation is impossible, there are many matters to be considered such as the future of the children, the house and furniture, and the provision of maintenance and necessities for the wife. Such matters must be dealt with either by agreement or by the court. If a separation has actually occurred or become inevitable, the law permits the parties to make a separation agreement which makes provision for such matters, see *Fender v. Mildmay* (1). So also if one party has started divorce proceedings or has decided to start them; the law permits the parties to make arrangements about such matters so long as they are made in good faith and with reasonable cause.

Even before an innocent party decides on divorce he or she may be faced with a difficult position. Take the case of an innocent wife. If her guilty husband is desirous of divorce, he may provide evidence, offer maintenance and costs and generally do all he can to persuade her to bring proceedings. She cannot stop him; and it is not every wife who can be expected to disregard such conduct. It may convince her that divorce is the only remedy for the situation that he has created, so that she accedes to his wish, decides to start proceedings

and accepts his offer, but that by itself is not collusion (see *Beattie v. Beattie* (2)). If she stoops, however, to accept a bribe, that is collusion, because the court cannot be sure that she genuinely seeks relief.

It is not lawful to buy or sell divorce or separation (see *Jones v. Waite* (3)). If a petitioner accepts a bribe, or extorts one, as an inducement to bring or carry on proceedings, or if he bribes a respondent not to defend, that is collusion. In bribery, as in extortion, innocence or guilt depends on whether the inducement is offered or sought with reasonable cause or not. The line may often be difficult to draw. The provision by a guilty husband of an allowance for his wife or of her costs may be merely the provision of necessities to which she is entitled by law; but if he pays her a large sum in cash it excites a suspicion that it is the price of his freedom. Similarly a husband who stipulates for an excessive sum as damages from the co-respondent raises the suspicion that it is the price he asks for giving his wife her freedom (*Thorne v. Motor Trade Association* (4), at p. 822 ([1937] 3 All E.R., at p. 170). Conversely the fact that a wife does not claim maintenance, or costs, may be simply because she has means of her own: but if she foregoes or agrees to forego her claims in return for the withdrawal by the husband of a defence on the merits, reasonable cause would be hard to find. Similarly the fact that a husband does not claim custody of children or damages gives rise to no suspicion: but if he agrees to forego his children or damages in return for a promise not to defend the suit on its merits, that may be collusion as it was in *Churchward v. Churchward* (5). It is for these reasons that the court requires that all agreements for permanent maintenance, custody of children, damages or costs shall be disclosed to it at the hearing of the petition. No such agreements are valid without the sanction of the court, except those made after decree absolute.

Where there has been collusion both parties are concerned to conceal the real nature of the transaction and it is necessary to see where the burden of proof lies. The subject has been recently considered by the Court of Appeal in *Churchman v. Churchman and Hicks* (6). The case related to connivance but the same principles apply to collusion. The Matrimonial Causes Act, 1937, puts on the petitioner the legal burden of proving that the petition is not presented or prosecuted in collusion with the respondent or either of the respondents. In order to discharge that burden the petitioner is entitled to rely in the first instance on the presumption of innocence. That, however, is a provisional presumption only, by which I mean that it is a presumption (like the presumption of testamentary capacity or the presumption of negligence in cases of *res ipsa loquitur*) from which the court may (not must) infer the fact in issue and which puts on the other side (when there is one) the provisional burden of calling evidence or taking the consequences. It must be distinguished from a compelling presumption (like the presumption of legitimacy or the presumption in favour of the holder of a bill) from which the court must in law infer the fact in issue unless the contrary or some other fact is proved and which puts on the other side the legal burden of proving that fact. The presumption of innocence in divorce cases is not a compelling presumption which puts on the other side the burden of proving collusion. If circumstances appear which, whilst not proving collusion, lead to a reasonable suspicion of it, they may counterbalance the provisional presumption (just as a suspicion of incapacity or an explanation consistent with due care respectively may counterbalance the provisional presumptions to which I have referred) and thus may shift the provisional burden back again. These provisional burdens which arise during the case and may shift within an issue must be distinguished from the legal burden of proving the fact in issue which never shifts. Provisional presumptions and burdens are not so much propositions of law as propositions of ordinary good sense, as was pointed out by a strong Court of Common Pleas which included WILLES, J., in *Sutton v. Sadler* (7), at p. 96; by BRETT, L.J., in *Pickup v. Thames Insurance Co.* (8), at p. 602; and by DU PARCQ, L.J., in *Easson v. L.N.E. Ry Co.* (9), at p. 425 ([1944] 2 All E.R., at p. 430). They are not necessarily decisive of the case, as is well illustrated by *Woolmington's* case (10). The legal burden on the other hand expresses a proposition of law, and is, in the last resort, decisive. The statute in divorce cases puts on the petitioner the legal burden of proving a negative which, though unusual, is not unknown to the law. At the end of the case the court must be satisfied on the evidence that the petition is not presented

or prosecuted in collusion with the respondent. It need not be satisfied beyond reasonable doubt. It is sufficient if the greater probability is that there was no collusion. If the matter is evenly balanced, the legal burden comes into play and requires the court to say that it is not satisfied.

A The critical point in the discussion is whether the presumption of innocence in these cases is provisional or compelling. In *Churchman's* case (6) the Court of Appeal considered the presumption against connivance which is the presumption of innocence applied to connivance. In one passage the court said, at p. 194:

B The issue only arises at all if the circumstances are such as to lead to a suspicion of connivance calling for investigation. Once the issue has been raised it might well be thought that, since in most cases of connivance, if not necessarily in all, the facts, including the all-important fact of his state of mind, are so especially in the knowledge of the party himself, that the burden of dispelling suspicion, once aroused, was always upon the party . . .

C That passage indicates that the presumption of innocence in these cases is provisional only: for a presumption which is counterbalanced by suspicion must be a provisional presumption: and the burden imposed by the special knowledge of a party must be a provisional burden for it does not supply the want of necessary evidence. In another passage, however, the court when dealing with connivance, said, at p. 195:

The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called.

D That passage indicates that the presumption of innocence in these cases is compelling, for a presumption which can only be defeated by strict proof must be a compelling presumption, and the burden which it produces must be a legal burden. The solution of this apparent difference is, I think, to be found by remembering that the statutory legal burden is the same in undefended as in defended cases and in cases when the King's Proctor intervenes and when he does not. In undefended cases where the King's Proctor does not intervene, the court is under the same duty to inquire whether there has been collusion or connivance, but there is no one to allege or prove it either by pleading, calling witnesses, producing documents, or by cross-examining the petitioner. At most in these cases there appears a suspicion of collusion or connivance, and then only when counsel for the petitioner in duty bound discloses it, or when a chance question by the judge discovers it. To require the same strict proof as is required in connection with criminal offences, that is, to require collusion or connivance to be established beyond reasonable doubt, would make the statutory legal burden of no effect and indeed reverse it. I come to the conclusion, therefore, that the presumption of innocence in these cases is provisional only and is counterbalanced by circumstances which lead to suspicion, and that thereupon the petitioner is left, as he began, with the legal burden of negating collusion or connivance.

E To turn now to the facts. The parties were married on Sept. 15, 1935, and separated on Sept. 18, 1944. Early in Oct., 1944, letters passed between solicitors in which the wife charged the husband with cruelty and he charged her with desertion. On Oct. 12, 1944, the wife filed a petition charging cruelty and on G Jan. 31, 1945, the husband filed an answer denying it. Meanwhile both before and during the proceedings the solicitors were negotiating about the division of the furniture and effects, the occupation of the flat, the education of the child, the amount of alimony *pendente lite*, and various other items. On the principles I have stated, none of those negotiations amounted to collusion. They dealt with matters which had to be settled either by agreement or by the court and the various claims were considered in good faith on their merits. In Feb., H and Mar., 1945, the parties met on several occasions to discuss the question of the furniture. On one of these occasions the husband told the wife that he was only defending the case because of the alimony. The wife said that he need not worry about that, because she was not going to claim any. He was, however, —I use her words—"the type of man who required 100 per cent. guarantee," and he got her to write out at his dictation a letter in these terms:

I Julia Emanuel swear that, if my husband Joseph I. Emanuel withdraws his defence and my divorce goes through undefended, I shall at no time claim any alimony from him. Julia Emanuel.

He told her that it was a gentleman's agreement. She said that the only thing she would expect him to do was to take care of the child. He told her that he would take the letter to his solicitor and if it did not do any good he would send it back by 5 p.m. the next day. He did not return it. She told her solicitor who wrote on Mar. 15, 1945, to the husband's solicitor saying that the husband quite wrongly extracted the letter from the wife and that it ought to be returned to them. It was not returned, nor was the defence withdrawn at that time. The case proceeded as a defended case. The husband filed an affidavit of documents which included the letter. The case was fixed for June 7, but a few days before the husband's solicitor telephoned the wife's solicitor saying that he was no longer going to defend the case. The case was heard by me on June 7, when counsel very properly at once drew my attention to the letter, but submitted that, as it was not acted on before the wife's solicitor asked for it back and the case went on as a defended case for another 2½ months, the proceedings were not tainted by collusion. A petition cannot be said to be presented or prosecuted in collusion with the respondent if all that has happened is that there have been collusive negotiations, so long as they have wholly broken down and have not affected the course of justice at all; but the difficulty I found in this case was that I was left in doubt whether the collusive understanding affected the proceedings; for in the absence of evidence by the husband I was unable to say whether he withdrew his defence in reliance on the promise contained in the letter (which he may still consider to be binding according to his notion of honour though not in law) or independently of it.

My suspicions were increased when I heard the evidence on the charge of cruelty. The petitioner gave evidence of a number of incidents throughout the married life but the only corroboration was of some incidents shortly before she left her husband in Sept., 1944. It became clear in the course of her evidence, however, that by that time she had formed an attachment for another man, and that these last incidents occurred when the husband found out about it and might have been provoked by it. In addition the petitioner's counsel very properly handed in to the court a copy of the correspondence disclosed by the respondent which showed that she was writing affectionate letters to him until Aug. 24, 1944, and that when she was about to leave him she drafted a letter thanking him for all his "wonderful kindness, help and advice." In these circumstances it seemed to me that this might be one of those familiar cases where the wife had formed an attachment for another man and, in order to excuse herself and get her freedom, had delved into the past for incidents to support a charge of cruelty. At all events, it was a case where there was a defence on the merits, which I can well understand that the husband would seek to sustain if he thought that his wife would claim permanent maintenance.

Applying the principles I have stated the case raises to my mind a suspicion of collusion which counterbalances the provisional presumption of innocence. At the end of the case I have on all the evidence to say whether I am satisfied that the petition is not prosecuted in collusion with the respondent. I am not satisfied and on that ground I dismiss the petition.

Petition dismissed.

Solicitors. W. R. Bennett & Co. (for the petitioner); Tarlo, Lyons & Co. (for the respondent).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

CANADIAN EAGLE OIL COMPANY, LTD. v. R.
SELECTION TRUST, LTD. v. DEVITT (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Simonds), **May 29, 30, 31, June 1, 4, 5, 6, 7, 11, 13, 14, 1945.**]

A *Income Tax—Double taxation—Relief—Shares in British companies held by Canadian company—Dividends of British companies suffering tax—Dividends of Canadian company paid to British shareholders less tax by company's London agents—Relief claimed by Canadian company in respect of tax so deducted—Income Tax Act, 1918 (c. 40), Sched. D, case V, Miscellaneous Rules, r. 7, All Schedules Rules, r. 20.*

B *Income Tax—Double taxation—Relief—British company holding shares in American company which held shares in five British companies—Dividends received by American company from British companies and by British company from American company suffering tax—Relief claimed by British company in respect of double taxation—Income Tax Act, 1918 (c. 40), Sched. D, case I.*

(1) The appellant is a company incorporated in Canada and not resident in the United Kingdom. Its income consisted at all material times either wholly or partly of income which bore United Kingdom income tax either by deduction or by direct assessment. Such income fell into three classes :
C (a) dividends on shares owned by the appellant in British companies resident in the United Kingdom which were received under deduction of tax ;
D (b) interest on loans made by the appellant to British companies resident in the United Kingdom which was also received under deduction of tax ;
and (c) interest on moneys deposited with banks in England by the appellant's agents, Midland Bank, Ltd., which was charged with tax by direct assessment on the appellant's agents. Many of the appellant's shareholders were resident in this country and their dividends were paid to them, under deduction of tax, by the appellant's agents. Until 1932, the Special Commissioners exempted from assessment to income tax such part of such dividends as arose from dividends received from the British companies, but since that date no repayment was allowed in respect of fixed preferential dividends, payable by the Canadian company. In 1940, the proportion for repayment was calculated only in relation to the appellant's directly-assessed income from deposits, and the two classes of income upon which tax was deducted against the company at the source were left out of account. The comparatively small sum thus tendered in repayment was refused by the appellant. As a result, the appellant, under the rule in *Gilbertson v. Fergusson* (1) claimed the repayment of all tax from 1932 onward assessed on dividends arising from dividends received by the appellant from British companies :—

HELD : (i) *Gilbertson v. Fergusson* (1) was based upon the erroneous view that some general principle was to be found in the Income Tax Acts, either expressly or by implication, which prohibited double taxation in the sense that income received by a person resident here from his shareholding in a foreign company should not be taxed as new income in his hands under Sched. D, case V, because some part of the income out of which the dividends had been declared could be traced back to a source in which it had been taxed in the United Kingdom.

Gilbertson v. Fergusson (1) overruled.

Barnes v. Hely-Hutchinson (2), *Cape Brandy Syndicate, Ltd. v. Inland Revenue Comrs.* (7), and *Bradbury v. English Sewing Cotton Co.* (8) applied.

H (ii) All Schedules Rules, r. 20, was intended to relate only to a company or other body which was chargeable to tax in the United Kingdom upon all its profits from whatever source derived, and did not apply, therefore, to a foreign company.

(iii) the Income Tax Act, 1918, Sched. D, Miscellaneous Rules, r. 7, which governed the case, imposed a charge upon dividends payable in respect of the shares of any foreign company without any reference to the sources of that company's income. There was nothing in the rule to imply that the charge upon the dividends was to be abated in proportion as the income

was itself chargeable, or not chargeable, to British income tax.

Decision of the Court of Appeal ([1944] 1 All E.R. 734) *affirmed on other grounds.*

Observed (per VISCOUNT SIMON, L.C., and LORD SIMONDS): the appellant had no other remedy than to proceed by Petition of Right, but where there is another and not less convenient remedy, a Petition of Right will not lie.

Holborn Viaduct Land Co., Ltd. v. R. (3) *considered.*

(II) The appellant, a British investment company, held, *inter alia*, shares in the common stock of a company incorporated in the United States. This American company in its turn held shares in five British companies trading in the United Kingdom; and the American company received dividends on those shares after deduction by the respective British companies of the United Kingdom income tax appropriate thereto. These dividends formed part of the profits of the American company, out of which they paid dividends on their stock; such dividends were paid to the appellant company on the shares which it held in the American company, without any deduction being made on account of United Kingdom tax. The appellant was accordingly assessed to income tax in respect of the dividends so received. The appellant, relying on the principle adopted in *Gilbertson v. Fergusson* (1), claimed that from the computation of its profits there should be omitted a part of the dividends received from the American company proportionate to so much of the American company's profits as was derived in its turn from the dividends of the shares of the five British companies paid to the American company under deduction of British income tax:—

HELD: *Gilbertson v. Fergusson* (1) was wrongly decided; but even if that decision had been well-founded, it would not be possible to say that the dividends paid by the American company to the appellant company had themselves borne British income tax. That the general profits of the American company would have been greater if there had been no deduction of British income tax on the dividends received by the American company from the five British companies in which they held shares, was a consideration too remote to hold that the appellant company, on paying tax on its trading profits, was called upon to pay the tax twice over in respect of the same thing.

Gilbertson v. Fergusson (1) *overruled.*

Barnes v. Hely-Hutchinson (2) *applied.*

Decision of the Court of Appeal ([1944] 1 All E.R. 742) *affirmed on other grounds.*

[EDITORIAL NOTE.] The point of interest in these cases is that the House had no scruples in overruling *Gilbertson v. Fergusson* (1), though the decision was given some 64 years ago. It was based on a construction of the Income Tax Acts (since held to be erroneous: see *per* VISCOUNT CAVE in *Inland Revenue Comrs. v. Blott* (4), and *per* LORD ATKIN in *Cull v. Inland Revenue Comrs.* (5)), under which it was supposed that in circumstances similar in a general way to those here under consideration, a company pays income tax on behalf of its shareholders and that there is some degree of double taxation which should be relieved against. It is here held on construction of the Acts, that a shareholder resident in the United Kingdom is taxable—whether through a paying agent or otherwise—in respect of the dividends on his shares in a non-resident corporation, as income from a source quite irrespective of the source of the income of the corporation, so that the fact that some part of that income has been subjected to United Kingdom income tax is irrelevant.

There is a fundamental distinction drawn in the Acts between the income of a non-resident corporation and the income derived out of it in the form of dividend by the resident shareholders in the corporation: they are two distinct incomes. The revenue laws of this country have no operation on a source outside the Kingdom; all they provide is that there shall be liability upon income arising to a resident person from the foreign source.

AS TO *GILBERTSON v. FERGUSSON* RELIEF, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 194, 195, para. 399; and FOR CASES, see DIGEST, Vol. 28, p. 79, No. 431.

AS TO TAX IN RESPECT OF INCOME FROM FOREIGN POSSESSIONS, see HALSBURY, *Hailsham Edn.* Vol. 17 pp. 195-200 paras. 400-412; and FOR CASES, see DIGEST, Vol. 28, pp. 79-81, Nos. 433-450.]

Cases referred to:

* (1) *Gilbertson v. Fergusson* (1881), 7 Q.B.D. 562; 28 Digest 79, 431; 46 L.T. 10; 1 Tax Cas. 501; *affg.* (1880), 5 Ex.D. 57.

* (2) *Barnes v. Hely Hutchison*, [1940] A.C. 81; [1939] 3 All E.R. 803; Digest Supp.; 108 L.J.K.B. 893; 161 L.T. 181; 22 Tax Cas. 655.

* (3) *Holborn Viaduct Land Co., Ltd. v. R.* (1887), 52 J.P. 341; 28 Digest 103, 634; 2 Tax Cas. 228.

* (4) *Inland Revenue Comrs. v. Blott*, *Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, 663; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

A * (5) *Cull v. Inland Revenue Comrs.*, [1940] A.C. 51; [1939] 3 All E.R. 761; Digest Supp.; 108 L.J.K.B. 879; 161 L.T. 173; *sub nom. Inland Revenue Comrs. v. Cull*, 22 Tax Cas. 603.

* (6) *London County Council v. A.-G.*, [1901] A.C. 26; 28 Digest 73, 392; 70 L.J.Q.B. 77; 83 L.T. 605; 4 Tax Cas. 265; *revsq. S.C. sub nom. A.-G. v. London County Council*, [1900] 1 Q.B. 192.

* (7) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K.B. 403; 42 Digest 666, 765; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; *affg. S.C.* [1921] 1 K.B. 64.

B * (8) *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; 28 Digest 81, 445; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481.

* (9) *Purdie v. R.*, [1914] 3 K.B. 112; 28 Digest 96, 570; 83 L.J.K.B. 1182; 111 L.T. 531.

* (10) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332.

C (I) APPEAL by the suppliant from a decision of the Court of Appeal (SCOTT, GODDARD and DU PARCQ, L.J.J.), dated May 24, 1944 and reported *sub nom. Re PETITION OF RIGHT OF CANADIAN EAGLE OIL CO., LTD.* ([1944] 1 All E.R. 734), affirming a decision of MACNAGHTEN, J., dated Oct. 12, 1943, and reported ([1943] 2 All E.R. 702). The facts and arguments are fully set out in the opinions of VISCOUNT SIMON, L.C., and LORD SIMONDS.

D (II) APPEAL by the taxpayer from a decision of the Court of Appeal (SCOTT, GODDARD and DU PARCQ, L.J.J.), dated May 24, 1944, and reported ([1944] 1 All E.R. 742), affirming a decision of MACNAGHTEN, J., dated Nov. 1, 1943, and reported ([1943] 2 All E.R. 727). The facts are sufficiently set out in the opinion of VISCOUNT SIMON, L.C.

The two appeals were heard in immediate succession, in order that the House might give judgment upon them together.

(I) *J. Millard Tucker, K.C.*, and *F. Heyworth Talbot* for the suppliant.

E The *Attorney-General* (*Rt. Hon. Sir David P. Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondents.

(II) *J. Millard Tucker, K.C.*, *Frederick Grant, K.C.*, and *J. W. P. Clements* for the appellants.

The *Attorney-General* (*Rt. Hon. Sir David P. Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

The House took time to consider its opinion.

F VISCOUNT SIMON, L.C.: My Lords, (I) the suppliant in this Petition of Right, the Canadian Eagle Oil Co., Ltd., is a company incorporated in Canada and not resident in the United Kingdom. Many of its shareholders, however are resident in this country. Their shares are of three different categories, cumulative first preference shares entitling the holders to dividends at a fixed rate, participating preference shares entitling them to dividends at a fixed rate and in certain circumstances to further dividends at a rate determined upon each particular occasion of distribution, and ordinary shares which entitle them to dividends at rates so to be determined. Their dividends are paid to them, under deduction of tax, by the Midland Bank, Ltd., as agents in this country for the suppliant company.

G The company does not carry on trade in the United Kingdom; but it receives income amenable to the Income Tax Acts in this country from three sources, H *viz.*, dividends on shares in British companies; interest on loans, and interest on moneys deposited with banks; in respect of the two former income tax is levied by deduction at the source, in respect of the last by direct assessment.

For a number of years, the company received repayments of the tax thus deducted by the Midland Bank from dividends paid to its shareholders resident in the United Kingdom, according to the rule adopted by the Court of Appeal in *Gilbertson v. Fergusson* (1); that is to say, so much of the amount of tax deducted against shareholders of all three classes as was found by means of a proportionate sum to be attributable to that part of the company's income

which was, as above stated, subject to United Kingdom income tax, was repaid to the company. Later, however, this repayment was confined to a similar proportion of the tax deducted against the holders of ordinary shares alone, a practice which was not disapproved by the House of Lords in *Barnes v. Hely-Hutchinson* (2). At a later stage, however, in 1940, in deference to certain observations made in that case, the proportion for repayment was calculated only in relation to the company's directly-assessed income from deposits, and the two categories of income upon which tax was deducted against the company at the source were left out of account. The comparatively small sum thus tendered in repayment was refused by the company.

As a result, the company, relying still upon the full application of the rule in *Gilbertson v. Fergusson* (1), claims to be entitled to repayment in respect of dividends on both classes of preference shares for the years ending Apr. 5, 1932, 1934, 1937, 1938, 1939 and 1940 (the years intervening and omitted are years in which no dividend was paid); and in respect of dividends on the ordinary shares for the year ending Apr. 5, 1940. It is claimed that the amount repayable should be calculated, in relation to all three categories of the company's income that are charged in the United Kingdom, by the method already mentioned.

A Petition of Right has been presented accordingly. The Attorney-General has demurred to the petition; and the demurrer has been upheld by the courts below. (MACNAGHTEN, J.: and in the Court of Appeal, SCOTT, GODDARD and DU PARCQ, L.JJ.)

At the time when *Gilbertson v. Fergusson* (1) arose and was decided, the Income Tax Acts of 1842 and 1853 were the principal ones in force. By the latter Act, the more general terms of Sched. D in the 1842 Act, were replaced by granting the duties (so far as material to the present subject):

... for and in respect of the annual Profits or Gains arising or accruing to any Person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere ...

Such a description includes (among many other matters):

... all Interest, Dividends or other annual Payments payable out of or in respect of the Stocks, Funds, or Shares of any Foreign Company ...

And by s. 10 of the 1853 Act in which those words are found, provision was made for the levy of the tax on this particular kind of income. This was done, it is important to notice, not by assimilating the procedure to that which regulated the levy of tax on the profits of a United Kingdom company or even of its shareholders, but by applying *mutatis mutandis* the provisions of the Income Tax (Foreign Dividends) Act, 1842, s. 2, which related to dividends or shares of annuities payable out of the revenues of any foreign state. By the 1853 Act, s. 10, then, when any:

... dividends ... in respect of the ... shares of any foreign company ... have been ... entrusted to any persons in the United Kingdom for payment to any persons ... in the United Kingdom, ... all persons "entrusted" with ... such ... payments ... or "acting therein as agents" ...

are required to do what was required of paying agents by the Foreign Dividends Act, 1842; that is, putting it shortly, to render accounts, submit to assessments, and pay the duty on such dividends; and moreover (for s. 2 of the Foreign Dividends Act, 1842, in its turn prays in aid the provisions of the Income Tax Act, 1842, s. 93, relating to payments out of public revenues) to "set apart and retain" the amount of duty in making the payments to the persons entitled to receive them—in other words, to deduct the tax at the source; and sect. 93 acquits and discharges the paying agents of the amount of the tax deducted as if it had been paid to the recipients of the dividends.

It is manifest from a consideration of the enactments thus summarised that the only power in the Revenue authorities to make repayment, or in the courts to order it, in accordance with the rule laid down in *Gilbertson v. Fergusson* (1), was for repayment through the paying agents who had deducted the tax to the shareholders who were entitled to receive the dividends. The company whose shares they held was not liable to the deduction of the tax, nor entitled to any repayment of it; this was recognised by COTTON, L.J., in the passages of his judgment, at pp. 572, 574, which were referred to by GODDARD, L.J., in the

Court of Appeal in the present case, as well as by BRAMWELL, L.J., at p. 569. Indeed, in *Gilbertson v. Fergusson* (1), the company was not a party; the appellant, Gilbertson, was a member and the representative of the London Committee who acted as the paying agents.

A So far as this point is concerned, the legal position has not been changed by the repeal of the Acts of 1842 and 1853 and their replacement by the Income Tax Act, 1918. The awkward arrangement of the relevant provisions has been but slightly modified by the 1918 Act, and their effect remains practically unaltered. By r. 7 (1) of the Miscellaneous Rules of Sched. D :

Where any . . . dividends . . . payable . . . in respect of the . . . shares . . . of any foreign or colonial company . . . are intrusted to any person in the United Kingdom for payment to any persons in the United Kingdom, the same shall be assessed and charged to tax under this schedule by the special commissioners.

B And by r. 7 (2) the provisions commonly called the "Paying Agents Rules" of Sched. C, which are primarily concerned with interest, etc., payable out of any public revenue, are extended to the tax to be assessed and charged under r. 7. R. 3 of the Paying Agents Rules directs the person entrusted with payment, out of the moneys in his hands, "to pay the tax on the dividends on behalf of the persons entitled thereto"; and he is to be acquitted in respect of all such payments. The substantive authority for charging dividends in respect of shares in a foreign or colonial company with tax is given by r. 1 (a) (i) of Sched. D :

Tax under this Schedule shall be charged in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere . . .

And but for r. 7 just quoted, such dividends would be charged by direct assessment on the recipient under Case V.

D The provision of the Income Tax Act, 1918, by which deduction at the source is authorised in the case of dividends in respect of shares in companies resident in the United Kingdom, stands in sharp contrast to the rules which relate to dividends of foreign companies. It forms the latter part of r. 20 of the General Rules (applicable to Schedules A, B, C, D and E). This rule begins with an obviously necessary direction that a body of persons is to be charged on the full amount of its profits :

E . . . before any dividend thereof is made . . . [and continues by providing that] . . . the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto.

There is here, as has often been pointed out, no *duty* imposed on the company to deduct tax such as appears in r. 7 of the Miscellaneous Rules of Sched. D ; nor is it liable to any assessment for the tax on the dividends. The liability of the company to tax does not depend upon the distribution of dividends, nor has it any direct relation to their amount ; it is based upon and ascertained according to the cases, rules and sections that may be applicable to the particular kinds of income chargeable with United Kingdom tax that the company enjoys. Any direct assessment on the company would be made upon the total amount of its profits thus ascertained, whether the amount of the dividends distributed were greater or less, and even if no part of these actual profits were distributed at all.

G These characteristics of r. 20 are illustrated by the fact that the legislature has found it necessary in the well-known provisions of the Finance Act, 1922, s. 21 (the scope of which has been more than once enlarged) to impose the sur-tax on the undistributed income of certain companies, and through them on their shareholders ; and, on the other hand, in the Finance Act 1940 s. 20 H to provide for the "grossing" of dividends paid without a full deduction of tax. For if the distribution of dividends by the company and the deduction of income tax against them on payment to the shareholders bore any necessary relation to the company's taxable profits or if such deduction were obligatory the gross amount of those profits would automatically be apportioned to each of the shareholders and form part of his "total income" for the purposes of sur-tax, as well as for the purpose of calculating his personal and other reliefs.

R. 20 of the General Rules in the 1918 Act is itself the successor of the middle portion of sect. 54 of the 1842 Act, with this perhaps not insignificant alteration

that, whereas s. 54 provides that the recipients :

... shall allow out of such dividends a proportionate deduction in respect of the duty so charged,

r. 20 in direct words entitles the body of persons which is charged on its profits :

... to deduct the tax appropriate thereto.

Now, although the definition of "body of persons" in the 1918 Act, s. 237, is sufficiently wide to cover a company not residing in the United Kingdom, the definition does not apply if "the context otherwise requires" and it is manifest that r. 20 is inapplicable to such a body. The tenor of that rule (as well as of its precursor) when read as a whole indicates that it is intended to relate only to a company or other body which is chargeable to tax in the United Kingdom upon all its profits from whatever source derived. To come down to details, if r. 20 were applicable to a foreign company, the company itself might deduct the tax against its shareholders in the United Kingdom, before remitting the net amount to the "person entrusted" as the channel for distribution here; the paying agent would be obliged to hand over to each shareholder the net amount thus allocated to him, and when an assessment came to be made on the paying agent under r. 7 of the Miscellaneous Rules, he would be left with no money in his hands out of which to pay the tax. In order to obviate this and other difficulties and to reconcile the two rules so that r. 7 might be read as subordinate to r. 20, counsel for the suppliant felt compelled to submit to the House an elaborate and ably drafted pair of provisos which he asked the House to read into r. 7. It need only be said that r. 7 is clear upon the face of it and when read with the Paying Agents Rules of Sched. C, which it incorporates, is comprehensive enough to cover the whole ground with which it perports to deal; there is, therefore, no warrant for reading into r. 7 words, and indeed whole sentences, which are not to be found there. R. 7 of the Miscellaneous Rules and r. 20 of the General Rules are not capable of being harmonized, for they are not *in pari materia*.

It was further argued that Miscellaneous Rule 7 and its precursor, sect. 10 of the 1853 Act, are mere machinery provisions to prescribe a method of assessing and collecting at the source tax in relation to foreign dividends, and that is certainly the case. But the argument goes on to suggest that this machinery was introduced in order to implement the charge imposed a number of years earlier by the Act of 1842, s. 54, and this suggestion is not well-founded. Sect. 54 did not impose a charge; it was itself a machinery provision, even more obviously so than General Rule 20 in the 1918 Act, for it begins and ends with directions as to the delivery of statements. The 1842 Act, however, provided no machinery for the collection of tax on dividends paid by foreign companies, other than as a result of direct assessment on individual shareholders, as in the case of other profits charged with tax under Case V; the 1853 Act, by s. 10, provided the much more convenient procedure by which the paying agent could be assessed, and compelled to pay the tax and deduct it against the recipient of the dividend. This, and not the filling up of any gap left in the 1842 Act, s. 54, was the improvement effected by the 1853 Act, s. 10.

Two further points remain to be noted in connection with the statutory enactments referred to in the course of the argument. General Rules 19 and 21 (like the provisions of the earlier Acts which they replace) deal with interest and "other annual payments"; they have no bearing upon dividends, even dividends upon preference shares, for dividends are not "annual payments," their distribution depending in every instance upon a specific declaration by the company. Again the Income Tax Act, 1918, ss. 16, 17, refer to allowances and deductions specifically granted by that Act and the Acts amending it, such as the personal allowances, life assurance allowances, allowances for children and so forth, and have nothing to do with the subject of the present appeal.

From the foregoing consideration of the enactments in force at the time of the decision in *Gilbertson v. Fergusson* (1), and of those now current, it emerges clearly that the rule adopted in that case enures for the benefit of the shareholders and not of the foreign company itself. This conclusion is consistent with the decision of the House in *Barnes v. Hely-Hutchinson* (2) already referred to; for if the rule were for the benefit of the company, it could obviously make no difference that some of the shareholders are entitled to dividends at a fixed

rate, and others only at a rate which is determined afresh at each declaration. Even on the assumption therefore that the rule is well founded, the suppliant is not entitled to the benefit of it.

A There is also a subsidiary point ; r. 7 of the Miscellaneous Rules of Sched. D provides, as has been seen, for the assessment of dividends from shares in foreign companies by the Special Commissioners, under that Schedule. A right of appeal against an assessment under Sched. D by those commissioners is granted by the 1918 Act, s. 147, to the person assessed, who is in this case the paying agent ; and no reason is apparent for excluding an assessment under r. 7 from the general words of sect. 147. If there is to be a repayment of tax assessed under r. 7 it must be because the assessment was excessive ; and it is the person assessed who is aggrieved. Where there is another and not less convenient remedy a Petition of Right will not lie ; see *Holborn Viaduct Land Co., Ltd. v. R.* (3), where the claim was in some respects comparable with that made in the present case.

B These observations might be sufficient to dispose of the present appeal ; but the question whether the rule in *Gilbertson v. Fergusson* (1) is in conformity with the Income Tax Acts has been fully argued both in this appeal, and in the second appeal where it arises in a somewhat different form. The validity of that rule comes, therefore, for a third time under the scrutiny of the House, and it is right that that general question should now be decided once and for all.

C Gilbertson and his colleagues were the representatives in England of the Imperial Ottoman Bank, a Turkish corporation, whose principal business was carried on in Turkey, but which also carried on some business in the United Kingdom, though it was not resident here. It had shareholders in the United Kingdom, and paid their dividends through the agency of Gilbertson and his committee. In the material year, the profits earned by the Bank in this country and remaining in the paying agent's hands, were sufficient in amount to pay the dividends of the shareholders in the United Kingdom, without any remittance from Turkey, and the claim was made that, therefore, no charge at all could be imposed on Gilbertson in respect of the dividends. It was contended on his behalf that the 1853 Act, s. 10, applied only to sums remitted from abroad in order to pay dividends here. This contention had commended itself to KELLY, C.B., who delivered a dissenting judgment in the Exchequer Chamber ; but the other judges of that court barely allude to it, and none of the members of the Court of Appeal refers to it directly.

E For the Revenue, on the other hand, it was conceded that some abatement or repayment should be made to the paying agent ; although he had in the first instance been assessed (somewhat tentatively it would appear) by the Special Commissioners upon the full amount of the dividends. Mr. Dicey in the Court of Appeal claimed no more on behalf of the Revenue than that income tax was payable "on the portion of the dividends paid to persons resident in England which arises from foreign profits," the Bank itself being liable to tax on the whole of the English profits. This claim succeeded ; and the paying agent's appeal was dismissed. It is well to bear this fact in mind ; for the majority in the Exchequer Chamber, and the judges of the Court of Appeal, were not adjudicating upon a claim to charge the paying agent with tax in respect of the whole amount of the dividends he had paid to the shareholders, and consequently cannot be taken to have rejected such a claim.

G What was no doubt in the minds of the Revenue and its advisers in taking this course, as well as of the judges in approving it, was the view then prevailing that a company charged with, and paying, tax under Sched. D, for example in respect of profits accruing to it in the United Kingdom, was assessed and paid the tax as agent on behalf of its shareholders. Thus in the Court of Appeal, H BRETT, L.J., commenced his judgment by saying, at p. 569, that the first question is :

... who are the persons intended to be charged ultimately with the income tax [and further on his Lordship says, at p. 570] . . . it would be so clearly unjust and obviously contrary to the meaning of the statute that the Government should have the tax payable twice over by the same person in respect of the same thing, that I should say it was a necessary implication that that could not be right. Therefore if part of the dividends in respect of which the income tax is payable is also in respect of profits earned from a business in England, the tax on that part would have to be paid twice over, which ought not to be ; and as to that, there should be a deduction.

And COTTON, L.J., says, at p. 572 :

... that when duty is charged as against the person in one part of the Act he is not to be charged again ...

(This passage will have to be considered again in another connection); the final sentences of his Lordship's judgment are based on the same underlying position.

But that position is demonstrably wrong; and the contrary view has now prevailed for a quarter of a century. The law was thus declared by VISCOUNT CAVE in *Inland Revenue Comrs. v. Blott* (4), at p. 201 :

Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a taxpayer, and if no dividend is declared, the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and in that case the payment by the company operates in relief of the shareholder. But no agency, properly so called, is involved.

That view has been acted upon in subsequent decisions, notably in that of the House of Lords in *Cull v. Inland Revenue Comrs.* (5), where LORD ATKIN stated the law thus, at p. 56 ([1939] 3 All E.R., at p. 763) :

My Lords, it is now clearly established that in the case of a limited company the company itself is chargeable to tax on its profits and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income tax on dividends, and they are not assessed in respect of them. The reason presumably is that the amount which is available to be distributed as dividend has already been diminished by tax on the company, and that it is thought inequitable to charge it again. At one time it was thought that the company, in paying tax, paid on behalf of the shareholder; but this theory is now exploded by decisions in this House; and the position of the shareholders as to tax is as I have stated it.

And LORD RUSSELL OF KILLOWEN, looking at the matter from a different angle, said, at p. 62 ([1939] 3 All E.R., at p. 767) that

... while the amount which [the company] could have deducted as the "tax appropriate thereto" has been definitely fixed at the standard rate for the year in which the amount of the dividend became due, it is in no way comparable with the tax payable by the company itself.

In face of the law thus established it is impossible now to hold that a shareholder in a foreign company who suffers a deduction of tax in respect of his dividend under r. 7 of the Miscellaneous Rules of Sched. D, or the paying agent who is charged on behalf of the shareholders and hands over the tax to the Revenue under the Paying Agents Rules incorporated by r. 7, is paying tax a second time upon a dividend which has already been taxed. The *ratio decidendi* of *Gilbertson v. Fergusson* (1) is gone; and the rule adopted in that case is not consistent with the true facts, or with the law as now understood.

Further, it was assumed in that case that there was a general principle to be applied in construing the Income Tax Acts that tax is not "payable twice over by the same person in respect of the same thing"; as BRETT, L.J., said in *Gilbertson v. Fergusson* (1), at p. 570; or as it was put by COTTON, L.J., at p. 572 :

... I take it there would be this implied exception, that when duty is charged as against the person in one part of the Act he is not to be charged again under another part, applying no doubt in terms to him, but intended to include those who have not been charged under the preceding part.

And again at p. 574 :

... where the dividend has already been taxed then, by the necessary implication of the statute, the duty is not again to be paid upon it. ...

There have certainly been cases in which some such inference has been drawn from particular provisions of the Income Tax Acts, as was done, for instance by the House of Lords from the Tenth Rule of Sched. A in the 1842 Act, sect. 24 of the Customs and Inland Revenue Act, 1888, and the other enactments considered in *London County Council v. Attorney-General* (6). But the opinions delivered by LORD MACNAGHTEN and LORD DAVEY in that well-known case proceed upon a meticulous construction of those particular provisions and not upon the supposition of any general principle underlying them, and remaining unexpressed. No such supposition is legitimate. The late ROWLATT, J., whose

outstanding knowledge of this subject was coupled with a happy conciseness of phrase, said in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (7), at p. 71 :

... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

- A Looking fairly at the language used in r. 7 of the Miscellaneous Rules of Sched. D in the 1918 Act, which governs the present case (as its predecessor, sect. 10 of the 1853 Act governed the case of *Gilbertson v. Fergusson* (1)) it is clear that a charge is there imposed upon dividends payable in respect of the shares of any foreign company without any reference to the sources of that company's income. There is nothing in either provision to imply that the charge upon the dividends is to be abated in proportion as the income is itself chargeable, or not chargeable, to British income tax. No general principle can be set up which would make any such abatement "a necessary implication of the statute." The thesis which lies at the root of the decision in *Gilbertson v. Fergusson* (1) is unsound, and for this reason, as well as for the reasons previously given, this appeal fails.

- B (II) The appellant in this appeal, the Selection Trust, Ltd., is a British company resident in the United Kingdom and carrying on here the business of dealing in and holding investments. As such, it holds *inter alia* shares in the common stock of a company incorporated in the United States and described in the Special Case as the "American Metal Co., Ltd." (*sic*). This American company in its turn hold shares in five British companies trading in the United Kingdom ; and the American company has received dividends on those shares after deduction by the respective British companies of the United Kingdom income tax appropriate thereto, as is authorised by r. 20 of the General Rules. These dividends formed part of the profits of the American company, out of which they paid dividends on their stock ; such dividends were paid to the appellant company on the shares which it held in the American company, without any deduction being made on account of United Kingdom tax.

- C The dividends thus paid to the appellant company were, of course, "income arising from possession out of the United Kingdom," and as such might have been charged under Case V of Sched. D. But the Inland Revenue Commissioners exercising the option vested in them, included these dividends in the charge under Case I in respect of the trade carried on in the United Kingdom by the appellant company ; and included the whole of those dividends in computing the amount of the charge. It does not appear whether the American company had any paying agent in the United Kingdom ; but at any rate there has been no assessment upon any such agent, and r. 7 of the Miscellaneous Rules of Sched. D has no application in this appeal.

- D E F In the circumstances stated, the appellant company seeks to have the benefit of the rule adopted in *Gilbertson v. Fergusson* (1). It claims that from the computation of its profits for the purpose of Case I of Sched. D there should be omitted a part of the dividends received from the American company proportionate to so much of the American company's profits as is derived in its turn from the dividends of the shares of the five British companies paid to the American company under deduction of British income tax. It is unnecessary to consider the actual figures which are to be found in the Special Case. Even if the rule in *Gilbertson v. Fergusson* (1) were well-founded (which for the reasons just given in the first appeal it is not), it would be impossible in the present circumstances to say that the dividends paid by the American company to the appellant company have themselves borne British income tax, although it may be that the general profits of the American company out of which those dividends were paid would have been greater if there had been no deduction of British income tax on the dividends received by the American company from the five British companies in which they held shares. That consideration is far too remote to justify the assertion that when the appellant company pays tax on its trading profits as they have been computed for the purpose of the charge under Case I of Sched. D, it has been called upon to pay the tax twice over in respect of the same thing. Such an extension of the rule in *Gilbertson v. Fergusson* (1) would be contrary to the reasoning of LORD ATKIN and LORD WRIGHT in *Barnes v. Hely-Hutchinson* (2).

Consequently, even upon this ground alone, the judgments of MACNAGHTEN, J., and of the Court of Appeal, given when it was still assumed that *Gilbertson v. Fergusson* (1) was good law, were right and should be approved. But, as has been decided in the first appeal, the rule there adopted can no longer be supported; and the appeal fails.

I move that these two appeals be dismissed with costs.

LORD THANKERTON: My Lords, I agree with the opinion of VISCOUNT SIMON, L.C., which has just been delivered, and which I had an earlier opportunity of considering. It expresses fully my views in its reasons and its conclusions, and I will only add observations on two points of crucial importance in these cases.

In the first place, in the first of these cases, it appears to me that the contentions of the appellant company require their being able to invoke the provisions of r. 20 of the General Rules applicable to all Schedules in their favour, but, in common with VISCOUNT SIMON, L.C., I am of opinion that it does not apply to the case of a non-resident body of persons, who are beyond the range of British taxing Acts, and are, therefore, outside the opening words of the rule.

In the second place, I am of opinion that the principle embodied in the decision in *Gilbertson v. Fergusson* (1) is so wrong, and might be so far-reaching, that, despite the lapse of time, it should not be left uncorrected. That principle, in my opinion, is to be found in the judgment of BRETT, L.J., afterwards LORD ESHER, at p. 570:

Now it may be true that there are no specific words in this statute which point out that the Government are not to receive the tax twice over, but it would be so clearly unjust and contrary to the meaning of the statute that the Government should have the tax payable twice over by the same person in respect of the same thing, that I should say it was a necessary implication that that could not be right.

It is clearly beyond the province of the courts either to correct hardship or afford justice by an implication which is not based on the language of the statute.

LORD RUSSELL OF KILLOWEN: My Lords, the main question which is raised in these two appeals, though from a different angle in each, may, I think, be stated thus: In taxing a person resident in the United Kingdom in respect of his income arising from dividends on shares in a foreign company (*i.e.*, in respect of income arising from possessions out of the United Kingdom under Case V of Sched. D), should relief from taxation be given as regards so much of that income as can be shown to have already borne tax in the United Kingdom? The claim to such relief is asserted in each appeal, but in the first appeal the benefit of the relief is claimed by the foreign company, while in the second appeal it is claimed by its shareholder, who is taxed under Case V.

The ground upon which the relief is claimed is the alleged necessity of avoiding what is alluded to as "double taxation." The normal meaning of double taxation is that the same person pays tax twice on his income; but the present relief is claimed not upon that footing, but upon the theory that if the income of a foreign company, out of which a dividend is paid to a shareholder resident here, can on being analysed and traced to its origins be shown to have at some time, as to some portion thereof, borne tax in the United Kingdom, then if the shareholder is taxed on the full amount of the company's income which is distributed to him in dividend, double taxation will have taken place as regards a portion of the income distributed to him as dividend, *viz.*, on so much as can be said to arise from profits made in the United Kingdom which has already been charged to tax.

The theory that this species of double taxation gives rise to a claim to exemption from or repayment of tax must rest on some express enactment in the Income Tax Acts, or on some principle to be implied from those Acts, or to be found in the common law. Express provision there is none. On principle, double taxation in the strict sense which I have indicated would, in default of express provision, no doubt be wrong: the Crown may choose the Case under which it taxes the subject, but it cannot tax the subject in respect of his income under one Case, and tax him again in respect of it under another. But I am unable to state, or justify, any principle (to be implied from the Acts* or existing at common law) to support the view that it is illegal for the Crown to levy and retain the tax on the full amount of its profits distributed in dividends

declared by a foreign company in favour of a shareholder resident here, because some part of the income out of which those dividends have been declared can be traced back to a source in which it has been taxed in the United Kingdom.

A That some such principle giving rise to the present claims did exist was decided many years ago in *Gilbertson v. Fergusson* (1), and was accepted and acted upon by the Revenue authorities until recently. Its correctness has now been challenged. The Court of Appeal, in the present cases, were bound by that decision, but they decided the present appeals in favour of the Crown on other grounds. In your Lordships' House, however, *Gilbertson v. Fergusson* (1) is open to review. Its correctness has been challenged before us and we cannot, I think, avoid the task of determining whether or not it should, notwithstanding its respectable age of 64 years, be overruled.

B There is no valid reason why, if we think that it was wrongly decided, it should not be overruled. Its long standing has only resulted in some taxpayers reaping a benefit for a time, during which the Revenue has suffered loss. No title has been created or affected by the decision, nor will any title be weakened or jeopardised by its being overruled.

C This theory about double taxation in the circumstances mentioned has no doubt arisen from the fact that in the legislation relating to income tax a departure has been made in one respect from the consequences which should logically have followed from the fact that a limited company is a legal entity separate and distinct from the individuals who are the owners of its share capital. Logically there would be no answer to the view that a company's income is one taxable income and that the profits which it distributes to its shareholders out of its taxed income in dividends is another and new income, taxable again in the shareholder's hands. But, as was said by LORD PHILLIMORE in *Bradbury v. English Sewing Cotton Co.* (8), at p. 769 :

D Their [*i.e.*, the shareholders] taxation would seem to be logical, but it would be destructive of joint stock company enterprise . . .

And he points out that the 1842 Act apparently proceeded on the idea that for revenue purposes a joint stock company should be treated as a partnership "so that the payment of income tax by a company would discharge the quasi-partners." The provisions of the 1842 Act which result in this fictional treatment of the relationship between a joint stock company and its shareholders are now to be found in rr. 1 and 20 of the General Rules. Under r. 20 the company, having been charged on the full amount of its profits and gains, is entitled to deduct tax from the dividends which it pays, the tax which it can so deduct being now (see Finance Act, 1927, s. 39 (1)) tax at the standard rate for the year in which the dividend is declared, irrespective of the rate or rates at which tax was paid by the company on the profits and gains out of which the dividend is being paid. The procedure indicated by r. 20 is accordingly an artificial device by means of which a shareholder's income from dividends of a joint stock company is protected from being treated as a new taxable income in his hands, but as a result of which the company in shifting the burden on to the shoulders of the shareholder, may well recoup itself a larger sum than the Revenue had received from it. As LORD ATKIN pointed out in *Cull's* case (5), the shareholder pays no tax, in the sense that the Revenue receives nothing from the shareholder, and receives no tax except what it has already received from the company. The shareholder, however, bears the burden of what the company has paid (and perhaps more), and has certainly paid tax by deduction within the meaning of the Income Tax Act, 1918, s. 29.

G But to contend that the same considerations which prompted (as regards resident companies) the provisions of the 1842 Act, now represented by r. 20, apply, or should be applied, to the case of foreign companies is quite another matter, and it is the examination of this question which must determine whether *Gilbertson v. Fergusson* (1) was rightly decided.

H Certain propositions which were discussed in the course of the arguments before us appear to me to be beyond question.

(i) Dividends paid by a foreign company and received in the United Kingdom constitute income arising from possessions out of the United Kingdom, and are taxable under Case V of Sched. D.

(ii) R. 20 does not enable a foreign company to deduct any British income tax

from dividends paid to it direct to a shareholder resident in the United Kingdom. The rule (in its application to a limited company) envisages a charge on the full amount of its profits before payment of a dividend to its shareholders, followed by a payment of a dividend to its shareholders, from which the company may deduct tax at the standard rate on the whole dividend.

(iii) If the foreign company (as is most probable) does not pay dividends direct to shareholders resident in the United Kingdom, it must resort to r. 7 of the Miscellaneous Rules applicable to Sched. D, which makes applicable the rules (under Sched. C) as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are entrusted. Under No. 3 of those rules, there is no escape from the position that tax on the full amount of the dividend has to be paid on behalf of and borne by the shareholder.

These appeals then resolve themselves into cases of a taxpayer resident here taxed under Case V of Sched. D in respect of dividends paid by a foreign company to a person resident in the United Kingdom (in the one case) in the manner indicated in r. 7 (and in the other case) direct without deduction of tax. They are the exact cases contemplated by LORD PHILLIMORE in the *Sewing Cotton* case (8), when he said, at p. 770 :

But the British taxpayer may be receiving annual sums from foreign possessions and thus become liable to be assessed and taxed . . . according to the 5th Case of Sched. D. And it matters not what the foreign possession is, whether it is land or goods or shares in a foreign company. The periodic sums which are so remitted to him . . . are liable to assessment and taxation, not because they are dividends on shares in foreign companies, but simply because they are remittances from foreign sources. The officers of the Crown do not know and do not care what is the character of the sources from which the money comes.

And I would myself add that I am not aware of any means by which those officers could insist on a disclosure of or verify the pedigree or sources of the income out of which a foreign company was paying any particular dividend.

The case is simply that such income is liable to assessment and taxation under Case V of Sched. D ; and since the tax legislation contains no provision in reference to the case, corresponding to r. 20, it must be treated as new income in the hands of the shareholder, and no question of the alleged or any other double taxation can arise.

The case of *Gilbertson v. Fergusson* (1) was a similar case. The facts were more complicated, and some confusion is apparent in the judgments between the position of the London agency as carrying on the Bank's business in the United Kingdom and its position as the person entrusted with the payment of dividends to persons in London, within sect. 10 of the Income Tax Act, 1853, the provision then in force corresponding to the before-mentioned r. 7. But the essence of the decision was as follows : The London agency had been assessed on the full amount of the dividends paid in London. It was held that since those dividends were payable out of the general earnings of the Bank, which were composed partly of profits made in the United Kingdom (which had already been taxed under Case I of Sched. D) and partly of profits made elsewhere, the agency should only be assessed under sect. 10 upon so much of the dividends as were paid out of the profits made elsewhere than in the United Kingdom. If that decision is right, a claim to some relief and repayment would arise in the present cases. In my opinion, however, the decision was wrong. It was based upon the view, which I think erroneous, that some general principle was to be found in the taxing Acts, either expressly or by implication, which prohibited double taxation in the sense which I have indicated. BRETT, L.J., calls it "the meaning of the Statute," while COTTON, L.J., speaks of "the necessary implication of the Statute." To exclude the power to exact such double taxation you must find some provision to that effect. As regards a company resident here and its shareholders, r. 20 prevents what the shareholder receives from the company in dividend being treated as new taxable income in his hands ; but r. 20 does not apply to a foreign company, and there is nothing in the tax legislation to justify the view that income (whatever its pedigree) received by a person resident here from his shareholding in a foreign company should not be taxed as new income in his hands under Case V of Sched. D.

I would dismiss both appeals.

LORD MACMILLAN : My Lords, encouraged by a recent success in an affair of outposts (*Barnes v. Hely-Hutchinson* (2)), the Inland Revenue authorities have now in these appeals launched a frontal attack on what is known as "the rule in *Gilbertson v. Fergusson* (1)." Speaking of *Gilbertson v. Fergusson* (1) LORD ATKIN said, in *Barnes v. Hely-Hutchinson* (2), at p. 89, ([1939] 3 All E.R., at p. 806) :

A . . . this House would hesitate long . . . before infringing a decision of such long standing and so often acted upon.

Despite this admonition, your Lordships are invited to hesitate no longer and boldly to declare that the decision was wrong and must be overruled.

B The problem may be stated in general terms. A company not resident in the United Kingdom, which I shall call "the foreign company," derives part of its income from business carried on in the United Kingdom, on the profits of which it pays income tax by direct assessment on its agents here or from dividends paid to it by companies in the United Kingdom in which it has shares and from which dividends income tax has been deducted. The total income of the foreign company is thus composed in part of income which has borne income tax either by direct assessment or by deduction. The foreign company also happens to have shareholders resident in the United Kingdom. To these shareholders it pays dividends out of its total available income either individually or by transmitting to agents in the United Kingdom a block sum sufficient to pay all dividends due to its shareholders in the United Kingdom, entrusting to these agents the task of distributing to each individual shareholder his appropriate dividend. The dividends distributed to shareholders in the United Kingdom are thus seen to be paid out of moneys which in part have already borne income tax, to the extent of the proportion which the part of the company's income which has borne income tax bears to its total income. Consequently if income tax is exacted in respect of the full amount of the dividends paid by the foreign company to its shareholders in the United Kingdom this is *pro tanto* to subject the same income to double taxation. So ran the successful argument in *Gilbertson v. Fergusson* (1), in which it was held that proportional relief must be given.

E It is important to consider the circumstances in which that decision was pronounced. There the foreign company, the Imperial Ottoman Bank, earned profits in London from business transacted there. On these profits it paid income tax through its London agency. These profits were merged with its profits made outside the United Kingdom and from its total profits thus ascertained dividends were paid to its shareholders in the United Kingdom. The profits earned in the United Kingdom were sufficient in amount to pay the whole dividends to the United Kingdom shareholders, and as income tax had already been paid on the profits earned in the United Kingdom it was contended that no further income tax was exigible in respect of the dividends paid to United Kingdom shareholders. This contention failed because the dividends paid to the United Kingdom shareholders were not paid solely out of the profits earned in the United Kingdom, but were paid out of the total profits of the foreign company, both those earned within and those earned outside the United Kingdom. So far as the dividends paid to United Kingdom shareholders were attributable to profits earned out of the United Kingdom, no income tax had been paid thereon, and the claim of the Inland Revenue which succeeded was that to this proportional extent the dividends paid to United Kingdom shareholders were liable to income tax. I note particularly the passage in the judgment of POLLOCK, B., where he states, at p. 74 :

H . . . to the extent that the amount paid by way of dividend consisted of profits earned in the United Kingdom, the commissioners admitted that this amount, having been taxed once as profits, was not further liable.

In view of this admission and of the way in which the case was presented, it is not surprising that the decision took the form which it did. The Inland Revenue authorities make no such admission in the present cases and they submit that they made an error in law in so admitting in *Gilbertson v. Fergusson* (1).

I pause to disencumber the question of a complication which in my view has no material bearing upon it. In *Gilbertson v. Fergusson* (1) the money necessary to pay the dividends to the United Kingdom shareholders was entrusted

in block (so it was held) to paying agents in London for distribution. As part of the general machinery of income tax collection at the source it is provided that where a foreign company adopts this convenient course, then the paying agents in the United Kingdom shall be accountable for tax on the dividends in block. But it is expressly declared in the statute that the paying agents "pay the tax on the dividends on behalf of the persons entitled" to the dividends. In *Gilbertson v. Fergusson* (1) the appeal was taken on behalf of the London agents of the Imperial Ottoman Bank, who had been assessed to tax on the sum entrusted to them for payment of the dividends to the United Kingdom shareholders, and the question does not appear to have been discussed as to who were properly entitled to the relief which the court found to be due. In the first of the two present appeals it is the foreign company which as suppliant craves repayment to itself or to its London agents of the tax alleged to have been doubly assessed. In the other present appeal it is the United Kingdom shareholder in a foreign company who claims relief in respect of tax on dividends received direct from the foreign company, in so far as these dividends have been paid by the foreign company out of dividends received by it under deduction of tax from United Kingdom companies. If it were necessary to express an opinion as to the proper party entitled to relief, if any, I should agree with the view of GODDARD and DU PARCQ, L.JJ., that it would be the United Kingdom shareholder who would be entitled to the relief and not the foreign company. This in itself would be a sufficient ground for dismissing the first of these appeals.

So far as the question of principle is concerned, it seems to me immaterial whether the United Kingdom shareholder in a foreign company receives his dividends direct from the foreign company without deduction of tax and is then taxed directly on the amount thereof or receives his dividends from agents in the United Kingdom of the foreign company who have been entrusted with the requisite funds, and having paid tax thereon on behalf of the shareholders, pay their dividends to them less tax. This is all merely machinery. The point is whether, in the type of case represented by *Gilbertson v. Fergusson* (1) and the appeals now before the House, the same income within the meaning of the Income Tax Acts is really being subjected to double taxation.

The key to the problem is to be found in the fundamental distinction drawn in the Income Tax Code between income arising from sources in this country and income arising from sources outside the United Kingdom. The income of a British taxpayer, so far as earned or received from sources within the United Kingdom, is dealt with in one way, and his income so far as received from sources abroad is dealt with in another way. And for the very good reason that sources of income in this country are subject to the jurisdiction of the Government of this country, which can enact laws and make regulations as to returns, accounts and investigations which it has no power to do in respect of sources of income outside the United Kingdom. So far as a British taxpayer has a source of income arising from possessions out of the United Kingdom, the revenue laws of this country have no operation on that source. It is only in so far as income from that foreign source is received by, or in some cases credited to, a resident within the United Kingdom that it comes within the purview of British taxation at all. The British Revenue authorities have no means of analysing or investigating such income from foreign sources. All that they have power to ascertain from the British taxpayer is the amount of his income derived therefrom. Thus in the case of income from stocks, shares or rents abroad, the tax is directed to be computed on the full amount thereof and with that full amount alone are the British Revenue authorities concerned. They have no power to pursue inquiries abroad as to the prior history or provenance of such income :

The officers of the Crown do not know and do not care what is the character of the sources from which the money comes.

(*Per* LORD PHILLIMORE in *Bradbury v. English Sewing Cotton Co.* (8), at p. 770.)

The topic has been darkened rather than illumined by a false analogy which it has been sought to draw with the case of the taxation of the income of United Kingdom companies and their shareholders. It is true, as LORD PHILLIMORE points out in the case just cited, at p. 769, that in the system of taxation in this country a company and its shareholders are for economic reasons treated as if they constituted a partnership having a single income, the tax on which is paid

by the company, the shareholders being thereby discharged of liability to tax (apart from sur-tax) on their dividends or shares of the company's income. The company recoups itself by deducting income tax from the dividends which it pays to its shareholders. The system is highly artificial, for the tax is deducted at the standard rate obtaining when the dividends are paid, while the profits out of which the dividends are paid may have been earned in previous years and have borne tax at a higher or a lower rate, and a company does not usually distribute in dividends in any one year all the profits of that year on which it has paid tax. But this is a domestic expedient limited in its operation to this country. It has no application to foreign companies. A foreign company paying dividends to its shareholders within the United Kingdom is not subject to British revenue laws or practice. It cannot pay dividends to its United Kingdom shareholders under deduction of a tax of which it has no knowledge and to which it is not subject except in so far as it derives income from a source in this country. It pays its dividends to its United Kingdom shareholders either directly or through paying agents in this country and then leaves our domestic revenue laws to operate upon the money so transmitted.

The so-called "rule in *Gilbertson v. Fergusson* (1)" is open in my opinion to at least one insuperable objection. It is agreed that the relief which it gives is not relief against the whole tax exigible on the foreign dividends, but only to the extent of the proportion which that part of the foreign company's income which has borne British tax bears to the total income of the foreign company, for the British shareholder's dividend is only in part paid out of income which has borne tax. But how is this proportion to be ascertained? The foreign company doubtless has quite different rules for arriving at its total profits from the artificial rules which apply to the ascertainment of the profits of a British company. One essential factor in the ascertainment of the extent of the relief under the rule in *Gilbertson v. Fergusson* (1) is thus entirely beyond any means of criticism and control on the part of the revenue authorities. This seems to me a quite untenable position. Incidentally I may point out that if the foreign company were to pay dividends to its British shareholders under deduction of tax, the amount to be deducted would be dependent on this same unverifiable factor.

The result of these considerations is to satisfy me that for the purposes of income tax the income of a foreign company and the income received from it in dividends by its British shareholders are not to any extent or effect one and the same income, but are two distinct incomes. The fact that the foreign company's total income is in part composed of British dividends which have borne tax by deduction is entirely irrelevant to the question of the tax to be paid by a British shareholder on the dividends received by him from the foreign company. There is no such identification of the British shareholder with the foreign company as there is between a British shareholder and a British company, and the attempted analogy is only misleading. The income of the foreign company and the income received in dividends from it by its British shareholder are in our revenue law the incomes of two different persons, and there can thus be no room for any invocation of the rule against double taxation, which applies only against taxing twice the same income of the same person.

The principle of the decision in *Gilbertson v. Fergusson* (1), already undermined by *Barnes v. Hely-Hutchinson* (2), is thus, if I am right, finally exploded. If it is relegated to the limbo of cases overruled, the whole basis of the arguments of the appellants in both these appeals goes with it. They should both, in my opinion, be dismissed.

LORD SIMONDS [read by LORD MACMILLAN]: My Lords, (I) this is an appeal from an order of the Court of Appeal dismissing an appeal by the appellant from an order of MACNAGHTEN, J., whereby a Petition of Right presented by the appellant was on demurrer dismissed with costs and the demurrer allowed.

The relevant facts do not appear to be in dispute but it is necessary for your Lordships to consider in regard to them certain provisions of the law relating to income tax and certain cases which have been recently decided in this House. I do not hesitate to say at the outset that in my opinion your Lordships, having done so, must refuse to admit that the case of *Gilbertson v. Fergusson* (1), upon which so much argument has turned, can any longer be regarded as a binding authority.

The appellant is a corporate body, incorporated in the Dominion of Canada under the laws of that Dominion. It has never been a person residing within the United Kingdom within the meaning of the Income Tax Acts. Its income for the years material to this appeal consisted either wholly or partly of income which bore United Kingdom income tax either by deduction or by direct assessment. Such income fell into three classes :

(a) dividends on shares owned by the appellant in British companies resident in the United Kingdom which were received under deduction of tax ;

(b) interest on loans made by the appellant to British companies resident in the United Kingdom which was also received under deduction of tax ; and

(c) interest on money deposited with banks in England by the appellant's agents on its behalf, which was charged with tax by direct assessment on the appellant's agents under the provisions of Case III of Sched. D of the Income Tax Act, 1918.

The authorised and issued capital stock of the appellant has at all material times consisted of (a) cumulative first preference shares, which are entitled only to a dividend at a fixed and predetermined rate ; (b) participating preference shares which are entitled to a dividend at a fixed and predetermined rate but are also entitled in certain circumstances to a further dividend ; and (c) ordinary shares. Dividends have from time to time been paid by the appellant upon one or more of the three classes of shares through the Midland Bank, Ltd., which I will call "the Bank," and in accordance with r. 7 of the Miscellaneous Rules applicable to Sched. D were assessed to tax by the Special Commissioners in the hands of the bank who deducted it at the appropriate rate from so much of the dividends as were paid to persons resident in the United Kingdom, after making any due adjustment in respect of Dominion tax relief allowance, and duly paid over to the Income Tax Commissioners the amount of tax so deducted.

Upon these facts the appellant makes a claim which is thus stated in its formal case. It contends that :

... there has been a double charge of United Kingdom income tax upon a portion of its income in that in addition to the tax suffered, either by deduction or direct assessment, upon the whole of the appellant's income which arose in the United Kingdom, there has also been paid to the said commissioners through the bank further sums by way of tax upon so much of that income as was distributed to British resident shareholders in dividend.

Upon this contention the appellant proceeds to base the further contention :

... that relief from such double charge must be given and that in the circumstances of the present case, it is the appellant itself who is entitled to such relief.

My Lords, I propose briefly to examine this claim in the light of the express provisions of income tax law before I turn to the case upon which the appellant relies, and first I will refer to the provisions under which the appellant itself paid tax.

Under Sched. D of the Income Tax Act, 1918 (to which I refer as "the Act"), tax is chargeable :

... in respect of (a) the annual profits or gains arising or accruing (i) to any person, residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere . . . (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom ; and (b) all interest of money, annuities, and other annual profits or gains not charged under Sched. A, B, C, or E, and not specially exempted from tax.

R. 1 of the General Rules applicable to Scheds. A, B, C, D and E provides that every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of the Act, and r. 20 of the same rules provides that the profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of the Act on the full amount of the same before any dividend thereof is made in respect of any share, right, or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto. It may be noted in passing that the words "appropriate thereto" are by virtue of the Finance Act, 1927, s. 39 (1), to have effect as if they were "at the standard rate for the year in which the amount payable becomes due." Rr. 19 and 21 of the same rules provide as a

matter of right or of obligation for the deduction of tax from any yearly interest of money annuity or any other annual payment by the person making such payment. It is unnecessary to state these rules more fully. From these provisions it follows that the appellant in respect of its three sources of income to which I have referred paid tax, either by deduction under r. 20, or by deduction under r. 19 or r. 21, or by direct assessment and payment. Deduction, assessment and payment were alike unchallenged and unchallengeable.

- A Next I refer to the tax suffered by the shareholders in respect of their dividends. Under Sched. D, Case V, tax is chargeable in respect of income arising from possessions out of the United Kingdom. This tax is chargeable only upon persons resident in the United Kingdom. Dividends of the appellant are income arising from possessions out of the United Kingdom within this Case. It follows that the shareholders of the appellant who are resident in the United Kingdom are chargeable to tax in respect of their dividends, and they would be directly assessable and chargeable but for the machinery provision to which I next refer. It is provided by r. 7 of the Miscellaneous Rules applicable to Sched. D (which replaces and substantially reproduces the Income Tax Act, 1853, s. 10) (i) that where any interest dividends or other annual payments payable out of or in respect of the stocks funds shares or securities of any foreign or colonial company are intrusted to any person in the United Kingdom for payment to any persons in the United Kingdom the same shall be assessed and charged to tax under Sched. D by the Special Commissioners; and (ii) that all the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue (other than as therein mentioned) and intrusted to any person (other than as therein mentioned) for payment to any persons in the United Kingdom shall extend to the tax to be assessed and charged under this rule. This takes me to the relevant rules under Sched. C. They need not be stated in detail. R. 1 provides for the persons who are entrusted with the payment of the dividends therein mentioned delivering to the Inland Revenue Commissioners certain accounts and particulars, r. 2 for the assessment and charge of the dividends by the Special Commissioners and for notice of the assessment and charge being given to the person intrusted with payment. R. 3 provides that the person intrusted with payment shall out of the moneys in his hands pay the tax on the dividends on behalf of the persons entitled thereto and shall be acquitted in respect of all such payments and that the provisions of the Act shall apply as in the case dividends payable out of the public revenue of the United Kingdom. R. 5 provides for remuneration by the Treasury of the person intrusted with payments who has thus in effect acted as a collector of taxes. It is perhaps worth referring to r. 7 of the rules as to interest payable out of the public revenue (referred to in r. 3 above) which provides that the retaining of this amount (*i.e.*, of tax) out of interest annuities or dividends by the Bank of England shall be deemed, a payment of the tax by the persons entitled to such interest, annuities or dividends. This reinforces, what is already sufficiently clear, that the payment of tax by the persons intrusted with the payment of dividends is a payment on behalf of the shareholder. It is a matter with which the foreign company paying the dividend has nothing whatever to do. Whether it pays its dividend direct to its shareholders or to paying agents for distribution to its shareholders, it fades from the fiscal scene as soon as the payments are made; more accurately it has never come on to the stage at all except so far as its own income may, directly or by deduction, have suffered British income tax.

- Here then are the simple facts. The appellant has under Cases I and III of Sched. D paid tax upon some part of its income: it has distributed dividends to its shareholders of whom some are resident in the United Kingdom: in respect of such dividends tax has been paid by such shareholders under Case V of Sched. D: some part of such dividends is attributable to income upon which tax has been paid by the appellant under Cases I and III: therefore, the appellant maintains that it is entitled to be repaid a proportionate part of the tax which it has paid.

This claim, my Lords, is not based on any express provision of the Act. Indeed, as may be plainly seen from my recital of the relevant provisions, it gets no support from them. It is founded on the authority of *Gilbertson v. Fergusson* (1) which was decided over sixty years ago, upon a long

course of practice by the Revenue authorities, and upon an alleged overriding principle of revenue law, which (whatever the statute appears to say) precludes the same income in the same hands being taxed twice over and for this purpose identifies as the same hands the hands of a company and its shareholders.

I must first deal with *Gilbertson v. Fergusson* (1). I respectfully concur in the view of the Court of Appeal in the present case that it was not open to them to treat the case as overruled, though I should have shared their difficulty in determining how much of it was left standing. I must concur also in the view expressed by LORD ATKIN in *Barnes v. Hely-Hutchinson* (2) that this House will hesitate long before overruling a case which has stood for so long. But, if I find that it is based on a line of reasoning which is not really consistent with the law as laid down in this House, I must conclude that it ought to be expressly overruled.

The relevant facts in *Gilbertson's* case (1) were these. The Imperial Ottoman Bank, a foreign corporation, not resident in the United Kingdom, carried on business and earned profits outside the United Kingdom. It also had an agency in London which there carried on a branch of its business. The dividends of the bank were payable at the option of its shareholders either abroad or by the London agency in London. In a particular year the profits earned by the business carried on in London by the London agency sufficed to enable the agency to pay all the dividends payable in London without recourse to the bank's profits which were made abroad or to funds held abroad. The London agency was assessed to tax under Case I of Sched. D of the Income Tax Act, 1842, in respect of the profits earned by the Bank in the United Kingdom. The validity of this assessment could not be and was not challenged. Then, however, upon payment of the dividends payable in London (which was entrusted to the London agency) two further assessments were made on the agency, which were contested by Gilbertson as its representative. One of them was held to be invalid and need not be examined. The other was on the London agency as the person intrusted with the payment of the dividend of a foreign corporation under the Income Tax Act, 1853, s. 10 (the precursor of the present r. 7 of the Miscellaneous Rules). Upon this it was held that under the cited section the London agency was liable to be assessed in respect of the dividends paid in the United Kingdom, but that since those dividends were payable out of the general income of the bank, which consisted of profits made partly in the United Kingdom and partly elsewhere, and the London agency had been assessed to tax under Case I of Sched. D on the profits earned in the United Kingdom, the agency ought to be assessed under the Income Tax Act, 1853, s. 10, only upon so much of the dividends as were not paid out of the profits arising in the United Kingdom which had themselves been taxed under Case I.

Two things in this case deserve attention: first, that the agency had a dual capacity; it was through it that the bank carried on its London business, and it was to it that payment of the dividends was intrusted; it was in the latter capacity that it was assessed and challenged the assessment under the Act of 1853, s. 10: secondly, that it would appear from the argument of counsel that the principle of the relief to which the agency was held to be entitled was conceded by the Crown. It is, I think, clear that, the challenged assessment being under the 1853 Act, s. 10, and being, therefore, an assessment upon the agency on behalf of the shareholders, it could only be on their behalf that the assessment was challenged. So far then as the case is to be regarded as an authority, it decides that in such circumstances the shareholders are entitled to relief and gives no support to the claim of the appellant that a foreign company which has been properly assessed under Sched. D, Cases I and III, is entitled to relief because certain of its shareholders are assessed to tax under Sched. D, Case V. This is alone sufficient to dispose of the appellant's claim so far as it rests on *Gilbertson's* case (1).

But, my Lords, as there is another case before the House, in which a similar claim is made by or on behalf of a shareholder, it is desirable to deal more fully with the matter. To me it seems that the decision in *Gilbertson's* case (1) is fundamentally wrong. As LORD ATKIN said of the case in *Barnes v. Hely-Hutchinson* (2), at p. 89 ([1939] 3 All E.R., at p. 806):

... it seems to me plain that the reasoning proceeded on the theory then prevailing that the company paid tax on its profits on behalf of its shareholders.

LORD ATKIN had already said in *Cull's* case (5), at p. 56, ([1939] 3 All E.R., at p. 763) :

A It is now clearly established that in the case of a limited company the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income tax on dividends, and they are not assessed in respect of them. The reason presumably is that the amount which is available to be distributed as dividend has already been diminished by tax on the company, and that it is thought inequitable to charge it again. At one time it was thought that the company in paying tax paid on behalf of the shareholder : but this theory is now exploded by decisions in this House ; and the position of the shareholders as to tax is as I have stated it.

B Similar statements in this House might be multiplied. I would take, however, LORD ATKIN's exposition of the relation between a company and its shareholders in regard to tax and apply it to, and contrast it with, the facts of the present case. It must be true of a foreign company as of an English one that the company does not pay tax on behalf of its shareholders. But when LORD ATKIN said that the shareholder in a limited company is not taxed in respect of his dividend, he was dealing with an English company, and cannot be read as referring to a foreign company, for no one doubts that a dividend from a foreign company is taxable as "income from foreign possessions" and that a shareholder in a foreign company does pay tax upon his dividend. The shareholder in an English company is not taxed upon his dividend, but he goes C untaxed because upon the true construction of the Income Tax Act no tax is imposed upon his dividend. He does not escape tax because some overriding principle says that he shall not be taxed. As ROWLATT, J., said in *Purdie v. R.* (9), at p. 116 :

There is strictly speaking no tax upon dividends at all.

D Cited with approval by LORD TOMLIN in *Neumann v. C.I.R.* (10), at p. 228. But in the case of the foreign company's dividend the Act imposes tax in unambiguous terms. It is impossible to escape it by reference to some overriding principle.

E These difficulties were, I think, present to the mind of the House in the recent case of *Barnes v. Hely-Hutchinson* (2). There the claim for relief was by a shareholder, but it was possible inasmuch as it was by a preference shareholder who had received his preference dividend in full, to reject it without formally overruling *Gilbertson's* case (1). But the decision appears to me to be wholly inconsistent with the principle upon which *Gilbertson's* case (1) was decided. For if there is an identity between a foreign company and its shareholders which requires that, if the company has paid tax upon its income, the shareholder should not pay tax upon so much of his dividend as is attributable to that income, F there can be no ground for saying that this is to apply to one class of shareholder but not to another. I would indeed be inclined to regard the claim in *Barnes v. Hely-Hutchinson* (2) as the *reductio ad absurdum* of the decision in *Gilbertson's* case (1) and the opinion of this House as an exposition of its falsity.

G It was urged by counsel for the appellant that even if the reasoning in *Gilbertson's* case (1) must be regarded as demonstrably wrong in the light of the decisions of this House, yet the actual decision could be supported on other grounds equally applicable to the present appeal. This argument is primarily founded on r. 20 of the General Rules which was originally enacted as s. 54 of the 1842 Act. I have already cited and need not repeat it. It is argued that the rule has five purposes (i) it recognises and affirms the principle that a dividend paid by a body corporate to a shareholder therein is not a new income separate from the income of the body corporate but is a part of such latter income, the ownership of which is, on the declaration and payment of a dividend, transferred H from the body corporate to the shareholder, (ii) it provides machinery for taxing the dividend received by such shareholder at its source, (iii) it ensures that where the shareholder receives part of the income of the body corporate, the burden of the tax attributable to that part falls on him unless the body corporate does not exercise its right of deduction, (iv) it ensures that the Crown does not receive tax more than once on the income of the body corporate whether such income is distributed or not, and (v) it affirms the principle that a shareholder cannot himself be assessed to tax on his dividend if it is one from which deduction of tax is authorised by the rule. I have set out this argument at such length

in deference to the care and elaboration with which it was presented. But it may be answered very shortly. I will for this purpose assume, though I am far from assenting to it, that r. 20 applies to a foreign company. If so, let the foreign company take advantage of it. But I am unable to see how there can be given to this rule, which is after all a rule and nothing more, the substantive effect for which the appellant contends. His contention involves nothing less than this, that there must be read into the statute, presumably as a proviso to Sched. D, a provision that where a foreign company has paid tax under Case I of Sched. D and at a later date (it does not matter how much later) its shareholders are taxed in respect of dividends under Case V of the same Schedule, then, if some part of the dividends is attributable to profits which have borne tax under Case I, the company is entitled to be repaid a proportionate part of the tax. There can, in my opinion, be no possible justification for such an interpolation. It is, I think, true that in the result the treatment meted out to English and foreign companies and their respective shareholders may not be the same. But I see no reason why this should not be so. It was, I think, justly observed by LORD PHILLIMORE in *Bradbury v. English Sewing Cotton Co.* (8), at p. 770, in regard to income from foreign possessions :—

... the officers of the Crown do not know and do not care what is the character of the sources from which the money comes.

Even if income tax law could be regarded as one logical and consistent whole, there appears to be good reason for differentiation between the two kinds of companies. But reason or no reason, the provisions of the Act are clear.

It is convenient now to deal shortly with the practice of the Revenue authorities since *Gilbertson's* case (1) and particularly in regard to the appellant since its incorporation in 1928. There appears to be no doubt that the Revenue authorities rightly or wrongly for long treated the decision in *Gilbertson's* case (1) as requiring or justifying the granting of such relief to a foreign company as the appellant now claims. Accordingly in the year 1929 (for which year the appellant paid dividends only on its cumulative first preference shares) repayment was made to the appellant of a substantial sum in respect of the tax which had been paid by the bank under r. 7, this sum being ascertained by means of an agreed formula with which I need not trouble your Lordships. In the year 1930 a similar course was followed. In the year 1931 the appellant paid dividends on all three classes of its shares and similar relief was given to the appellant in respect of the tax paid upon all such dividends. In the year 1932 a change was made, for in that year the Revenue authorities declined to grant relief in respect of the tax paid upon the dividends on the two classes of preference shares, the ground of their refusal being that they were advised no relief was allowable in the case of dividends paid at a fixed rate. I see no logic in this, for it was the company that claimed relief on the ground that the same income was being taxed twice, first in its hands and then in the hands of its shareholders and it must be irrelevant what were the rights of the shareholders either *inter se* or in relation to the company. However the Revenue authorities maintained their position and the appellant did not contest it. In the years 1933, 1935 and 1936 the appellant paid no dividends at all. In the year 1934 it paid dividends only on its preference shares. In the years ended Apr. 5, 1937, 1938 and 1939, the appellant paid dividends on all three classes of its shares and in these years relief was claimed and allowed in respect of the dividends on the ordinary shares only. For the year ended Apr. 5, 1940, a new attitude was adopted by the Revenue authorities. In that year the appellant again paid dividends on all three classes of shares, but on claiming relief in respect of tax paid on the ordinary share dividend was told by the Revenue authorities that it could only be granted in respect of so much of the tax as was attributable to that part of its income arising in the United Kingdom which had been the subject of direct assessment, *i.e.*, the interest paid by banks in England with whom money had been deposited. This refusal led to the whole issue being raised which has eventually reached this House. For the appellant thereupon presented its Petition of Right praying for relief in respect of the tax upon the dividends of all three classes of shares, and the Crown, though at first willing to concede the much diminished relief to which I have referred, at the last has objected that no relief of any kind should be given.

Upon these facts the appellant argued that, whatever opinion your Lordships might form upon the merits of the case if the matter were *res integra*, it was too late to disturb a decision given sixty years ago and so long honoured by the Crown, particularly in a matter of revenue where there is in each year an opportunity for review. There would be great weight in this contention but for the fact that, as I have already pointed out, the *ratio decidendi* of *Gilbertson's* case (1) is inconsistent with later decisions of this House. I see no way of maintaining the earlier decision. If this House were to do so, it would assert the validity of two contradictory views of the relation of a company and its shareholders in regard to the payment of dividends. That is a course which your Lordships will, I think, decline to take. In my opinion *Gilbertson's* case (1) must be overruled without any qualification or distinction either in regard to the different sources of the foreign company's income arising in the United Kingdom or in regard to the quality of the shares held by shareholders in the United Kingdom to whom it pays dividends.

I would make one further observation upon the merits of the claim. It has been found possible in the past, when the principle of relief was accorded, to agree the proportion of dividend attributable to the company's income arising in the United Kingdom. And since it has been found possible, I cannot say that it is impossible. But I do say that such an attribution must involve an examination of accounts, which in the case of a foreign company might well present great difficulties and at the best result in a conventional and arbitrary figure. The constituents of the fund out of which a dividend is paid, made up perhaps of profits earned in the year in question, of a carry over from previous years, of recourse perhaps to a dividend equalisation fund, really defy analysis. It is a satisfactory result of your Lordships' decision that such an investigation will not be necessary.

Finally, I would say on the question of procedure which is no longer relevant that it appears to me that the appellant had no other remedy than to proceed by Petition of Right.

(II) This appeal raises substantially the same question as that which your Lordships have just determined on the appeal of the Canadian Eagle Oil Co., Ltd. The differences are these: (i) the appellant who claims relief is a holder of ordinary shares in a foreign company not the foreign company itself, and (ii) the foreign company paid its dividends direct to its shareholders in the United Kingdom, who were therefore directly assessed in respect of such dividends as income arising from foreign possessions under Case V of Sched. D of the Income Tax Act, 1918. It differs only from the case of *Barnes v. Hely-Hutchinson* (2) in that there the claimant was a holder of preference shares carrying a fixed rate of dividend, here he is a holder of ordinary shares. He relies on the authority of *Gilbertson v. Fergusson* (1), as did the claimants in the cases cited. I have already given my reasons for thinking that case was wrongly decided and should be overruled and will not repeat them. I concur in the motion that this appeal should be dismissed.

Appeals dismissed with costs.

Solicitors: *Horace Davey* (for the suppliant, appellants of the first appeal); *Freshfields, Leese and Munns* (for the appellants of the second appeal); *Solicitor of Inland Revenue* (for the respondents of the first and second appeal).

[Reported by C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re WAR DAMAGE ACT, 1943,
SAMUEL v. SALMON & GLUCKSTEIN, LTD.

[CHANCERY DIVISION (Uthwatt, J.), July 13, 1945.]

Emergency Legislation—Landlord and tenant—War Damage contribution—Annual payment of premium for term of lease—Premium in addition to rent reserved by the lease—“Rent”—War Damage Act, 1943 (c. 21), s. 50.

By a lease dated June 9, 1931, the plaintiffs demised to the defendants certain premises for a term of 22 years, in consideration whereof the defendants covenanted to pay a premium of £600 yearly in addition to the rent of £600 per annum reserved by the lease. The question for the determination of the court was whether, upon the true construction of the lease and the War Damage Act, 1943, the rent reserved by the lease was £1,200 or £600 within the meaning of sect. 50 of the Act:—

Held: the premiums payable by the defendants under the lease were for the use of the demised premises and, therefore, formed part of the rent reserved within the meaning of the War Damage Act, 1943, s. 50.

[EDITORIAL NOTE.] It is held here that an annual sum paid for the use of land is “rent” for the purpose of the War Damage Act, 1943, although it is described as a “premium”; it is merely a question of the effect of the lease, properly construed. The case may be contrasted with *Westminster (Duke) v. Store Properties, Ltd.*, [1944] 1 All E.R. 118, where an annual sum was held not to be “rent,” although so described, since it was payable by virtue of a collateral agreement containing no demise.

AS TO NATURE OF RENT, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 158, 159, paras. 170, 171; and FOR CASES, see DIGEST, Vol. 31, pp. 213, 214, Nos. 3523-3533, pp. 216-218, Nos. 3550-3566.]

ACTION by the plaintiffs, the lessors, to determine whether an annual payment of a premium (in addition to the rent reserved by the lease) by the defendants, the lessees, during the whole period of the lease of certain premises, was part of the rent reserved within the meaning of the War Damage Act, 1943, s. 50, so as to be taken into account in ascertaining the proportion of the War Damage contribution for which the defendants were primarily liable.

T. J. Sophian for the plaintiffs.

H. Lightman for the defendants.

UTHWATT, J.: By a lease dated June 9, 1931, the plaintiffs demised to the defendants a ground floor shop in Westminster for the term of 22 years. The question which I have to determine is whether the rent reserved by the lease is £1,200 or £600 within the meaning of that expression as used in the War Damage Act, 1943, s. 50, the matter being of importance to the parties in determining the proportions in which they ultimately bear the burden of war damage contribution.

The effect of the leading provisions of the War Damage Act, 1943, in their application to this case is that the contributory value of the premises in question is determined by the net Sched. A assessments (ultimately ruling during the year in question at the sum of £918 5s.); that the lessees under the lease in question were primarily liable to pay the instalments of contribution under the Act falling due in each of these years, and that under sect. 48 the lessees had an indemnity in respect of each instalment from their landlords calculated by reference to the proportion of the tenancy as determined in accordance with sect. 50 of the Act as at the relevant date, that is, Jan. 1 in each year.

One then comes to sect. 50, which lays down the method of determining the proportion appropriate to any tenancy. Sect. 50 (1) provides:

The proportion appropriate, as at any date, to a tenancy shall, for the purposes of the two last preceding sections, be determined as follows.

As the result of sect. 50 that date at which the proportion appropriate to the tenancy is to be determined is Jan. 1 in each of the years in question. Then, by sect. 50 (2), you ascertain the period which at that date the tenancy has still to run. That presents no difficulty in this case. Sect. 50 (3), so far as relevant is as follows:

There shall also be ascertained the proportion which the rent reserved for the period in which the relevant date falls, or, if that period is other than a year, the annual equivalent thereof, bears (a) where the land comprised in the tenancy is the contributory property in question, to the contributory value thereof.

Para. (b) is irrelevant. The appended table goes upon the footing of determining the appropriate proportion by taking into account the two factors, unexpired length of the lease and proportion of rent to value as assessed in accordance with the calculation.

The only question argued was whether the expression "rent reserved" in the section was for the purpose in hand £600 or £1,200, and I was relieved from the necessity of considering the proviso or any other part of the section. It was assumed, perhaps rightly, that the expression "rent reserved" for the period in which the relevant date falls means the rent reserved for the yearly period of the lease in which the relevant date falls.

The material provisions of the lease run as follows. The lessors, Henry Samuel and Vivian Samuel, are defined, where the context so admits, as including "the persons from time to time entitled to the reversion immediately expectant on the term hereby granted," and the lessees are defined as including where the context so admits their successors in title. By cl. 1 it is provided as follows :

In consideration of the payment by the lessees during the first twenty-one years of the term hereby granted of a premium at the rate of six hundred pounds per annum payable yearly on the twenty-fifth day of December in each of the years one thousand nine hundred and thirty one to one thousand nine hundred and fifty-one inclusive and of the rent hereinafter reserved and covenants on the lessees' part and conditions hereinafter contained the lessors hereby demise unto the lessees . . .

At the end of cl. 1 there is a reservation :

. . . yielding and paying therefor yearly and proportionately for any fraction of a year the clear yearly rent of six hundred pounds to be paid without any deduction [except landlord's property tax and any tax on land values] by equal quarterly payments.

The first covenant of the lease is this :

The lessees hereby for themselves and their successors in title covenant with the lessors in manner following that is to say : (1) That the lessees will pay to the lessors for and in respect of each of the first twenty-one years of the said term hereby granted the said annual premium of six hundred pounds on the twenty-fifth days of December in each and every of such first twenty-one years the first of such payments in respect of the year commencing twenty-fourth day of June one thousand nine hundred and thirty-one to be made on the twenty-fifth day of December one thousand nine hundred and thirty one Provided that in the event of the term hereby granted being determined whether by effluxion of time or forfeiture or otherwise howsoever during any of such first twenty-one years the premium payable hereunder shall cease to be payable as from the date of such determination but the lessees shall in respect of the period from the twenty-fourth day of June next preceding the date of such determination up to the date of such determination pay a *pro rata* proportion of such premium immediately on such determination and the lessors will on such determination account to the lessees for any part of the premium paid in respect of any period beyond such date of determination.

Cl. 2 provides :

That the lessees will pay the rent hereinbefore reserved at the times and in manner aforesaid.

By the 14th covenant it is provided :

The lessors for themselves and their successors in title hereby covenant with the lessees as follows : (a) That they the lessors will throughout the said term hereby granted pay and discharge all existing and future rates taxes assessments duties impositions and outgoings whatsoever charged or imposed upon the said premises or upon the owner or occupier in respect thereof or payable by either in respect thereof (including the water rate).

Then the proviso for re-entry is the last material clause. That provides :

That if the said yearly rent hereby reserved (as distinct from the said annual premium) or any part thereof shall remain unpaid for twenty-one days after the same shall have become due (whether formally or legally demanded or not) or if default shall be made in the performance and observance of the covenants and stipulations on the part of the lessees hereinbefore contained or if the lessees shall go into liquidation (not being a voluntary liquidation for the purposes of amalgamation or reconstruction) or if any assignee or assignees of the lessees being an individual or individuals shall become bankrupt or have a receiving order made against him her or them or shall enter into any composition with his her or their creditors or being a limited company shall go into liquidation (save as aforesaid) then and in any of the said cases or at any time thereafter

it shall be lawful for the lessors to re-enter upon the said premises and thereupon this demise shall absolutely determine but without prejudice to any right of action by the lessors in respect of any antecedent breach by the lessees of the covenants hereinbefore contained.

"Rent service" has been defined as "an annual return made by the tenant, . . . in labour, money, or provisions, in retribution for the land that passes" (see GILBERT ON RENTS (1758), p. 9, Co. Litt. 142a). No technical words are needed in order to create a rent service, but in regard to that it is a return of something that was not in the grantor before the words "reddendo," "reservando," "solvendo" and "inveniando" were treated as proper words (see GILBERT ON RENTS (1758), p. 30). Of these words "reservando" seems to have captured the ear, with the result that it has become usual to refer to the rent agreed to be paid by a lease as the "rent reserved by a lease." But in my view, "rent" and "rent reserved" do not differ in meaning.

Is this so-called premium "rent" or not? That, I think, is merely a question of the effect of the lease properly construed. There are no difficulties of interpretation, and the commercial effect of the lease is obvious enough. The "premium" is payable in each of the first 21 years, but is not payable in the 22nd year. It is, therefore, payable periodically during practically the whole period of the lease. There is no prior quantification of a capital sum. The obligation to pay sums by way of "premium" ceases with the determination of the lease before its expiry by effluxion of time, and there is a provision for apportionment in respect of any broken year. There is nothing in the transaction which relates the "premiums" to anything except the right to occupy the leased land. The "premium," like the "rent," is expressed to be payable to the reversioner for the time being, showing the parties' intention that the "rent" and the "premium" were to march together. The differences between them under the lease—different days for payment and slight difference in the working of the forfeiture clause—are immaterial.

It appears to me that the proper inference on the construction of the lease is that in all respects the sums were intended to be, as in fact they were, payments for the use of the land. In my view, the label "premium" applied to the promised payments does not alter the situation. Parties may freely make their agreement as to the terms on which the use of land is ceded by one to the other of them. Land may be leased for a consideration which is not a rent in law or for a consideration which consists of or includes a rent. The parties may write the agreement in such terms as they please and, if so minded, may attach any label they wish to the payments agreed to be made by the lease. But, when all that is done, it is for the law to decide on the effect of the document what payments are rent reserved and what not. No label can create a fact: a label may accurately describe a fact or it may misdescribe it, or may help to the solution of a doubtful question of interpretation. What the parties have done—not their description of it—is the determining consideration.

In my view, the payments expressed to be premiums were in law part of the rent, and are for the purposes of the War Damage Act, 1943, s. 50, part of the "rent reserved."

Declaration accordingly.

Solicitors: *Hicks, Arnold & Co.* (for the plaintiffs); *Bartlett & Gluckstein* (for the defendants).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

Re MAYFAIR & GENERAL PROPERTY TRUST, LTD.

CRANG v. MAYFAIR & GENERAL PROPERTY TRUST, LTD.

[CHANCERY DIVISION (Vaisey, J.), July 31, 1945.]

Companies—Debenture—Receiver—Appointed by court in debenture stockholders' action—Liability—Rates.

The applicants were the rating authority for the district in which certain properties belonging to the D. Co. were situated. The properties were let at "inclusive rentals," i.e., the rates as between landlords and tenants were to be discharged by the landlords. The D. Co. was a subsidiary of the M. Co., and the properties were subject to a charge for securing the stock issued by the M. Co. On Mar. 5, 1940, in an action brought by the debenture stockholders, the court appointed a receiver and manager of the properties subject to the charge. The applicants took out a summons in the action asking that they might obtain payment of their unpaid rates on the properties for the half-year ending Sept. 30, 1940. It was contended for the applicants that (i) since the receiver had received as rent an aggregate sum exceeding by the amount of the rates the sum payable as rent if the rates had been payable by the tenants, it would be unconscionable for an officer of the court to retain this additional benefit; (ii) by the applicants not exercising their proper remedies of distraint the interests of the stockholders had been benefited:—

HELD: the claims of the rating authority could not be put higher than the claims of ordinary creditors when in competition with the rights of secured creditors. The application, therefore, failed.

Re British Fullers' Earth Co., Ltd. (1) followed.

[EDITORIAL NOTE.] This case is an application of the principle laid down in *Re British Fullers' Earth Co. (1)*, that a rating authority has no right to rank ahead of ordinary creditors against sums in the hands of the receiver for debenture holders, since the appropriate remedy is by distress. Here such sums included moneys attributable to rates, paid by tenants in an "inclusive rental."

AS TO LIABILITIES OF RECEIVER, see HALSBURY, Hailsham Edn., Vol. 5, pp. 523-525, paras. 851, 852; and FOR CASES, see DIGEST, Vol. 10, pp. 797, 798, Nos. 5037-5042, and pp. 802, 803, Nos. 5085-5094.]

Cases referred to:

(1) Re British Fullers' Earth Co., Ltd., Gibbs v. British Fullers' Earth Co., Ltd. (1901), 17 T.L.R. 232; 10 Digest 803, 5094.

(2) Bach v. Meats (1816), 5 M. & S. 200; 18 Digest 363, 1007.

(3) Hand v. Blow, [1901] 2 Ch. 721; 10 Digest 797, 5037; 70 L.J.Ch. 687; 85 L.T. 156.

ADJOURNED SUMMONS in a debenture stockholders' action by the rating authority for the area in which certain properties subject to the charge were situated. The facts are fully set out in the judgment.

Wilfrid Hunt for the applicants.

J. Pennyquick for the respondents.

VAISEY, J.: This is a summons in a debenture stockholders' action. The applicants are the corporation of the city of Westminster, who are the rating authority for the area over which their jurisdiction extends. The parties to the action are all named as respondents to the summons and are all interested in opposing the application. The plaintiffs, who alone appeared and argued the case before me, are the trustees of the deed for securing the stock, which was issued by the Mayfair & General Property Trust, Ltd. (which I will call the Mayfair Co.), and secured upon blocks of flats, offices and chambers or other buildings brought into charge partly by the Mayfair Co., and partly by a subsidiary or associated company named the Duchess Property Co., Ltd. (which I will call the Duchess Co.). The Mayfair Co. and the Duchess Co. are both defendants to the action, and there are other defendants whose particular interests are for the present purpose immaterial.

On Feb. 26, 1940, C. J. G. Palmour (whom I will call the receiver) was appointed out of court by the plaintiffs under a power contained in the deed to be receiver and manager of the properties subject to the charge, and he acted as such until by an order made on Mar. 5, 1940, he was appointed to be such receiver and manager in the action; and as such retained and took over the business and

assets of both companies ; and he has ever since been in receipt of the rents and profits of the properties. The business of each of the two companies consisted of owning, managing, maintaining and letting flats, offices and chambers either furnished or unfurnished, and the properties belonging to them so far as the present application is concerned are all within the city of Westminster. It matters not for the present purpose to which of the two companies the properties affected by the question which I have to decide belonged, though it would seem that they in fact belonged to the Duchess Co., nor need I particularly describe such properties. A

The summons asks that the receiver may be directed to pay to the applicants out of the moneys in or to come to his hands, the unpaid rates in respect of the half-year begun Apr. 1, and ended Sept. 30, 1940, on the properties retained by the plaintiffs and himself, or alternatively that such unpaid rates may be directed to be paid either immediately or upon the further consideration of the action out of the moneys in court to the credit of the action, or that by some means or another the applicants may obtain payment of such unpaid rates. I may here say that in some cases the Duchess Co., and in others the tenants themselves were the rated occupiers of the properties. All the properties in question were let at what is known as inclusive rentals, *i.e.*, upon the terms that the rates were, as between the landlords (*i.e.*, the Duchess Co.) and the tenants, to be paid and discharged in each case by the landlords. In respect, therefore, of the half-year to which this application relates, it may be assumed that the receiver did in fact get in by way of rent an aggregate sum which exceeded by the amount of the rates the aggregate sum which he would have got in had the rates been payable by the tenants and not by the landlords or, in other words, that the rentals would have been lower by the amount of such excess. In no case (as I was told) did the leases or tenancy agreements reserve, in addition to what I may call a primary rent, a further rent calculated by reference to, or otherwise expressly associated with, the rates, but all the rents were "inclusive" without any such differentiation. The main argument for the applicants was to the effect that it would be unconscionable for an officer of the court (such as the receiver in the present case) to retain this additional benefit, *viz.*, the excess to which I have referred, and that it would be productive of an unjust and dishonest result if he were allowed to do so ; still less, it was argued, will the court be instrumental in furthering the alleged injustice and dishonesty by ordering any payment out of court of moneys in part consisting of the so-called swollen rents without making provision for the satisfaction of the present claim. It was pointed out that if the applicants had been rigorous in asserting their rights by exercising their proper remedies of distraint, the interests of the stockholders would have been injured, and that the fruits of the action have been substantially augmented by the forbearance of the applicants. These considerations carry a measure of conviction, but it remains to be seen whether they are sound. B C D E F

In the first place, and on principle, I cannot see that the claims of the rating authority can be put higher than the claims of ordinary creditors when in competition with the rights of secured creditors. Let me take as a parallel, or at least an analogous case, a letting of a furnished flat or office at an inclusive rent when the furniture had not been paid for by the lessor. In such a case, the rents got in would, of course, be much higher than if the furniture had not been there, but the unpaid vendor of the furniture could never be heard to say that a receiver of such rent must in some way compensate him for having incautiously allowed the property in the furniture to pass out of his possession before the price of it was paid to him. The answer to any such suggestion would be that he had, or at any rate had had, his remedy of suing for the price. How does the present case differ from that ? In my judgment, not at all. The applicants had remedies which they could have exercised, but they forbore to exercise them, and this may, on the whole and in the long run, have been to their advantage, because I realise that local authorities are bound to avoid even the appearance of acting oppressively. The fact remains, however, that as regards the rates now in question, the applicants did not avail themselves of the rights which they possessed at the time when they could have done so. G H

Secondly, however, the point seems to be covered by the decision of BUCKLEY, J., in *Re British Fullers' Earth Co., Ltd.* (1), which I should, of course, follow

even if, which is not the case, I disagreed with it. An earlier decision of *Bach v. Meats* (2) confirms me in the view that there is no element of fraud or dishonesty in the contentions of the respondents to this summons; and in *Hand v. Blow* (3) it was explained that in a mortgagees' or debenture-holders' action the court is not administering the affairs of the mortgagor or company, but merely giving effect to the contractual rights of the mortgagees or debenture-holders. The principle that the court's officer will always be controlled if he attempts to bring about a fraud or injustice is well established, but this, in my judgment, is not such a case. I need not and do not consider what would be the position in comparable circumstances in bankruptcy or in an administration action, nor if a lease or agreement of tenancy reserved a particular rental earmarked, as it were, for the discharge of the rates on the demised property. In the last-mentioned case, the local authority might conceivably have a claim in the nature of a claim for moneys had and received to its use, though I express no opinion upon that. Nor do I say anything about the rates for the half-year towards the end of which the receiver was appointed, *viz.*, the half-year ended Mar. 31, 1940, the whole of which, I understand, are to be treated as preferential under the Companies Act, 1929, ss. 78 and 264.

It was argued, somewhat faintly, that the course of dealing between the receiver and the applicants had given rise to some sort of estoppel, or that the forbearance of the applicants in not exercising their appropriate remedies had been somehow induced by the receiver so as to render resistance to the applicants' present claim unconscionable and dishonourable. I can find no justification for any such argument.

The application fails, and the summons must be dismissed with costs. If leave to appeal is required, I am willing to grant it.

Summons dismissed with costs. Leave to appeal granted.

Solicitors: *Allen & Son* (for the applicants); *Last, Sons & Fitton* (for the respondents).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

MILLARD *v.* MILLARD & ADDIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Denning, J.), July 31, 1945.]

Infants and children—Custody—Husband and wife—Child born before marriage—Husband obtaining divorce from wife—Husband entitled to custody of child—Decree of legitimacy no condition precedent to order for custody—Legitimacy Act, 1926 (c. 60), s. 1—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193.

The parties were married on Dec. 24, 1932. They had three children, the eldest of whom was born on Sept. 5, 1932, before the marriage. The husband, while serving abroad as a soldier, was taken prisoner in 1940 and his wife went off with the co-respondent taking the three children with her. In Apr., 1944, a petition for divorce was filed on the husband's behalf and a decree *nisi* was made on Oct. 29, 1944, on the ground of the wife's adultery. The husband claimed in his petition the custody of the three children, but, as he was a prisoner at the time of the hearing, no order was then made for custody. On May 13, 1945, the husband returned home and, on June 25, 1945, he took out a summons asking for the custody of the three children. It was found that it would be in the best interests of the children if the husband were given the custody of them. The

question for the determination of the court was whether the husband was entitled to the custody of the child who was born before the marriage, having regard to the directions in the Divorce Registry which provided that, if such a child had not been declared legitimate by a decree under the Legitimacy Act, 1926, no order for custody could be made :—

HELD : (i) an order for custody did not involve a finding *in rem* that the child was legitimate. It was only a decision *in personam* as between the parents, which parent should have the custody of the child. Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, the right to custody of a child legitimated by the subsequent marriage of the parents depended upon parenthood and not on legitimacy. Therefore, the husband was entitled to the custody of the eldest child as well as the other two of the marriage.

Langworthy v. Langworthy (4) applied.

(ii) there was nothing in the Legitimacy Act, 1926, which made the obtaining of a decree of legitimacy a condition precedent to an order for custody.

[EDITORIAL NOTE.] The first point decided here is that the jurisdiction under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, to make an order for the custody of a child depends upon its parentage and not upon its legitimacy.

The second point decided is that any court has power to find legitimacy without a legitimacy degree. The finding is *inter partes* only and may be necessary for various purposes, e.g., custody, settlement or affiliation. The refusal of the Divorce Court to do this in cases of legitimacy *per subsequens matrimonium* since the *Bednall* case (1) in 1927 is held to be wrong and inconsistent with *Langworthy v. Langworthy* (4).

AS TO ORDERS FOR CUSTODY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 752-754, paras. 1181-1188; and FOR CASES, see DIGEST, Vol. 27, pp. 418, 419, Nos. 4232-4252.]

Cases referred to :

- * (1) *Bednall v. Bednall and Shivussawa*, [1927] P. 225; Digest Supp.; 96 L.J.P. 150; 137 L.T. 632.
- * (2) *Green v. Green*, [1929] P. 101; Digest Supp.; 98 L.J.P. 58; 140 L.T. 93.
- * (3) *Jones v. Jones* (1929), 98 L.J.P. 74; Digest Supp.; 140 L.T. 647.
- * (4) *Langworthy v. Langworthy* (1886), 11 P.D. 85; 27 Digest 552, 6057; 55 L.J.P. 33; 54 L.T. 776.
- (5) *Thomasset v. Thomasset*, [1894] P. 295; 27 Digest 533, 5780; 63 L.J.P. 140; 71 L.T. 148.
- * (6) *Gordon v. Gordon*, [1903] P. 92; 27 Digest 419, 4252; 72 L.J.P. 34; 88 L.T. 573.
- (7) *Gordon v. Gordon*, [1903] P. 141; 27 Digest 543, 5935; 72 L.J.P. 33; 89 L.T. 73.
- (8) *Russell v. Russell*, [1924] A.C. 687; 27 Digest 297, 2743; 93 L.J.P. 97; 131 L.T. 482.
- (9) *Re Lowe, Stewart v. Lowe*, [1929] 2 Ch. 210; Digest Supp.; 98 L.J.Ch. 440; 141 L.T. 428.
- (10) *Re Hepworth, Rastall v. Hepworth*, [1936] Ch. 750; Digest Supp.; [1936] 2 All E.R. 1159; 105 L.J.Ch. 380; 155 L.T. 250.
- (11) *Re Wicks' Marriage Settlement, Public Trustee v. Wicks*, [1940] Ch. 475; Digest Supp.; 109 L.J.Ch. 163; 163 L.T. 31.

SUMMONS adjourned into court for an order for the custody of children applied for by the husband petitioner to whom a decree absolute of divorce had been granted on the ground of his wife's adultery. The petition was filed while the petitioner, a soldier, was a prisoner of war and included a prayer for the custody of the three children, the eldest of whom was born before the marriage.

DENNING J.: The parties married on Dec. 24, 1932. They were the parents of three children, the eldest born on Sept. 5, 1932, before the marriage, the next on Sept. 9, 1934, after the marriage, and the youngest on Nov. 17, 1936. The husband is a company quartermaster sergeant in the Gloucester Regiment. He was called to the colours on Sept. 3, 1939, and was taken prisoner at Calais on May 26, 1940. Whilst he was a prisoner in Germany his wife went off with the co-respondent, taking the three children with her. In Apr., 1944, a petition for divorce was launched on the husband's behalf and a decree *nisi* was made at the Gloucester Assizes on Oct. 29, 1944, on the ground of the wife's adultery. The husband claimed in his petition custody of the three children, but as he was still a prisoner when it was heard no order was then made for custody. On

May 13, 1945, he returned to this country. On June 25, 1945, the decree was made absolute, and on June 29, 1945, he took out a summons asking for custody of the three children. He has a sister who has known the children since birth and is very fond of them, and his intention is for her to live with him and look after him and the children. Mr. Chew, a justice of the peace and an alderman of the County Council, says that the sister is a most trustworthy, capable and reliable person, and has an excellent character and reputation and is well suited to look after young children.

A On the facts I am satisfied it is in the best interests of the three children that I should give the custody to the father. It is said, however, that, whilst I can make an order in regard to the two younger children, I have no power to do so in regard to the eldest child because she was born before the marriage, and that I must leave her with the mother. I do not think that would be in the best interests of the eldest child herself or of the other two children. They

B ought all to be brought up together.

Apart from authority, I should have thought that under the statute I have power to give the petitioner custody of the eldest child as well as of the other two. The powers conferred by the Judicature (Consolidation) Act, 1925, s. 193, are not confined to children of the marriage, but apply to "children the marriage of whose parents is the subject of the proceedings," as it is put in one place, or the "children of the petitioner and respondent" as it is put in another place.

C Both those expressions seem to me to make parenthood the test, not legitimacy.

The difficulty arises from the cases of *Bednall v. Bednall and Shivussawa* (1), *Green v. Green* (2), and *Jones v. Jones* (3). According to those cases, an order for custody can only be made in respect of legitimate children. It is to be noticed, however, that sect. 193 applies not only to proceedings for divorce, but also to proceedings for nullity of marriage; and in *Langworthy v. Langworthy* (4), a nullity case where there never was a valid marriage, the Court of Appeal held that the section enabled the children of the union to be provided for. That decision was not cited in any of the three cases, and it seems to me to show that the test under sect. 193 is parenthood, not legitimacy.

D Assuming, however, that the section does only apply to legitimate children, there is ample evidence in this case that the eldest child is legitimate. She was not born legitimate, but she was legitimated by the subsequent marriage of the parents. The facts in evidence, which are not disputed, bring the case

E within the Legitimacy Act, 1926, s. 1.

The next difficulty, however, is that according to those self-same cases I am not at liberty to find those facts in this proceeding, because it is said that a finding of legitimacy can only be made when the child herself and other interested persons are before the court. The result of those cases is expressed in the directions issued in the Divorce Registry, which say that "if the child has not been declared legitimate by a decree under the Act, no order for custody can be made."

F In other words, the child herself must, by a next friend, petition for a decree of legitimacy, making the Attorney-General a party and any other persons whom the court may direct, and must go to all the expense and delay of obtaining a decree of legitimacy before an order for custody can be made. I see no justification for that view. An order for custody does not involve a finding *in rem*

G that the child is legitimate. It is only a decision *in personam*, as between the parents, which parent should have the custody of the child. See *Thomasset v. Thomasset* (5). If it is necessary to find that the child is legitimate, the finding can be made in these proceedings as between the parents without binding the child or anyone else.

H Apart from the Divorce Court, I know of no court in this country which has refused to find that a child is legitimate simply because a decree of legitimacy is not produced. The Divorce Court has only so refused since 1927, and then only in cases where the child has been legitimated by the subsequent marriage of its parents. I see no reason for putting such children under such a disability. There is nothing in the Legitimacy Act, 1926, which makes the obtaining of a decree a condition precedent to legitimacy. Once the parents are married the child acquires the status of legitimacy as fully as a child born legitimate. The only difference between a child born before and one born after marriage is that in the former case, in order to prove legitimacy, there must be evidence of parenthood whilst both parents were unmarried, whereas in the latter case,

there is a presumption of legitimacy. In either case the obtaining of a decree is not a condition precedent to legitimacy; and where, as here, the parenthood is not and never has been in dispute, it may be quite unnecessary.

The procedure to obtain a decree of legitimacy was introduced in 1858, and it is nothing more than a means of ascertaining and recording legitimacy, if desired. Long before 1858, and also since, the courts of this country have habitually decided questions of legitimacy whenever they arise as between the parties to a cause without more ado, whether the child be represented or not. Familiar examples can be found in ejectment cases concerning the title to land, in poor law cases concerning the settlement of paupers, in affiliation and maintenance cases, and in cases where a claim is made to a fund or an estate. The Divorce Court itself has acted on the same basis. There are two reported divorce cases where the courts have, on an application for custody, decided questions of legitimacy as between the parents, without the presence of the child or the Attorney-General. See *Gordon v. Gordon and Bell* (6) and *Gordon v. Gordon and Granville Gordon* (7), which was approved by LORD SUMNER in *Russell v. Russell* (8). In those two cases the children were born during wedlock, but there is no reason why the same course should not be taken in cases of children born before marriage. The courts, other than the Divorce Court, have made no distinction between the two classes. They have often found a child to be legitimated by the subsequent marriage of its parents without the necessity of any decree of legitimacy. For more than a century they have done so in cases where the law of the father's domicile at the time of the birth and at the time of the subsequent marriage recognises such legitimation. Since 1926 they have also done so when the father's domicile is in England at the time of the subsequent marriage. See, for instance, *Re Lowe* (9), *Re Hepworth* (10), and *Re Wicks* (11).

What then ought I to do? The decisions of other judges of first instance are not absolutely binding on me, but it is my duty to follow them in the absence of strong reasons to the contrary. One of the strongest of such reasons is inconsistent decisions by other judges, for then I must decide which of them I ought to follow. I think that the decisions of the Divorce Court of *Bednall v. Bednall and Shivussawa* (1), *Green v. Green* (2), and *Jones v. Jones* (3), and the directions that have been founded on those cases, are inconsistent with the decision of the Court of Appeal in *Langworthy v. Langworthy* (4), which shows that under sect. 193 the test is parenthood, not legitimacy, and also with the established principle that a child can be found to be legitimate without the necessity of a decree of legitimacy. There are sometimes special reasons why the courts should follow decisions of long standing even though they think them to be wrong; but none of those reasons apply here. Relieved of those three cases, I give the custody of the eldest child, as well as the other two, to the father.

Order for custody granted.

Solicitors: *W. F. Gillham*, agent for *L. J. Slade*, Newent, Glos. (for the petitioner); *Haslewood, Hare & Co.* (for the respondent).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. THE NATIONAL ANTI-VIVISECTION SOCIETY.

[KING'S BENCH DIVISION (Macnaghten, J.), July 20, 23, 27, 1945.]

Income Tax—Exemption—Charity—Anti-Vivisection Society—Whether established for charitable purposes only—Burden of proof—Main object of society not beneficial to community—Income Tax Act, 1918 (c. 40), ss. 37 (1) (b), 40.

The respondent society, during the year ended Apr. 5, 1943, received income from its investments amounting to £2,876 15s. 7d. In respect of that income the respondent society claimed exemption from income tax, under the Income Tax Act, 1918, s. 37 (1) (b), on the ground that it was "a body of persons established for charitable purposes only." The Special Commissioners, though finding that the object of the respondent society was, on balance, not for the public benefit, decided that the respondent society was a "charity" in the legal sense of that word and allowed the exemption claim, issuing an order for repayment of the tax. On appeal, the question for the determination of the court was whether there was any evidence before the Special Commissioners on which they could find that the society was established for charitable purposes only:—

HELD: (i) it was the duty of the respondent society to establish affirmatively that it was a society "established for charitable purposes only."

Re Hummeltenberg, Beatty v. London Spiritualistic Alliance (3) and *Re Grove-Grady, Plowden v. Lawrence* (5) applied.

(ii) the main object of the respondent society being the total abolition of vivisection, it was established by evidence that the attainment of that object, so far from being beneficial, would be gravely injurious to the community. The respondent society was, therefore, not a body established for charitable purposes only and, accordingly, its claim for exemption from income tax failed.

Re Foveaux, Cross v. London Anti-Vivisection Society (1) not followed.

[EDITORIAL NOTE.] The Society was held in 1895 to be a charity, but the doubt indicated by RUSSELL, L.J. in *Re Grove-Grady* (5), that in the light of later knowledge in regard to the benefits accruing to mankind from vivisection, anti-vivisection societies might possibly be held not to be charities, is here held to require the society to prove affirmatively that it was a society "established for charitable purposes only." This it had failed to do and it is accordingly held not to be a charity.

AS TO MEANING OF CHARITIES FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-317, paras. 617-624; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.

AS TO CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 125, 126, para. 166; and FOR CASES, see DIGEST Supp., Charities, Nos. 4a, 208a.]

Cases referred to:

(1) *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; 8 Digest 259, 206; 64 L.J.Ch. 856; 73 L.T. 202.

(2) *Re Wedgwood, Allen v. Wedgwood*, [1915] 1 Ch. 113; 8 Digest 259, 208; 84 L.J.Ch. 107; 112 L.T. 66.

(3) *Re Hummeltenberg, Beatty v. London Spiritualistic Alliance*, [1923] 1 Ch. 237; Digest Supp.; 92 L.J.Ch. 326; 129 L.T. 124.

(4) *Re Cranston, Webb v. Oldfield*, [1898] 1 I.R. 431; 8 Digest 259, 214i.

(5) *Re Grove-Grady, Plowden v. Lawrence*, [1929] 1 Ch. 557; Digest Supp.; 98 L.J.Ch. 261; 140 L.T. 659; varied on appeal, sub nom. *A.-G. v. Plowden*, [1931] W.N. 89.

(6) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 8 Digest 241, 1; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53.

CASE STATED under the Finance Act, 1925, s. 19 and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The facts are fully set out in the judgment.

D. L. Jenkins, K.C., *J. H. Stamp* and *Reginald P. Hills* for the appellants. *Frederick Grant, K.C.*, *Valentine Holmes, K.C.*, and *R. W. Lomax* for the respondents.

Cur. adv. vult.

MACNAGHTEN, J.: It is provided by the Income Tax Act, 1918, s. 37 (1) (b), that exemption from the payment of Income Tax shall be granted:

... in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only ...

And, by sect. 40, that any claim for such exemption shall be made to the Special Commissioners who, on proof of the facts to their satisfaction, shall allow the claim, and issue an order for repayment of the tax.

The respondent to this appeal, the National Anti-Vivisection Society, during the year ended Apr. 5, 1943, received income from its investments amounting to £2,876 15s. 7d., and it claimed exemption from income tax in respect of that income on the ground that it was "a body of persons established for charitable purposes only." The Special Commissioners allowed the claim and issued an order for repayment of the tax. The question at issue on this appeal is whether there was any evidence before the Special Commissioners on which they could find that the society is established for charitable purposes only.

The respondent is a voluntary society; it consists of a president, vice-president, and members described as honorary members, life members and annual members. It is governed by a council which annually elects an executive committee, and the executive committee, subject to the supreme authority of the council, has the sole and entire management of the business of the society, and appoints its officials and servants. The chief official of the society is its director. The society was originally formed in the year 1875. It was then called the Society for the Protection of Animals liable to Vivisection. Later its name was changed to the Victoria Street Society for the Protection of Animals from Vivisection. In 1897 it adopted its present name, the National Anti-Vivisection Society.

Before the Special Commissioners the hearing occupied three days. On behalf of the society Dr. R. Fielding-Ould, its director and treasurer, gave evidence. Part of his evidence was accepted by the Special Commissioners, and part was rejected. On the other side the Inland Revenue Commissioners called no less than nine gentlemen of great eminence in opposition to the claim of the society, namely, Major-General L. T. Poole, Honorary Physician to His Majesty, and Director of Pathology at the War Office; Sir Edward Mellanby, K.C.B., a Fellow of the Royal Society; Dr. Robert Daniel Lawrence, a Fellow of the Royal College of Physicians; Dr. John William Trevan, Director of the Wellcome Physiological Research Laboratories; Sir John Ledingham, a Fellow of the Royal Society; Sir William Savage, President of the Society of Medical Officers of Health; Dr. Joshua Burn, Professor of Pharmacology in the University of Oxford; Professor Wooldridge, a Fellow and a Past President of the Royal College of Veterinary Surgeons; Sir Leonard Rogers, K.C.S.I., Retired Major-General of the Indian Medical Service. The Special Commissioners accepted their evidence in its entirety and gave their decision in the following terms:

In this case the society claims exemption from Income Tax under the Income Tax Act, 1918, s. 37, on the ground that it is a body of persons established for charitable purposes only. The object of the society, as set out in its book of rules, is stated to be "to awaken the conscience of mankind to the iniquity of torturing animals for any purpose whatever; to draw public attention to the impossibility of any adequate protection from torture being afforded to animals under the present law; and so to lead the people of this country to call upon Parliament totally to suppress the practice of vivisection." An explanatory resolution was passed by the council of the society on Feb. 9, 1898, in the following terms: "The Council affirm that, while the demand for the total abolition of vivisection will ever remain the object of the National Anti-Vivisection Society, the society is not thereby precluded from making efforts in Parliament for lesser measures having for their object the saving of animals from scientific torture." The quotations set out above are taken from the book of rules of the society as reprinted in 1938. We are satisfied that the main object of the society is the total abolition of vivisection, including in that term all experiments on living animals whether calculated to inflict pain or not and (for that purpose) the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether. Dr. Fielding-Ould in his evidence before us suggested that there were some experiments on living animals to which the society did not object, and that the society was only opposed to such experiments as caused pain and suffering to the animals, but we find it difficult to reconcile this evidence with the statements contained in the literature produced by the society, or, indeed, with the speeches of Dr. Fielding-Ould, as reported in "The Animals' Defender," a paper of which he is the editor. We are satisfied that the members of the society are actuated by an intense love of animals, and that the work of the society is to a large extent directed towards the prevention of cruelty to animals. Part of its propaganda literature is directed towards inculcating a love of animals in the young. A number of very distinguished men were called as witnesses by the Crown with the object of proving the great benefits which had accrued to the public by reason of the medical and scientific knowledge which had been obtained

through experiments on living animals. We think it has been proved conclusively that (a) a large amount of present day medical and scientific knowledge is due to experiments on living animals; (b) many valuable cures for and preventatives of disease have been discovered and perfected by means of experiments on living animals, and much suffering both to human beings and to animals has been either prevented or alleviated thereby. We are satisfied that if experiments on living animals were to be forbidden (i.e., if vivisection were abolished) a very serious obstacle would be placed in the way of obtaining further medical and scientific knowledge calculated to be of benefit to the public. We were very impressed by the evidence of Major-General

- A Poole, Director of Pathology at the War Office, as to the great value of experiments on living animals in connection with the successful carrying on of the present war by the maintenance of the health of the troops and of avoidance or minimising of many diseases to which soldiers in the field are particularly liable. There was no express evidence before us that any public benefit in the direction of the advancement of morals and education amongst men (or in any other direction) would or might result from the society's efforts to abolish vivisection, but if it must be assumed that some such benefit would or might so result, and if we conceived it to be our function to determine the case on the footing of weighing against that assumed benefit the evidence given before us, and of forming a conclusion whether, on balance, the object of the society was for the public benefit, we should hold, on that evidence, that any assumed public benefit in the direction of the advancement of morals and education was far outweighed by the detriment to medical science and research and consequently to the public health which would result if the society succeeded in achieving its object, and that, on balance, the object of the society, so far from being for the public benefit, was gravely injurious thereto,
- C with the result that the society could not be regarded as a charity.

- Nevertheless, the Special Commissioners considered that they were bound to allow the society's claim for exemption because, in *Re Foveaux* (1), CHITTY, J., decided that the society, under its former name of the Victoria Street Society for the Protection of Animals from Vivisection, was a "charity" in the legal sense of that word, and his judgment in that case was referred to without dissent
- D in *Re Wedgwood, Allen v. Wedgwood* (2), by LORD COZENS-HARDY, M.R., and SWINFEN-EADY, L.J. But since then the decision of CHITTY, J., has been subjected to criticism. In *Re Hummeltenberg, Beatty v. London Spiritualistic Alliance, Ltd.* (3), the question arose as to whether a bequest to the treasurer for the time being of the London Spiritualistic Alliance, Ltd., of a sum of £3,000 to form the nucleus of a fund for the purpose of establishing a college for the training and developing of suitable persons, as mediums, was a good charitable gift. In that case RUSSELL, J., as he then was, said, at p. 242 :
- E

It was contended that the court was not the tribunal to determine whether a gift or trust was or was not a gift or a trust for the benefit of the public. It was said that the only judge of this was the donor of the gift or the creator of the trust. For this view reliance was placed on the views expressed by the Master of the Rolls and by some members of the Court of Appeal in Ireland in *Re Cranston* (4). Reliance was also placed on a sentence in the judgment of CHITTY, J., in *Re Foveaux* (1). So far as the views so expressed declare that the personal or private opinion of the judge is immaterial, I agree; but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree. If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example.

- G The matter was further dealt with in *Re Grove-Grady, Plowden v. Lawrence* (5). That case came before the Court of Appeal, and LORD HANWORTH, M.R., said, at p. 572 :

Who is to decide these questions ? [namely, questions whether a gift was a charitable gift within the meaning of that word in law.] I agree with HOLMES, L.J., that the answer does not depend upon the view entertained by any individual—"either by the judge who is to decide the question, or by the person who makes the gift" : *Re Cranston* (4). The test is to be applied from evidence of the benefit to be derived by the public or a considerable section of it; though a wide divergence of opinion may exist as to the expediency, or utility, of what is accepted generally as beneficial. The court must decide whether benefit to the community is established. In my judgment RUSSELL, J., as he then was, correctly states the proposition : "The question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it."

RUSSELL, L.J., expressed a similar view. He said, at p. 582 :

There can be no doubt that upon the authorities as they stand a trust in perpetuity

for the benefit of animals may be a valid charitable trust if in the execution of the trust there is necessarily involved benefit to the public; for if this be a necessary result of the execution of the trust, the trust will fall within LORD MACNAGHTEN's fourth class in *Pemsel's* case (6)—namely, “trusts for other purposes beneficial to the community” [that is, trusts for purposes other than the relief of poverty, the advancement of education and the advancement of religion]. So far as I know there is no decision which upholds a trust in perpetuity in favour of animals upon any other ground than this, that the execution of the trust in the manner defined by the creator of the trust must produce some benefit to mankind. I cannot help feeling that in some instances matters have been stretched in favour of charities almost to bursting point; and that a decision benevolent to one doubtful charity has too often been the basis of a subsequent decision still more benevolent in favour of another. The cases have accordingly run to fine distinctions, and speaking for myself I doubt whether some dispositions in favour of animals held to be charitable under former decisions would be held charitable to-day. For instance, anti-vivisection societies, which were held to be charities by CHITTY, J., in *Re Foveaux* (1), and were described by him as near the border line, might possibly, in the light of later knowledge in regard to the benefits accruing to mankind from vivisection, be held not to be charities. A

In view of these authorities, it was for the society to prove affirmatively that it was a society “established for charitable purposes only.” But not only did the society fail to prove that fact, but the evidence called in opposition to the society's claim proved that the main object of the society was the total abolition of vivisection, and that the attainment of that object, so far from being beneficial, would be gravely injurious to the community. In these circumstances, it was the duty of the Special Commissioners to reject the society's claim for exemption from income tax. B

In my opinion, therefore, this appeal must be allowed, and the order granting the exemption must be revoked. C

Appeal allowed with costs. Order granting the exemption revoked.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Shield & Son* (for the respondents). D

[Reported by P. J. JOHNSON, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. DESOUTTER BROTHERS, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), July 25, 26, 27, 1945.] E

Revenue—Excess Profits Tax—Royalties received from licences of patented inventions—“Income received from investments”—Finance (No. 2), Act, 1939 (c. 109), Sched. 7, Pt. I, para. 6, s. 12 (4).

The respondent, a British company manufacturing electrical and pneumatic tools, was the registered proprietor of British patents covering improvements in electrically operated hand tools. It also owned patents taken out in the United States of America covering the same subject matter. By two agreements, dated June 3, 1937 and Aug. 1, 1940, respectively, the respondent granted to Millers Falls Company, a company incorporated under the Laws of the State of Massachusetts, an exclusive licence to manufacture and sell, within a defined territory, drills made in accordance with the patents mentioned in the agreements. A royalty was reserved to the respondent company in respect of the tools manufactured or sold by Millers Falls Company. On the question whether those royalties ought to be included in the computation of the respondent company's profits for the purpose of assessment to Excess Profits Tax with regard to the chargeable accounting period for the twelve months ended on Dec. 31, 1940, it was contended for the company (i) that the patents were investments within the meaning of para. 6, Sched. 7, Part I, of the Finance (No. 2) Act, 1939; (ii) that the royalties ought not to be included in the computation of the company's profits for the purpose of Income Tax nor, consequently, for Excess Profits Tax; (iii) that the functions of the company consisted mainly or wholly in the holding of investments within the meaning of the Finance (No. 2) Act, 1939, s. 12 (4), and that, therefore, the holding of the investments should be deemed to be the business of the respondent company:— F

HELD: (i) the patents held by the respondent company were not invest- H

ments within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Part I, para. 6, and the royalties ought, therefore, to be included in the computation of the profits.

Inland Revenue Comrs. v. Rolls-Royce, Ltd. (1) followed.

(ii) it was part of the respondent company's trade to exploit the patents and the royalties received therefrom constituted an income receipt which must be included in the computation of the profits of the company's trade.

(iii) on the facts the main function of the respondent company was the manufacture of electrical and pneumatic tools and, therefore, the provisions of the Finance (No. 2) Act, 1939, s. 12 (4) did not apply.

[EDITORIAL NOTE.] This case again considers the character of royalties received by a company from a licensee of patented inventions from the point of view of excess profits tax, and follows the *Rolls Royce* case (1), in holding that the royalties are not "income received from investments." It is also held that as the main function of the company was to carry on the trade of manufacturing tools and to exploit its patents abroad by a licensee, the receipts expressed to be royalties, must be included in the computation of its trade profits assessable to excess profits tax. The main function being thus determined, the Finance (No. 2) Act, 1939, s. 12 (4), relating to a company whose main function is the holding of investments is also inapplicable.

FOR THE FINANCE (NO. 2) ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 1180.]

Case referred to :

(C) **(1) Inland Revenue Comrs. v. Rolls-Royce, Ltd.*, [1944] 2 All E.R. 340.

CASE STATED under the Finance (No. 2) Act, 1939, s. 21 (2), the Finance Act, 1937, Sched. 5, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

On an appeal by the company against an assessment to Excess Profits Tax for the chargeable accounting period for the twelve months ending Dec. 31, 1940, in the estimated sum of £225,000, the following facts were found by the Commissioners :

The company carries on in the United Kingdom the trade of manufacturers of electrical and pneumatic tools : this is its main function. It is the registered proprietor of British Patents covering improvements in electrically operated hand tools, which are one of the classes of tools which it manufactures. It is also the proprietor of patents which it took out in the United States of America covering the same subject matter . . .

By an agreement, dated June 3, 1937, the company granted to Millers Falls Co., an American corporation, sole and exclusive licence to manufacture and sell in the territory therein defined drills made in accordance with the said American patents or any further patents thereafter granted.

The said agreement reserved a royalty to the company in respect of each unit sold and was expressed to continue in force for a period of two years and thereafter to be determinable by six months written notice . . .

By a further agreement, dated Aug. 1, 1940, the company granted to Millers Falls Co., a non-exclusive licence to manufacture and sell the said drills. This agreement also reserved a royalty to the company in respect of each unit sold and was similarly determinable . . .

During the chargeable accounting period the company received royalties amounting to 3,150 dollars (approximately £868) from Millers Falls Co., under the said agreements. The company does not itself manufacture under the said American patents . . .

(C) The decision of the Commissioners was as follows :

. . . the word "investments" in [the Finance (No. 2) Act, 1939, Sched. 7, Part I] para. 6 was apt to include patents which had been licensed and which were yielding a royalty income and the . . . royalties were income from investments . . .

D. L. Jenkins, K.C., and *Reginald P. Hills* for the appellants.

Frederick Grant, K.C., and *A. L. Macmillan* for the respondents.

Cur. adv. vult.

(H) *MACNAGHTEN, J.* : The respondent, Desoutter Brothers, Ltd., carries on in the United Kingdom the trade of manufacturers of electrical and pneumatic tools. It is the registered proprietor of British patents covering improvements in electrically operated hand tools, and it also owns patents taken out in the United States of America covering the same subject matter.

By an agreement dated June 3, 1937, the company granted to Millers Falls Company, a company duly incorporated under the laws of the State of Massachusetts, an exclusive licence to manufacture and sell in the territory defined in the agreement (which covers a large part of the continent of America, as well

as some parts of what is known as the Far East) drills made in accordance with the American patents belonging to the company. By a further agreement dated Aug. 1, 1940, it granted Millers Falls Company a further licence to sell drills manufactured in accordance with the patents therein mentioned.

By the agreements, apart from other provisions relating to the sale of tools and the provision of drawings and assistance in manufacture, the company reserved a royalty in respect of the tools manufactured or sold by the Millers Falls Company. The question at issue on this appeal is whether those royalties ought to be included in the computation of the company's profits for the purpose of assessment to Excess Profits Tax. The question arises with regard to the accounting period for the twelve months ended on Dec. 31, 1940.

The main contention set up by the company before the Special Commissioners was that these patents were investments within the meaning of para. 6 of Part I of Sched. 7 to the Finance (No. 2) Act, 1939, the Act imposing the Excess Profits Tax, and the Special Commissioners held that the contention was well founded. That decision, however, was before the case came before me in this court entitled *Inland Revenue Comrs. v. Rolls Royce, Ltd.* (1), where the question arose with regard to royalties on patents belonging to the Rolls Royce company. In that case I held that the patents were not investments within the meaning of that paragraph, and, therefore, the claim for exemption from inclusion in the computation of the profits of the company for the purpose of Excess Profits Tax failed. Counsel for the respondent conceded that my decision in that case covered this present case; he did not, therefore, argue that point; reserving, however, his right in the event of an appeal to take the point that the decision in the *Rolls Royce* case (1) was erroneous.

But that was not the only point taken for the respondent. It was said that these royalties ought not to be included in the computation of the profits of the company for the purpose of Income Tax, and, therefore, it follows that they ought not to be included for the purposes of the Excess Profits Tax.

I do not think this further contention is well founded. The company carries on the trade of manufacturers of electrical and pneumatic tools; that was its main function. It is, therefore, assessable in respect of the profits of its trade under Sched. D, Case I. The patents in question relate to improvements in such tools; the company is engaged in exploiting those patents. If the patents were being exploited in this country the licensee would deduct the tax from the royalties. I do not think it makes any difference that instead of being exploited in the United Kingdom the patents are being exploited in the United States. It is part of the company's trade to exploit the patents, and the money that they receive, expressed in the agreement as a royalty, is an income receipt which must be included in the computation of the profits of its trade. It is true that, in the case of moneys received from abroad, an assessment could be made under Sched. D, Case V; but where an assessment could be made under more than one case of Schedule D, the Revenue authorities can charge it under whichever case they think proper. In my opinion that further point fails.

There was also a third point under the Finance (No. 2) Act, 1939, s. 12 (4). That subsection provides as follows:

Where the functions of a company . . . consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society.

It has, therefore, no application to the respondent company, because the case finds that the main function of the company is the manufacture of electrical and pneumatic tools. Therefore, I think the third point also fails, and in my opinion the decision of the Special Commissioners, which was founded on the view that the patents were investments within the meaning of para. 6, Part I, of the Seventh Sched. of the Finance (No. 2) Act, 1939, was erroneous; so that the appeal must be allowed with costs.

Appeal allowed with costs. Case remitted to the Special Commissioners to deal with the assessment accordingly.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Alfred Cox & Son* (for the respondents).

[Reported by P. J. JOHNSON, ESQ., Barrister-at-Law.]

ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD.
 v. KERR (INSPECTOR OF TAXES).
 ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD.
 v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), July 26, 27, 1945.]

A *Income Tax—Capital or income—Company directors retiring from office—Covenants in restraint of trade—Payments made by company to retiring directors in consideration of covenants—Payments not deductible from company's trading profits as revenue expenditure—Capital expenditure—Income Tax Act, 1918 (c. 40), Sched. D, Case I.*

Revenue—National Defence Contribution—Payments made by company to retiring directors—Payments made in consideration of covenants in restraint of trade—Whether payments capital or revenue expenditure—Finance Act, 1937 (c. 54), Sched. IV.

B S. and C., directors of the appellant company, retired from office in 1939. By two similar agreements, dated July 3 and July 26, 1939, respectively, the two retiring directors covenanted with the appellant company that they would not, after Dec. 31, 1939, without the previous written consent of the company "carry on or be engaged or concerned in the manufacture of any kind of Portland cement . . . and other cements for building, constructional or decorative purposes, lime, whiting or bricks," within any part of the world. In consideration of those covenants the company covenanted to pay to S. the sum of £20,000, and to C. the sum of £10,000. On appeal, the question for the determination of the court was whether, in the computation of the company's profits for the purposes of Income Tax and National Defence Contribution, these two sums ought to be regarded as trading expenses diminishing the company's profits for the year in question :—

C HELD : since the sums were paid by the company to prevent the retiring directors from setting up in business in competition with the company, the payments were made for the acquisition of a valuable right and must be regarded, therefore, as a capital expense and not as a trading expense.

D *Collins v. Adamson (Joseph) & Co., Adamson (Joseph) & Co. v. Collins (4) and British Insulated and Helsby Cables, Ltd. v. Atherton (1) applied.*

[EDITORIAL NOTE. The question in this case is whether payments made by a company to directors, who are about to retire, in consideration of covenants by them barring them from engaging in activities in competition with the company are capital expenditure because, by the expenditure, the company acquired an asset or an advantage for the enduring benefit of its trade, or whether on the other hand the covenants merely protected the company's existing goodwill. It is held that the decision of LAWRENCE, J., in *Southern v. Borax Consolidated, Ltd.* (3) was not in point, but that the decision in *Collins v. Joseph Adamson & Co.* (4) was applicable. In that case sums were expended in the purchase of the goodwill and undertaking of a boiler works and for a covenant by the owner of the land upon which the works stood restrictive of its user.

F AS TO CAPITAL EXPENDITURE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 158-161, paras. 325-327; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 237-253; DIGEST Supp., Income Tax, Nos. 244a-252h.]

G Cases referred to :

- * (1) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 28 Digest 52, 264; 95 L.J.K.B. 336; 134 L.T. 289; affg. S.C. *sub nom.* *Atherton v. British Insulated & Helsby Cables, Ltd.*, [1925] 1 K.B. 421.
- (2) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 28 Digest 56, 287; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *reusg.*, [1914] 2 K.B. 891.
- * (3) *Southern v. Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412; Digest Supp.
- H * (4) *Collins v. Adamson (Joseph) & Co., Adamson (Joseph) & Co. v. Collins*, [1938] 1 K.B. 477; [1937] 4 All E.R. 236; Digest Supp.; 107 L.J.K.B. 121; 21 Tax Cas. 400.

* (5) *Deverell Gibson & Hoare, Ltd. v. Rees (Inspector of Taxes)* (1943), 25 Tax Cas. 467.

CASES STATED under the Income Tax Act, 1918, s. 149, and the Finance Act, 1937, s. 24 (2), Sched. 5, Part II, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. (i) On the appeal by the company against an additional assessment to income tax in the sum of £31,179 made upon the company for the

year 1940-41 under Sched. D, Case 1, the following facts were found by the Commissioners :

... In 1900, when the company was formed, Stevens was appointed secretary . . . In 1906 he was appointed one of the managing directors of the company, and continued to be a managing director until his retirement on Dec. 31, 1939. . . . on July 18, 1934, Stevens entered into a service agreement with the company . . . extending his service as one of the managing directors of the company for a further period of 5 years as from Jan. 1, 1935, *i.e.*, up to Dec. 31, 1939 . . . At the conclusion of the 1934 service agreement Stevens would have been free . . . to turn his abilities to account in the way of lending his name to any enterprise which might compete with or otherwise act to the disadvantage of the appellant company . . . Some months before the date of expiry of the 1934 service agreement, Stevens intimated . . . to . . . the chairman of the company that he wished to resign his post as managing director and retire from the Board of the company . . . The minute [of the board meeting] records the acceptance of . . . Stevens' resignation . . . it further records the approval of a proposal by the chairman that Stevens should forthwith enter into an agreement not to engage for the remainder in competitive trade in any form, the consideration for such agreement to be the sum of £20,000 together with an indemnity against income tax, sur-tax or other tax upon income in respect of the same sum . . . On July 26, 1939, Stevens entered into such an agreement as aforesaid, *viz.*, a deed of covenant in restraint . . .

In cl. 1 Stevens covenants with the company that he will not after Dec. 31, 1939, being the date of his retirement, " Without the previous written consent of the company, either alone or jointly or as a director or manager or agent or servant of any company, firm or person :

(a) carry on or be engaged in the manufacture of any kind of Portland cement coloured and other cements for building constructional or decorative purposes lime whitening or bricks within :

- (i) the British Isles including Northern Ireland and Eire ;
- (ii) the province of British Columbia in the Dominion of Canada ;
- (iii) India ;
- (iv) the Republic of Mexico ;
- (v) the Union of South Africa ;
- (vi) any other part of the world.

... cl. 4 provides that " In consideration of the covenants by Stevens hereinbefore contained the company hereby covenants with Stevens (a) that the company will pay to Stevens on Dec. 30, 1939, the sum of £20,000 ; (b) that if Stevens should die before the said Dec. 30, 1939, the company will pay the said sum of £20,000 to his legal personal representative on production of evidence of their title " . . . (there) was no provision for a tax indemnity such as that referred to in the minute of the board meeting . . .

Charleton, to whom . . . a payment of £10,000 was made in consideration of a covenant similar to that entered into by Stevens, also resigned from office under the appellant company, in the year 1939.

... in the " summarised general trading account " the sum of £30,000 consisting of the aforesaid £20,000 paid to Stevens . . . and the £10,000 paid to Charleton . . . are charged to revenue under the head " sundry special reserves."

The decision of the Commissioners was as follows :

For the . . . company reliance was placed on *Southern v. Borax Consolidated, Ltd.* (3). In that case, however, the moneys allowed as a deduction in computing the profits of Borax were moneys expended in defence or maintenance of a title which must be assumed to have been a good title (LAWRENCE, J., at p. 419), in the present case the appellant company, before entering into the covenants of July, 1939, had no title to freedom from competitive activities by either of the two directors on the retirement . . . indeed the appellant company covenanted to pay the sums in question precisely in order that it might acquire such a title and secure itself from the risk of competition. On the facts of the case, and in the light of the authorities, we hold that the expenditure although incurred for purposes of the company's trade, was of a capital nature and was not a proper charge to revenue. The appeal fails and we leave the figures to be agreed . .

(ii) On the appeal against an assessment to National Defence Contribution made upon the company for the chargeable accounting period of twelve months ended Dec. 31, 1939, where the sole question for the determination of the commissioners was the same as that set out in the company's appeal against an additional assessment to income tax under Sched. D, Case I, the commissioners held in accordance with their decision relating to income tax that the company's appeal failed and that, on the figures being agreed, the assessment to National Defence Contribution was to be increased to the agreed amount.

Cyril King, K.C., and *J. S. Scrimgeour, K.C.*, for the appellants.

D. L. Jenkins, K.C., and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

MACNAGHTEN, J. : These are appeals by the Associated Portland Cement Manufacturers, Ltd., from the decision of the Special Commissioners with regard to (a) the assessment of the company to income tax for the year 1940-41 under Sched. D, Case I, and (b) its assessment to National Defence Contribution for the chargeable accounting period of the twelve months ended Dec. 31, 1939. The question at issue is the same in both cases, namely, whether two sums, of £20,000 and £10,000, ought to be included as trading expenses in the computation

- A The sums in question were paid to officers of the company for the purpose of those assessments. The sums in question were paid to officers of the company who were about to retire from its service ; one, Stevens who had been long in the service of the company, first as its secretary, and then since 1916 as one of its managing directors ; the other, one Charleton, who had been associated with the company since its formation in 1900 and had held the office of a director since 1931. The agreement made with Stevens was dated July 26, 1939. He at that time was serving the company as managing director under an agreement which would come to an end at the close of the year. He had intimated his intention of retiring from the service of the company when the year closed. He was under no restriction at all as to what he might do when his service agreement terminated and the directors thought it was desirable to obtain from him a covenant restraining him from activities that might be harmful to the appellant company. Accordingly, by the agreement, dated July 26, 1939, after reciting that Stevens had been for many years and still was one of the managing directors of the company and that he had expressed his desire to relinquish his duties both as managing director and as an ordinary director, and it having been agreed that he should do so on Dec. 31, of that year, the company had requested him to enter into the covenant set out in the agreement, Stevens covenanted that he would not, after Dec. 31, 1939, without the previous written consent of the company :

- D . . . carry on or be engaged or concerned in the manufacture of any kind of Portland cement, coloured and other cements for building, constructional or decorative purposes lime whitening or bricks . . .

within any part of the world, and in consideration of that covenant the company covenanted to pay him on Dec. 30, 1939, the sum of £20,000. The covenant also provided that if Stevens should die before Dec. 30 the company would then pay the £20 000 to his legal personal representative. Fortunately Stevens survived and, therefore, it did not turn out, as it might have turned out, that the company were paying £20,000 for nothing.

- E The agreement with Charleton was in similar terms. It was dated July 3, 1939, and under that agreement the sum of £10,000 was to be paid to him on Sept. 30 of that year, and in his case also it provided that if he should die before that date the £10,000 should be paid to his legal personal representative.

- F The question at issue on these appeals is whether in the computation of the company's profits for the purposes of income tax and National Defence Contribution these two sums amounting to £30,000 ought to be regarded as trading expenses diminishing the company's profits by that amount. Were they income payments or capital payments ? On that question reference was made to *British Insulated and Helsby Cables, Ltd. v. Atherton* (1), which contains the well-known judgment of VISCOUNT CAVE, L.C., who said, at p. 212 :

- G But there remains the question, which I have found more difficult, whether apart from the express prohibitions, the sum in question is (in the words used by LORD SUMNER, in *Usher's case* (2)) a proper debit item to be charged against incomings of the trade when computing the profits of it ; or, in other words, whether it is in substance a revenue or a capital expenditure. This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case ; but where, as in the present case, there is no express finding by the Commissioners upon the point, it must be determined by the courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities.

- H In this case the commissioners have decided against the contention of the company. But that was not the only light that VISCOUNT CAVE, L.C., threw upon the subject, because he said also, at p. 213 :

But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading

to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

Counsel for the company relied strongly on a case which was decided by LAWRENCE, J., when he was sitting as revenue judge, *Southern v. Borax Consolidated, Ltd.* (3). In that case the judge reviewed some of the numerous authorities in which this question was debated, and he came to the conclusion that the expenditure in question in that case ought to be regarded as a revenue expenditure. But I do not think that the *Borax* case (3) is really of any assistance in the present case. The Borax Company owned some real property abroad, and had to incur legal expenses in defending its title to the property, and the question was whether those expenses should be treated as income or as capital expenses: on that question there could, I think, be little doubt but that they were to be regarded as expenses properly chargeable to income.

The case which I think does resemble the present case is *Collins v. Joseph Adamson & Co.* (4), which was also decided by LAWRENCE, J. Joseph Adamson & Co., were members of an association called the Association of Shell Boiler-makers which was founded with the object of maintaining prices by means of a pooling scheme. A member of the association was proposing to sell his business to a non-member, which would have been contrary to the interests of the members of the association, and they, therefore, decided to buy the business themselves, and they subscribed the necessary amount to make up the purchase price. The question, of course, in that case was whether the amount subscribed by Joseph Adamson & Co. towards the purchase price should be treated as an income or as a capital expense. In that case LAWRENCE, J., made a very careful review of the authorities, and he came to the conclusion that it ought to be regarded as a capital expense. The argument as he put it seems to me to be clear and conclusive. That case appears to me to be precisely parallel with this one. That being so, it follows that in this case, since the £30,000 was paid by the company to prevent Stevens and Charleton, after they had left the services of the company, setting up in business in competition with the company, the company obtained a valuable right. It was for the company to measure in money what the acquisition of that right was worth; in one case they thought it was worth £20,000 and in the other they thought it was worth £10,000. In my opinion, the money was paid, as the Special Commissioners have found, for the acquisition of a valuable right and must be regarded as a capital expense and not as a trading expense. I think that the decision of the Special Commissioners was right.

Counsel for the company also relied to some extent on a judgment of my own in the case of *Deverell, Gibson & Hoare, Ltd. v. Rees* (*Inspector of Taxes*) (5), in which I held that a payment made by the appellant company to a retiring director was a "withdrawal of capital" within r. 1 (f). The appellant company was what may be called "a two men company," consisting of one Hoare and one Packer, and it carried on the business of printers in London. Packer before joining the company had carried on a printing business of his own, and he joined it on the terms that the whole of his connection as a printer should belong to the company. He and Hoare were the directors of the company and the only persons interested in it. Their premises were blitzed during the war, and in consequence Packer became "temperamental," with the result that he quarrelled with Hoare and resigned his directorship, and at the same time said that unless the company took over his connection, which he had in fact already sold to the company, he would make other arrangements in regard to it. Hoare asked Packer what he wanted, and Packer replied that he wanted £600, and he received that sum from the company. The question was whether that should be treated as a trading expense. The commissioners held that it could not be treated as a trading expense, and I thought they were right. The commissioners considered that the £600 should be regarded as the price paid by the company for Packer's "connection." I thought that, since Packer had already sold his "connection" to the company, the £600 should be regarded as an unwarranted withdrawal of capital, because the company could not properly reduce its capital without the sanction of the court. The concluding sentence of my judgment, at p. 471, implies that I thought that Packer received the £600 in consideration of an obligation not to compete with the company. I ought to have explained more

clearly that there was no consideration for the payment.

In my opinion these appeals fail, and must be dismissed with costs.

Appeals dismissed with costs.

Solicitors: *Linklaters & Paines* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by P. J. JOHNSON, Esq., Barrister-at-Law.*]

WOLFENDEN v. WOLFENDEN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), June 6, July 27, 1945.]

B *Divorce—Nullity—Petitioner Canadian by birth but domiciled in England—Petitioner in China on consular service—Marriage of petitioner to Canadian lady in China—Ceremony not performed by an episcopally ordained priest—Extent of English law applicable to British subjects abroad—Marriage valid—Foreign Marriages Act, 1892 (c. 23), s. 23—China Order in Council, 1925 (S.R. & O., 1925, No. 602), art. 104.*

C *Divorce—Desertion—Parties married in China—Ceremony not performed by an episcopally ordained priest—Knowledge by parties that further ceremony before proper consular officer necessary to validate marriage—Refusal by respondent to undergo further ceremony—Respondent leaving petitioner.*

D The petitioner who was born in Canada of Canadian parents visited England in 1930 and decided to make his home here. He then went to China to take up an appointment with the Chinese Maritime Customs, which was a British consular service. The respondent, a Canadian lady, to whom the petitioner was engaged to be married, came to China in 1938. The petitioner was living at the time in the district of Ichang, and, on Oct. 29, 1938, the parties went through a ceremony of marriage which was performed by the Minister of the Church of Scotland Mission who was the only minister available in the district. Subsequently, the petitioner was informed that this particular minister was not authorised to perform a valid ceremony of marriage under the Foreign Marriages Act, 1892, and that it was necessary for the parties to go through a civil ceremony before the proper consular officer at Chungking or elsewhere. The respondent, however, refused to go through any further ceremony, and left for Canada against the petitioner's wish. Shortly after the outbreak of war the respondent wrote to the petitioner suggesting that they might make an attempt to come together. The petitioner in reply stated that her offer was impracticable owing to the war and the difficulties which had already existed between them. The petitioner filed a petition for nullity on the ground that there never was a valid marriage; or, alternatively, on the footing that the marriage was valid, for a dissolution on the ground of the respondent's desertion:—

E **F** **G** **H** **HELD:** (i) by the China Order in Council, 1925, art. 104, so much of English law was incorporated as was applicable to the situation and condition of British citizens living in the district of Ichang. So far as the requirements of English law were concerned in relation to the common law marriage, no obligation existed that the ceremony should be performed by an episcopally ordained priest. The marriage, therefore, was valid.

Catterall v. Catterall (2) and *Maclean v. Cristall* (3) applied.

(ii) in the particular circumstances of the case, the refusal of the respondent to go through what she and the petitioner believed was necessary to validate the marriage, and the fact that the respondent left the petitioner against his wish, led to the conclusion that the respondent deserted the petitioner and continued to remain in desertion. The petitioner, therefore, was entitled to a decree *nisi*.

[**EDITORIAL NOTE.** According to *R. v. Millis* (1) a common law marriage can only be validly celebrated before an episcopally ordained priest. This doctrine does not apply in full force in colonial possessions, however, for, in the words of BLACKSTONE, although "colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition." Accordingly a

ceremony of marriage of a British subject performed by a Minister of the Church of Scotland in a district of China, he being the only available Minister, is held valid. This is in accordance with the reasoning in *Catterall v. Catterall* (2) where the marriage was in New South Wales, and *Maclean v. Cristall* (3) where the marriage was in India. There is nothing in the Foreign Marriage Act, 1892, to impair the validity of this marriage, although it took place in a district to which the Act applied.

AS TO MARRIAGES OUT OF ENGLAND, see HALSBURY, Hailsham Edn., Vol. 16, p. 596, para. 926; and FOR CASES, see DIGEST, Vol. 11, pp. 419, 420, Nos. 857-858 see also DIGEST, Vol. 27, p. 63, No. a.]

Cases referred to :

* (1) *R. v. Millis* (1844), 10 Cl. & Fin. 534; 27 Digest 43, 222.

* (2) *Catterall v. Catterall* (1847), 5 Notes of Cases, 466; 11 Digest 420, 858.

* (3) *Maclean v. Cristall* (1849), 7 Notes of Cases, Supp. XVII; 27 Digest 63, a.

PETITION by the husband for a declaration of nullity on the ground that there never was a valid marriage; or, alternatively, for divorce on the ground of his wife's desertion on the footing that there was a subsisting marriage.

Colin Duncan for the petitioner.

E. Holroyd Pearce, K.C., and *J. G. P. Comyn* for the King's Proctor.

LORD MERRIMAN, P.: I am bound to say that the case is one which has given me very great anxiety and I should, I confess, have been glad to give a little more consideration to the somewhat intricate problems involved. But, having come to a very definite opinion on the legal aspect of the matter—and having regard not merely to the calendar but also to certain personal considerations which affect the petitioner himself—I am disposed to deal with the matter now and to forego the advantage of further consideration.

Logically, of course, the question of the validity of the marriage comes first. On the occasion when this matter was before me on June 6, 1945, I heard all the evidence, including that of the wife who had not appeared but was called as a witness, and I came to the conclusion that it was necessary to adjourn the case in order that I might have the assistance of the King's Proctor upon the point of law. I have today had the advantage of a very full and careful examination of the authorities by counsel on behalf of the King's Proctor, for which I am very much indebted to him.

The material facts on the question of the marriage are these: The husband was born in Canada of Canadian parents but in 1930 he visited England on a holiday. I am quite satisfied from his evidence (which I am prepared to accept without any question; he was demonstrably a fair and candid witness) that he became enamoured of this country and determined, if possible, should circumstances permit, to cast his lot here. He had been employed in the Canadian Pacific Railway; he had disappointments in connection with naval training in Canada which evidently rather disgusted him and made him inclined to pass his sea career in some other country, and I am quite satisfied with his evidence that in 1930 he made up his mind, if he could, to make England his home. It is quite true that the events which happened shortly afterwards, and in particular the outbreak of war later, interfered considerably with that intention; first of all, he accepted employment in the Chinese Maritime Customs at Shanghai (which really was a British consular service) which necessarily prevented him from actually giving effect to his intention of making his home in England. He was engaged in Shanghai, or at any rate in that district, until 1938.

In 1938 the lady to whom he had been engaged, or whom he had been courting, in Canada decided to come out to China to be married. He was at that time in the district of Ichang and they went through a ceremony of marriage which was performed by the Minister of the Church of Scotland Mission at Ichang on Oct. 29, 1938. I believe the full description of the Church is "the Burgess Church of the Church of Scotland Mission, Ichang." It was a small building and was the only church of any denomination in the district of Ichang. The Rev. Forbes Tocher was the only available minister in the district of Ichang in the Province of Hupeh. No form giving notice of the marriage was filled up, no licence was obtained, and no banns were published. After the ceremony the minister issued a certificate that he had joined the parties, describing them and their parentage and so forth, in holy matrimony before certain specified witnesses.

There is no doubt at all, and I find as a fact, that so far as all present were concerned it was intended that as far as was legally possible a marriage was

thereby consecrated. But I must add this. I am satisfied, without going through the detail, that it had been made quite clear to the husband on enquiry from Consular officials at, I think, Chungking, that this particular minister was not authorised to perform a valid marriage ceremony under the Foreign Marriages Act, 1892. Incidentally, though no doubt with less authority, his own head office had made it clear that a further ceremony would be necessary. I have not the slightest doubt that at the time when this ceremony was performed it was the fixed intention of both of them to go through the civil ceremony before the proper Consular officer at Chungking or elsewhere. Equally I have not the slightest doubt that, so far as the religious aspect of the matter is concerned, they intended this ceremony to be a religious celebration of their marriage.

The question is whether or not this ceremony, although the parties undoubtedly thought it was not fully effective, did effect a valid marriage. That it did not conform with the Foreign Marriages Act is made quite clear—indeed, there is no dispute about it—by a Foreign Office certificate dated June 4, 1945, under the hand of the late Prime Minister and under the seal of the Foreign Office duly put in before me.

It was suggested that I might have to consider whether the marriage conformed to the law of the place where it was celebrated. I have no evidence at all about Chinese law and I am bound to say, having considered the matter. I do not think I could possibly hold that in the circumstances of this case that law was applicable.

The real question in this case, on the supposition that the local law had nothing to do with it, and the marriage admittedly was not validated by the Foreign Marriages Act, is whether it is valid as a common law marriage, though it was not performed by an episcopally ordained priest.

It was decided in *R. v. Millis* (1), that so far as England and Ireland are concerned it is the law that a common law marriage can only be validly celebrated before an episcopally ordained priest. It is not in the least to the purpose to point out that that result was arrived at in a somewhat curious way. It arose out of a trial for bigamy, inasmuch as the accused had gone through the form of a second marriage after an earlier ceremony performed according to the rites of the Presbyterian Church. He could not, of course, be convicted of bigamy unless the first ceremony was valid. The court in Ireland were equally divided, two against two, but in order to raise the question one of the judges withdrew his opinion. The matter came up to the House of Lords and there again six Law Lords were equally divided, the result being that the appellant failed and it was held that the original marriage performed according to the rites of the Presbyterian Church was invalid. Nevertheless it must be taken that that is the law as regards England and Ireland.

The question in this case is whether, in order to effect a valid common law marriage in the district of Ichang, in the Province of Hupeh, China, in 1938, it was or was not necessary that the ceremony should be performed by an episcopally ordained priest. If the decision in *R. v. Millis* (1) had never been qualified it manifestly would compel me to decide in the same sense, but that is not the position.

In 1847 DR. LUSHINGTON in *Catterall v. Catterall* (2) held that a marriage in New South Wales before a Presbyterian minister, where there was in fact consent between the parties to become husband and wife, was a valid marriage notwithstanding the fact that the ceremony did not comply with the provisions of a local Act; in that Act, however, there were no words which constituted the ceremony a nullity failing compliance with the Act. DR. LUSHINGTON held that there was a valid marriage upon which he could base a decree. He so held not merely notwithstanding the terms of the Australian Act (which, as he had held earlier, did not of itself nullify any ceremony not performed in accordance with the Act) but also notwithstanding the decision in *R. v. Millis* (1). He held, in effect, that that case did not apply with full force to a marriage performed in New South Wales.

I need not examine *Catterall v. Catterall* (2) any further because the matter was dealt with in what I regard as conclusive fashion by SIR ERSKINE PERRY, C.J., delivering the judgment of the Full Court of the Supreme Court of Judicature of Bombay in *Maclean v. Cristall* (3) in 1849. In that case the matter

arose because the husband was suing an adulterer in an action for criminal conversation. The marriage had been celebrated at Surat by a "Minister of the Gospel and Missionary" who was not in holy orders but belonged to a sect called Congregationists or Independents. It was admitted that no person in holy orders was present at the marriage. If, therefore, *R. v. Millis* (1) applied to a marriage in Surat it would be impossible for the action of criminal conversation to proceed. The matter was fully considered and the Chief Justice delivered a considered judgment in the course of which, after setting out the full effect of *R. v. Millis* (1) he discussed the question whether that judgment applied in India with all its full effect. In dealing with that question on p. 24 he said :

But the next step of the reasoning, as to the extent to which the English law has been introduced into India, is the point on which the judgment in the present case must depend. The rule on this subject is afforded by the doctrine of the common law with respect to colonies, which, though not strictly analogous, is more in point than any of the other rules in our law books. The rule in such case is, that although colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition. In many cases no question will arise as to the inapplicability of several provisions of English law, which are clearly seen to be merely municipal ; but whenever a question does spring up, it must be decided, like other disputed points of law, in the law courts of the country. BLACKSTONE lays down the rule very authoritatively on this subject : "What shall be admitted and what rejected, at what time, and under what restrictions, must, in case of dispute, be decided in the first instance by their (the colonists') own provincial judicature, subject to the revision and control of the King in Council."

Not only in respect of that last quotation but in respect of the earlier proposition that though "colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition," SIR ERSKINE PERRY, C.J., was relying on the corresponding statement in BLACKSTONE'S COMMENTARIES. He came to the same conclusion as DR. LUSHINGTON, that in effect it was surely inconsistent with the theory on which the incorporation of British law into a Colony was based that this particular requirement of the common law marriage should apply in India.

It is not suggested that either of these two authorities has ever been questioned; as far as I know they have stood for the best part of one hundred years. The question is whether they do, or do not, govern this case.

It was suggested that there was a distinction inasmuch as we are here dealing with a place to which the Foreign Marriages Act applies, and a place in which at the time in question British citizens had extra-territorial rights. It is common ground in this case that the China Order in Council, 1925, applied to the Province of Hupeh. The Order recites that :

Whereas by treaty, grant, usage, sufferance and other lawful means His Majesty the King has jurisdiction within the dominions of the Republic of China : . . . His Majesty, by virtue and in exercise of the powers in this behalf . . .

was pleased to pass an Order in Council setting out a system of judicature in that province, to the details of which it is unnecessary to refer. It was suggested therefore, that that raised a different situation ; that in such a situation, at any rate, the principles available to the first entry of colonists on to a new territory and the like could not apply, and if the theory is that this particular province (or any other place to which extra-territoriality applies) is British then the whole law of England, without any exception must apply also. In other words, that the decision in *R. v. Millis* (1) would apply with the full force and effect.

I do not think that can be so for two reasons. First of all, I do not see any distinction in principle between applying in a colony, as New South Wales was at the time of DR. LUSHINGTON'S judgment, only so much of the English law as suited the situation (but applying it notwithstanding the fact that there was a local Act of Parliament) and applying only so much of the English law as it suited to the situation of a British subject in this Province of Hupeh notwithstanding that by Order in Council having the effect of legislation the courts of law are set up there to administer British justice. Unless there is something in either case which excludes anything but that which is laid down in the legislation it seems to me that precisely the same principles apply in the one case as in the other.

In fact, there is nothing in the legislation which is inconsistent with that,

for I find in art. 104 of the China Order in Council this provision :

Subject to the provisions of this Order, the civil jurisdiction of every court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English law for the time being in force.

A That certainly cannot possibly be said to be exclusive. It seems to me that whether one puts it on the basis that one of the circumstances which must be taken into account is that the English law is being imported into a foreign country which in all material respects is indistinguishable from a colony, so far as access to priests of the Established Church and the like is concerned, or whether one puts it on the other basis that when it is indicated that the jurisdiction of the Court shall "be exercised on the principles of and in conformity with the English law for the time being in force," the English law for the time being in force consists not only of the decision in *R. v. Millis* (1) but of the decision in *R. v. Millis* (1) as interpreted as far as such a situation is concerned by the decisions in *Catterall v. Catterall* (2) and *Maclean v. Cristall* (3), one comes to the same result. In such a territory as this there is, so far as the requirements of English law are concerned in relation to a common law marriage, no obligation that the ceremony shall be performed in the presence of an episcopally ordained priest.

C In my opinion, therefore, so far as the first point is concerned, it seems to me that the petition on the ground of nullity must fail and that it is my duty to say that this marriage was a valid marriage.

D I ought only to add this to show that I have not overlooked the point. I said earlier that it was quite clear that both parties thought at the time, and so did everybody else concerned, that further validation was necessary under the Foreign Marriages Act, but that does not really touch the question I have just decided. By the Foreign Marriages Act, 1892, s. 23, it is laid down that :

Nothing in this Act shall confirm or impair or in anywise affect the validity in law of any marriage solemnized beyond the seas, otherwise than as herein provided . . .

If this marriage is valid, as I think it is, there is nothing in the provisions of the Foreign Marriages Act which in any way impairs its validity.

E That brings me, therefore, to the second head of the petition : On the basis of a valid marriage has the husband proved desertion ? It is only right that I should say in the course of a very full hearing on the previous occasion a great deal more stress was laid on that part of the case with which I have just been dealing than on the question of desertion. It is also right to say that counsel for the petitioner was clearly inclined at the time to think that the nullity point was his better point. I am not going to say that he abandoned desertion, he did not formally abandon it, but he certainly was not inclined to pursue it very strongly. I am equally bound to say that, on the evidence as it was presented to me at the time and without any very particular consideration of the matter, as I was about to refer the whole matter to the King's Proctor, the difficulties in the way of the husband in the case of desertion presented themselves rather forcibly to my mind, but no concluded opinion was come to either by counsel presenting the case or, I hope needless to say, by myself.

G But, on further consideration, I have come to the conclusion that as regards the very matters to which I have been referring today in connection with this ceremony of marriage, their bearing on the question of desertion was, perhaps, not sufficiently considered. In order to make that point clear I must say one word more about the facts. It is quite clear without going into very great detail that very early in this married life the wife certainly and I think ultimately the husband, realised that a great mistake had been made. It was a case in which H two young people who had been fond of each other in Canada had waited for each other, and the husband had been out in China for some four years before she followed him out to be married. I suppose, as sometimes happens in these cases, things did not turn out as she, or perhaps either of them, expected. One cardinal feature emerges very early and it was this. Both parties being perfectly well aware that everybody on the spot expected them to validate this marriage—as I have held unnecessarily, but as everybody thought necessarily—before the British Consul at Chungking, the wife said point blank within five or six weeks of the marriage that she did not intend to bind herself.

I have seen the wife in the witness box and there is no question about it, the husband gave me the evidence and the wife did not deny it, in fact she emphasised it. She made it perfectly clear to me in the witness box that because she thought this marriage was not going to be a success she declined the husband's repeated requests that they should go up to Chungking to go through what they thought was the proper and necessary ceremony of marriage at Chungking.

I am bound to say on reflection and reading my notes over again preparatory to this hearing that it struck me very forcibly, and I am still of the same opinion, that that is a most important fact because it shows quite clearly that even thus early in the marriage the wife had made up her mind, if she could, somehow or other to get rid of the marriage. I think that the later correspondence which occurred between the parties must be read in that light, and I think also in the light of the fact that the wife, having refused to go through any further ceremony at Chungking, they both quite genuinely and I am bound to say very naturally, to put it at the lowest, had very grave doubts whether they were really married at all. When one looks at the letters which passed between the parties, which might be of rather an unfortunate character from the point of view of anybody who is alleging desertion, in the light of these considerations it may be quite legitimate to draw a somewhat different inference from what one would otherwise be obliged to draw. To put it in a sentence, the real difficulty in this case from the point of view of desertion was that when quite soon after the marriage the wife determined to go back to Canada the husband rather appeared to acquiesce in it. Then when oddly enough after the outbreak of war the wife wrote him a letter in which she made a faint suggestion that they should come together in Canada the husband pointed out the difficulties. In a word one might be driven to the conclusion that it was difficult to say that this separation was then anything but consensual, although I am and was quite satisfied that in the first instance the husband wanted to keep the marriage going and did not want his wife to go to Canada. As long as she would conduct married life with some relation to his means and the rest of it, because one of the difficulties was that she was very extravagant in entertaining, he was not in the least anxious that she should leave him and go back to Canada.

I do not propose to go through all the letters or all the evidence, but when she was on her way home she wrote from Chungking in Mar., 1939. In that letter she first of all said, contrary to the local view, that she thought the consular marriage was unnecessary and that her passport had been made up. I have been told all about that; it appears that there are Foreign Office instructions to officials to take the view, whatever the real law about the matter is, that the benefit of the doubt should be given to marriage of this kind and that passports should be made out; in other words, people who have gone through a ceremony of marriage should be given the benefit of the doubt for administrative reasons. It does not settle anything. That is the reason why she got the passport changed. Secondly in that letter she said "Definitely no consular wedding as far as I am concerned." It shows quite plainly that the husband had suggested that a new start might be made but she also made it plain that she would never be content with the society of one man. In other words, up to the time of her leaving Chungking I have no doubt whatever that it was she who was breaking up the marriage, but after the war broke out (I think I am right in saying he came to this country two months after the outbreak) she did write and suggest that the war had changed things and they might make an attempt to get together again. He wrote in October of that year explaining what the difficulties were. He is still in Chungking, he has not left for England, but he indicates that he may be still out there or he may be in England, and so forth and so on; and says his chances of visiting Canada in the near future are very remote.

He did say something in that connection which gave me a little uneasiness on the question of domicile although as I say I am really quite satisfied about that now. He said he hoped again to live in Canada some day but that day was a long time off. He said that even if he could come to Canada her proposal would be "awfully difficult" to accept. Then he traced the events of the marriage, saying, as I think undoubtedly was the fact, "You left me because you could not live with me any longer and now you ask me to come to you as a lover because you are in need of one." Then lower down:

I quite agree with you that this personal business must be cleared up as soon as

possible, and as I cannot come to you, and you must have a lover, we seem to be left with only one alternative, and that is that you must have your freedom, which, of course, you must decide yes or no.

In an ordinary case I would find it very difficult to get over a letter like that and say that the writer was in a position to charge his wife with desertion. But it is a commonplace to say that every case must be decided on its own facts. I think the whole of this correspondence must be looked at very much
 A in light of the fact that both these parties really were doubting whether they were really married at all, and certainly that it was the wife who had definitely and unequivocally refused to go through what she and he both believed was the necessary ceremony to validate the marriage, and in view of the fact that she had removed herself, as I am quite satisfied against her husband's will in the first instance, half way across the world at a time when it was utterly impracticable for him to follow her. I gave her any opportunity that she wished of
 B expressing her own point of view about that matter and she really declined to say anything. I am bound to say that I doubt really whether there was any substance in her offer at all, and perhaps that is all I need say about it. But, even if, for a moment, because of the outbreak of the war and feeling of loneliness and so on, she had made something which could be called an offer to reconstitute the marriage, I do not think that I could bring myself in all the circumstances
 C of this case to hold that the husband was in the wrong because he explained what the practical difficulties were.

I think really when one sees the thing in proper perspective that this is one of the cases in which one ought to find that the wife, who unquestionably was in desertion in the first instance, can fairly be said to have continued to desert the husband in spite of the fact that she did make this rather half-hearted and tentative approach in Sept., 1939. I do not think there was any reality in it
 D and she had, as I say, a full opportunity of saying that there was had she wished to do so.

In these circumstances I think, though I have felt that the case is full of difficulty on this point as on the other, I can fairly say I am satisfied that the husband has proved his charge of desertion and I will give him a decree *nisi*.

Petition on the ground of nullity dismissed. Decree nisi granted on the ground of desertion.

E Solicitors: *Haslewood, Hare & Co.* (for the petitioner); *Treasury Solicitor*.
 [Reported by R. HENDRY WHITE, ESQ., *Barrister-at-Law*.]

F CRUH v. CRUH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Denning, J.), July 27, 1945.]

Divorce—Desertion—Domicil—Petitioner alien by domicil of origin—Petitioner deciding to live in England—Marriage of petitioner in England—Petitioner convicted of criminal offence and recommended for deportation—Order for
 G *deportation to be carried out as soon as practicable—Jurisdiction of court to hear petition pending execution of deportation order.*

The petitioner, an alien, came to England in 1938 and subsequently married here. He intended at first to go to America, but, on joining the British Army, he decided to stay in England if he were allowed to do so. Eventually he was discharged from the Army and, in Jan., 1944, he was convicted of an offence of conspiracy for which he was sentenced to imprisonment and recommended for deportation. The deportation order was not
 H carried out but it was still the intention of the Home Office to carry it into effect as soon as practicable. His wife left him and some time before Jan., 1941, she wrote to the petitioner saying that she did not intend to live with him again. The petitioner sought the dissolution of his marriage on the ground of his wife's desertion:—

HELD: (i) until the deportation order is effected, the petitioner's domicil of choice was England and the court had jurisdiction to deal with the petition.

(ii) on the facts of the case it seemed that, in all probability, the petitioner's wilful neglect or misconduct conduced to his wife's desertion, so that the court had a discretion, on that ground, whether or not to grant a decree. In the circumstances a decree *nisi* was pronounced.

[EDITORIAL NOTE.] This case carries the law a stage further than *May v. May* ([1943] 2 All E.R. 146). It was there held that the acquisition of a domicile of choice by an alien was not prevented by reason of his liability to be deported. Here the alien had in fact been recommended for deportation which was to be carried out as soon as practicable, but it is held that the domicile of choice is not thereby affected.

As to JURISDICTION OF THE ENGLISH COURTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 296-299, para. 353; and FOR CASES, see DIGEST, Vol. 11, pp. 421-425, Nos. 874-906.]

PETITION by the husband for the dissolution of his marriage on the ground of his wife's desertion. The facts are fully set out in the judgment.

P.R. Hollins for the petitioner.

DENNING, J.: In this case the husband petitioner is by domicile of origin an Austrian or German; he came to this country in 1938, he married here, and although at first he had the intention of going on to America he altered that intention afterwards when he was serving in the Pioneer Corps in the British Army and he decided to stay in this country if he were allowed to do so. Eventually he was discharged from the British Army and, in Jan., 1944, he was convicted in this country of an offence of conspiracy and sentenced to imprisonment for six months, ordered to pay a fine of £500 and £200 costs, and recommended for deportation. But the deportation order or recommendation has not yet been carried into effect, although the Home Office have written a letter to say it will be effected as soon as it becomes practicable.

The first question I have to decide is whether the domicile of choice, which I hold he acquired when he determined to stay in this country if he were allowed, was put an end to by the order or recommendation of deportation and the intention of the Home Office to effect it as soon as practicable. I hold that, until the deportation recommendation is actually effected, his domicile of choice remains. I hold, therefore, that I have jurisdiction to deal with this case.

He charges his wife with desertion, and she has written a letter, which is produced before me, in which she makes it plain that, some time before Jan., 1941, she made her decision not to live with him again. She says:

I would like you to understand that the quicker you appreciate that we have to live separate lives the better. You know that I have made this decision some time ago; this sounds very hard, but after all what happened, it cannot be different.

I have had a certain amount of evidence and it seems to me that, in all probability, his wilful neglect or misconduct conduced to the desertion, so that I have a discretion, on that ground, whether to grant a decree or not. I do not know that there was just cause for the desertion because, supposing a man is a bad man, his wife is not necessarily entitled to desert him on that account. I find that she deserted him without cause, but he was guilty of wilful misconduct conducing to it, and I have a discretion in the matter. Having a discretion in the matter, I think probably the best thing is to end this marriage. It might be well for the wife's sake, too. I pronounce a decree *nisi* on the ground of the wife's desertion.

Decree nisi granted.

Solicitors: *S. Rutter & Co.* (for the petitioner).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

VYNER v. WALDENBERG BROTHERS, LTD.

[COURT OF APPEAL (Scott, MacKinnon and Morton, L.J.J.), June 6, 7, 8, July 13, 1945.]

reasons of SCOTT, L.J., at p. 549, cited. CORK v. KIRBY MAC-KINNON, LTD. [1952] 2 All E.R. 402.

s machinery—Statutory duty—Circular saw—Guard in-
d—Operator injured—Breach of safety regulations—Defence
negligence—Onus of proof—No express delegation to operator
of employers' statutory duty—Factories Act, 1937 (c. 67), ss. 14 (2), 60, 159 (1)
—Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196),
regs. 10 (b), (c), 21, 23.

The appellant had part of his left thumb cut off and the index finger lacerated by a circular saw which he was operating at the respondents' works. The guard on the machine in question had been habitually kept at a height of 3½ inches which was a breach of the safety regulations: (Woodworking Machinery Regulations, 1922, reg. 10 (c)). Moreover, the riving knife was not in accordance with reg. 10 (b). The appellant had been employed by the respondents for over 35 years, originally as a wood carver; although he had often worked the machine during the war, he was not a skilled circular saw operator, and he had not been taught how to set and adjust the guard. The respondents had never made an express delegation to the appellant or to anyone else of the duty of maintaining the guard at the proper level under reg. 10 (c), or of adjusting it so as to enable the work to be carried on "without unnecessary risk" under reg. 21. It was not known exactly how the accident occurred. The respondents contended that the appellant had been guilty of contributory negligence. They alleged that he had been using the single-cut method of operation without using a push-stick, but the trial judge held that the appellant had been using the double-cut method, which was right:—

HELD: (i) if there is a definite breach of a safety provision imposed on the occupier of a factory and a workman is injured in a way which could result from the breach, the onus of proof is on the employer to show that the breach was not the cause.

Lee v. Nursery Furnishings, Ltd. (1) applied.

(ii) nothing short of definite delegation of authority and duty in regard to maintenance to a person properly qualified and instructed can absolve the occupier of the factory from his duties under regs. 10 and 21. In the circumstances of the case, there could be no inference that the respondents' liability had been delegated to the appellant.

Smith v. Baveystock & Co., Ltd. (2) distinguished.

(iii) the respondents had failed to discharge the onus which was on them of proving that they did not contribute causally to the accident. The defence of contributory negligence had not been established and the appellant was entitled to damages.

[EDITORIAL NOTE. It was held in *Smith v. Baveystock & Co.* (2) that an employer is entitled to delegate to a competent man the duty to fence or safeguard machinery imposed by the Woodworking Machinery Regulations. Here there was no evidence of delegation and the employer is held liable for injury caused by breach of regs. 10 and 21.

AS TO ABSOLUTE DUTY TO FENCE DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81, and Supplement.]

Cases referred to:

* (1) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285.

* (2) *Smith v. Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531.

* (3) *Murray v. Schwachman, Ltd.*, [1938] 1 K.B. 130; [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407.

(4) *Miller v. William Boothman & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] 1 K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187.

APPEAL by the workman from a decision of WALLINGTON, J., given at the Leeds Assizes, and dated Mar. 26, 1945. The action was brought by the workman to recover damages for personal injuries sustained in consequence of an alleged breach of statutory duty by the defendants, his employers, under the Factories Act, 1937, s. 14, and the Woodworking Machinery Regulations, 1922, which were made under the Factory and Workshop Act, 1901, s. 79, and continued in force by sect. 159 (1) of the 1937 Act. The facts are set out in the

judgment of the court delivered by SCOTT, L.J.

S. R. Edgedale for the appellant.

C. Paley Scott, K.C., and R. Lyons for the respondents.

Cur. adv. vult.

SCOTT, L.J. [delivering the judgment of the court]: We will refer to the appellant as the plaintiff and to the respondents as the defendants. The plaintiff had part of his left thumb cut off and the index finger lacerated by a circular saw, with resultant shock. He was a Russian Jew by birth and his native language was still Yiddish. We think there was much difficulty in his understanding the questions put and in his expressing what he intended to say in some of his answers. The judge, who tried the case very carefully, thought him honest, truthful and accurate, as far as his knowledge went.

The judge had the great advantage of a personal inspection at the defendants' works of the machine and the guard, etc., called for by the Woodworking Machinery Regulations, 1922. We see no reason for not accepting completely his findings of fact. It is, however, impossible to understand them fully without reference to two photographs of the machine *in situ*. No. 1 shows the upper part of the saw (of 14ins. diameter), and the protecting guard or fence raised up some 3½ins. above the protecting table, under which were hidden all the lower two-thirds or so of the saw and along and on top of which the wood to be sawn would be pushed from left to right in the photograph by the person working the machine. That is the position in which the judge finds as a fact that the guard was at the time of the accident. It undoubtedly left a very dangerous gap through which a hand could get in, and was a grave breach of the law. No. 3 photograph shows the guard lowered right down on to the table and exposes the vertical column with notches in it, up and down which the guard could be raised or lowered. The notches serve to engage a movable pin which thus holds the guard at a given height; but all the notches are one inch apart, so that no lowering of less than one inch was possible. The evidence was that quite a small clearance of the wood in process of being sawn is sufficient; for such wood as the plaintiff was cutting, even as little as ¼th of an inch.

The plaintiff had been in the employment of the defendants for over 35 years, at one time as a wood carver, but during the war he had often worked at the machine in question. The judge found (i) that the guard on the machine in question had been habitually kept at the height of 3½ins., as in photograph No. 1; (ii) that that height was a breach of the safety regulations; (iii) that if the height was altered by anyone—*e.g.*, for use with a saw of 12ins. diameter (the only other size used at the bench)—the guard was always put back to a height of 3½ins.; (iv) that the defendants never made any express delegation to the plaintiff or anyone else of the duty of maintaining the guard at the proper level under the Woodworking Machinery Regulations, 1922, reg. 10 (c), or of adjusting it so as to enable the work to be carried on "without unnecessary risk" under reg. 21. No one witnessed the accident, and the injured plaintiff obviously did not know how it happened.

The main defence was contributory negligence, the allegation being that the plaintiff was pushing the pieces of wood, about 3ft. 6ins. long and ½in. thick which he was cutting into strips half an inch wide, by a single cut: *i.e.*, pushing them right through to the end of each cutting operation, a method which would be negligent, because he was admittedly doing it without using a push-stick to push the piece forward, when it got near to the end of the cut. He said he was not using that method, but the double-cut method: *i.e.*, first cutting half the length of the piece or an inch or two over the half, and then drawing it back from the saw, turning it over endways (*i.e.*, raising the end nearest to him—still uncut—in the air and turning it right over and down, so that the underside became the upper side and the reverse or uncut end came nearest to the saw) and then pushing the uncut half up to and under the descending teeth of the saw with his hand on the end of the cut half. How the accident really happened, no one can know, but the judge held definitely that the plaintiff was doing the operation by the double-cut method, which was right; and this disposed of the defendants' main plea of contributory negligence in failing to use a push-stick. What was the immediate cause it is hard to guess, but there are two further matters which bear on that question. The Woodworking Machinery Regulations, 1922, reg. 10 (b) requires a certain description of riving knife

to be maintained at the back of the saw in a certain position in relation to the ascending teeth of the saw where the cut wood comes out after cutting, therefore on the other side from where the workman stands; and the riving knife has to be "strong, rigid, and easily adjustable." The knife in question did not conform to the requirements of the regulation. Its function is as a wedge to enter the cut just as the divided wood comes out from the saw, and so keep the cut open to the full thickness of the wedge so as to prevent binding; for, if binding occurs, it causes a sudden check on the forward progress of the wood under the pressure of the workman's hands at the ingress side, and then an equally or more sudden release as the resistance is overcome, with the probable result that the workman's hands first increase pressure to overcome the unexpected resistance and then suddenly are thrown forward as the back pressure is suddenly released. As we understand the judge's findings about the knife, he held definitely that in three respects it was not in accordance with reg. 10 (b); and we also believe that the view we have just stated expresses his view of what was likely to happen.

In these circumstances and but for the consideration of certain other aspects (which he considered and we will consider presently) the judge indicated that, if the case stopped there, it would mean judgment for the plaintiff. We agree with him. But we go further. If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty. As LORD GODDARD said when presiding in the Court of Appeal in *Lee v. Nursery Furnishings, Ltd.* (1), at p. 390:

The only point that has given me some hesitation in this case is whether or not the evidence was sufficient for us to say that it was due to this gap or breach of the regulation that the accident happened. I have already said that one difficulty in the case is the evidence which the young lady gave herself, in which on certain points obviously she was mistaken. In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident. I think here that the evidence is clear enough on one point. We have not only got the evidence of the plaintiff that she was holding the wood, and it was inherently likely that she would be holding the wood; we also have got the evidence of a boy, who, although his evidence is somewhat vague, is quite firm on one thing, and that is the young lady was holding this wood with her right hand. If she was holding the wood, it is quite possible—indeed, it is much more probable—that the hand went where it did because of this gap.

We therefore assume that something unexpected did happen and that it was that which caused the plaintiff's left hand suddenly to go forward and come into touch with the descending teeth. But that is just the sort of case where Parliament has intended the employer to bear the risk, and it is obviously one which, as Parliament realised, by the practice of insurance is distributed over the cost of the articles supplied and thus enters into the consumer's price.

The only decision which at first sight caused us a little doubt is that of this court in *Smith v. Baveystock & Co., Ltd.* (2). In that case it was held that the employers had been entitled to delegate their own duty of adjustment under reg. 21 to the injured plaintiff; but there are certain important differences between that case and this. (i) There the injured man was an experienced hand who had spent most of his working life at circular saws and knew all about them. (ii) The employers had there definitely delegated to him the performance of their duty of adjusting the guard. Here not only had there been no express delegation, but the guard had regularly been maintained at a level far higher than it ought to have been, and the plaintiff had never been reprimanded, still less taught what was right. We think the defendants must be regarded as knowing quite well the height of 3½ ins. above the table at which the judge finds the guard was regularly maintained. That was obviously a very serious breach of the regulation, and we cannot see how it can be consistent with the intention of the regulations that the occupier of the factory should be able to say either "I thought that was not a breach under reg. 21" or "The workman ought to have adjusted it under reg. 23." The only real way of preventing

accidents is to hold the occupier responsible under a personal duty, unless he proves clearly that he has delegated his duty to a definite person who knows how the guard to the machine and its safety appliances ought to be made and set. If the manager, foreman or other person fails in the duty, it is, of course, no defence for the employer sued by some other persons: it is only if the person injured by the failure is himself the very person to whom the employer has delegated the duty, that the employer has a defence. In the last case the decision of this court in *Smith v. Baveystock & Co., Ltd.* (2) applies. But even if the delegate is himself the suffering party it is important to keep in mind the decision of this court in *Murray v. Schwachman, Ltd.* (3). There this court (GREER, SLESSER and GREENE, L.J.J.) held that the employers, having ordered the injured workman not to use the guard, had failed to provide a guard; and that was equivalent to a total failure by them to provide a guard, with the consequence that, as the provision of a proper guard by the employer is a condition precedent to the obligation imposed on the workman by reg. 23, that regulation had not been brought into operation. Here the employers altogether shut their eyes to regs. 10 and 21, and in particular to the proper adjustment of the guard, especially in respect of height—a vital point—and let the machine continue to be used for years at the wrong height; how can it be just to put the blame on the workman?

In our view also there is another principle which should be borne in mind in interpreting these regulations. It is true that they were passed under the Act of 1901 which contained no parallel to sect. 14 (2) of the 1937 Act; but whilst sect. 60 of the 1937 Act authorises special regulations which under subsect. (2) may modify the safety provisions of the Act, the old regulations are given their statutory effect by sect. 159 (1) of the 1937 Act as if made under it. It follows, therefore, that they must now be construed in the light of sect. 14 (2) which contains these provisions:

Where the Secretary of State is satisfied that there is available and suitable for use in connection with machinery of any class any type or description of safety device which (a) prevents the exposure of a dangerous part of machinery whilst in motion . . . he may make regulations directing that the type or description of device shall be provided for use in connection with such class of machinery as may be specified in the regulations.

It also follows that the regulation-making provision of sect. 60 ought not to be construed as overriding the express provisions about regulations contained in sect. 14 (2) with its preventive purpose. As LORD GODDARD said of that subsection in *Miller v. Boothman* (4), at p. 334, it "does not . . . create an exception; it provides for an additional precaution," and in construing the regulations its preventive purpose should be borne in mind.

For the above reasons we have come to the conclusion that nothing short of definite delegation of authority and duty in regard to maintenance to a person properly qualified and instructed can absolve the occupier of the factory from his duties under regs. 10 and 21. If there had been any real but unexpressed delegation of authority to the plaintiff to perform the defendants' statutory duties, there would certainly have been some reprimand of him for not seeing that those duties were properly performed. The truth is, we expect, that the defendants did not take the trouble to ascertain what kind of guard was required by the statutory rules or did not care whether they were being broken. If so, it would be absurd to draw an inference that their responsibility had in the present case been shifted by delegation on to the shoulders of the plaintiff. There is the further point, apart from the guard itself, of the breaches of duty in regard to the riving knife, found as facts by the judge; the onus of proof that they did not contribute causally to the accident was on the defendants and, in our opinion, was not discharged. For these reasons we do not think that any of the judge's reasons for putting the blame on the plaintiff hold good.

The appeal must be allowed; judgment entered for the appellant for the £330 10s. 10d. damages provisionally fixed by the judge, with costs here and below, on the same scale as before.

Appeal allowed.

Solicitors: *Shaen, Roscoe & Co.* (for the appellant); *Corbin, Greener & Cook* agents for *Pullan, Davies & Co., Leeds* (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Distinguished. SPRINGATE v. QUES-
TIER. [1952] 2 All E.R. 21.

CLARKE v. MOULD.

[KING'S BENCH DIVISION (Wrottesley and Oliver, JJ.), May 10, 11, 1945.]

Street Traffic—Motor car—Charge of dangerous driving—Prosecution—Driver of car unknown to police—Inaccurate information regarding owner of car given to police by local taxation officer—Notice of intended prosecution sent to firm of which owner was member instead of to owner—Notice to firm not notice to individual member of firm—Reasonable diligence shown by police—Road Traffic Act, 1930 (c. 43), ss. 11, 21.

The respondent was the registered owner of a motor car numbered BVG 88, but for the years 1943 and 1944 the application for a licence in respect of the car was signed by the firm's accountant on behalf of M. and B., the firm of which the respondent was a member. On July 5, 1944, the appellant, a police inspector, was informed that on July 3 the car BVG 88 was being driven in a dangerous manner. At the time of committing the alleged offence, the driver of the car had not been warned, under the Road Traffic Act, 1930, s. 21 (a), that the question of prosecuting him under sect. 11 of the Act would be considered, nor was a summons served on him within 14 days, under sect. 21 (b) of the 1930 Act, because it was not known at the time who was the driver. The appellant was told by the person reporting the alleged offence that the car belonged to the firm of M. and B. Inquiries as to who was driving the car at the time in question were made by the police on several occasions at the firm's offices, but without result. On July 15, the police asked the local taxation officer, by telephone, for the name and address of the registered owner of the car, and they were inaccurately informed that M. and B. were the registered owners. On the same day, the appellant had a notice of intended prosecution sent to the firm, M. and B., in the belief that they were the registered owners of the car. The notice was received by the respondent, but he contended that he could not be convicted because the police had not complied with sect. 21 of the 1930 Act. It was contended on behalf of the appellant that (i) sect. 21 (c) had been complied with and that the notice had been sent by registered post to the registered owner, because notice to a firm included every individual in that firm; (ii) the case came within proviso (i) (1) to sect. 21, because there had been no lack of diligence on the part of the police; (iii) the respondent had caused the licence applications to be made in the name of the firm and had therefore contributed to the failure of the police to comply with the requirements of sect. 21, with the result that proviso (i) (2) to the section applied:—

HELD: (i) the appellant had not complied with the requirements of sect. 21 (c) of the 1930 Act, because notice to a firm could not be regarded as notice to every individual in that firm. The fact that the respondent had received the notice was immaterial. Sect. 21 being a penal section must be strictly construed.

(ii) in the circumstances of the case, there had been no lack of diligence on the part of the police, and proviso (i) (1) to sect. 21, therefore, applied.

(iii) the failure of the police to comply with sect. 21 was not due to the conduct of the respondent. The case did not, therefore, come within proviso (i) (2) to sect. 21.

[EDITORIAL NOTE.] It is held in this case that notice of prosecution under sect. 21 of the Road Traffic Act, 1930, addressed to a firm is not properly served upon an individual who is a member of the firm. As the police were informed by the local taxation officer that the firm were the registered owners of the car, however, they are held to have used due diligence to obtain the name and address of the registered owner, within the proviso to sect. 21.

It may be worth noting that the court expresses the opinion that the telephone is a proper method of obtaining such information, especially as the duty is upon the police to complete a certain process within a specified period.

AS TO NOTICE OF PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 31, pp. 680, 681, para. 1008; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 245a-245e.]

APPEAL by way of case stated from a decision of the justices for the county of Lincoln (Parts of Kesteven). The facts are set out in the judgment of WROTTESELEY, J.

M. D. Van Oss for the appellant.

W. K. Carter for the respondent.

WROTTESELEY, J. : The respondent to the case, Reginald Cecil Lane Mould, was charged with an offence alleged to have been committed on July 3, 1944, against the Road Traffic Act, 1930, s. 11, at Swaton in the petty sessional division of Sleaford, *viz.*, of unlawfully driving a motor car in a manner dangerous to the public. It is not so found in the case, but we are driven by all the facts that are set out to assume that the complaint was against the person who was driving a car which had the number BVG 88. Of that car with that registration number, the respondent was the registered owner at the time ; but he was not warned at the time of the allegation against him, and, indeed, we do not even know that he was there, although a lot of the argument in this case proceeded on the assumption that we know that. Nor was he summoned within 14 days, for the police were in doubt as to who was responsible. The respondent, therefore, neither having been warned at the time nor summoned within 14 days, could not, under the terms of the Road Traffic Act, 1930, be convicted unless within 14 days a notice was served on or sent to him by registered post, or unless the proviso to sect. 21 of that Act applied, which provides that in certain circumstances the failure to send such a notice may be excused.

The offence having been alleged to have been committed on July 3, there was no complaint to the police until July 5, and the police inquiries (as to whether there was any substance in the complaint) went on until July 9. The further activities of the police are set out in paras. (v) to (x) of the case :

(v) On July 9 the appellant [*i.e.*, the inspector of police] sent the papers to the chief constable of Grantham, Lincolnshire, for inquiries to be made of Mould and Bloomer, of Midland Bank Chambers, Westgate, Grantham, aforesaid as to who was driving the said motor car at the time of the alleged offence, and with a view to interviewing such driver when ascertained. The appellant had been informed by one Siddans, who reported the alleged offence to the police, that he, Siddans, had been told that the said motor car belonged to the said Mould and Bloomer. (vi) Inquiries as to who was driving the said motor car at the time of the alleged offence were made on several occasions at the offices in Grantham of Mould and Bloomer when the respondent was not present without result and the appellant was so informed on July 15. On the same day on the appellant's instructions a police officer inquired by telephone of the assistant local taxation officer of the Kesteven county council as to the name and address of the registered owner of the said motor car, BVG 88, and was informed that the registered owners were Mould and Bloomer of Midland Bank Chambers, Westgate, Grantham. (vii) The assistant local taxation officer when giving the said information had before him the most recent application for a road fund licence made in respect of the said motor car dated Jan., 6, 1944, which purported to be signed on behalf of the firm of Mould and Bloomer. The said application, and a similar application for 1943, which were produced in court, were signed by Ernest T. Johnston, on behalf of the said Mould and Bloomer, from their said address. The said Johnston is employed by the said firm of Mould and Bloomer as accountant. The respondent has caused or permitted the said applications to be made in the manner and in the form aforesaid notwithstanding the fact that he was at the date thereof himself the registered owner of the said motor car as appeared from the registration book produced by him at the hearing. (viii) A perusal of the whole file relating to the said motor car which was produced to us by the assistant local taxation officer would have revealed that the respondent was the registered owner of the said motor car. (ix) In reliance upon the information given by the assistant local taxation officer as above set out the appellant on July 15, 1944, caused a notice of intended prosecution to be sent by registered post to "Messrs. Mould and Bloomer, Midland Bank Chambers, Grantham, Lincs.," in the belief that they were the registered owners of the said motor car. The sufficiency of the said notice in point of form was not contested. (x) The respondent received the said notice of intended prosecution upon a date which he was unable to remember, and produced the same at the hearing.

The justices found that there had not been compliance by the police officer with sect. 21 of the Act of 1930. On the other hand the appellant says that sect. 21 (c) was complied with. Sect. 21 provides :

Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless . . . (c) within the said 14 days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person

registered as the owner of the vehicle at the time of the commission of the offence.

It was with the latter part of sect. 21 (c) that the police officer purported to comply, because the police inquired as to who was the person registered as the owner of the vehicle, and they sent by registered post to Mould and Bloomer a notice as to which there is no complaint as to its form or material. It is contended that a notice addressed to and sent to Mould and Bloomer at the business address of that firm in Grantham, was a notice sent by registered post to Reginald

A Cecil Lane Mould, who is the respondent here and who was the person summoned. Reginald Cecil Lane Mould is a member of that firm, and that firm carried on business in two places; one of them was at the address in Grantham and the other was somewhere in Westmorland. Mould lives, however, at Bottesford, and by no stretch of language can it be said that, by sending that notice to those persons, Mould and Bloomer, the police officer complied with the obligation imposed by this Act of Parliament, which is the sending by registered post to the person summoned or the person registered as the owner of the vehicle of the notice in question. To indicate how dangerous such a doctrine would be, counsel for the respondent pointed out to us that we have no information as to who the other members of the firm are or how many there are; how many persons named Mould are in it, or how many persons named Bloomer, or how many persons with other names either Mould or Bloomer. The language of a statutory provision of this kind must be construed strictly and in its literal sense, especially when, so construed, it presents no difficulty whatever. The argument which has been put before us by counsel for the appellant might have some attraction if the obligation imposed by this Act of Parliament had been, not to send by registered post a document to a person, but to bring to the notice of the accused the intention to prosecute. Then the fact that he attended with the notice in his hand, coupled with the fact that the requirement of the section is always

D to be deemed to have been complied with unless and until the contrary is proved, might or might not have been sufficient ground for the justices to say that they were not satisfied that the police officer had not complied with the section. That, however, is not the language of the section, and in my view the safeguard which was enacted by Parliament must be obeyed literally.

E Secondly, it was said by counsel for the appellant that the firm had implied authority to receive notices on behalf of Reginald Cecil Lane Mould. That is the purest surmise. There is not a word in the case to indicate that there was any such authority asked for or given, and it appears a strange kind of partnership in which your partners are under obligation to accept criminal process on your behalf. But the receipt of the notice is immaterial; it is the sending of the notice which is the obligation.

F The next point taken by counsel for the appellant was that in the circumstances of this case the police officer was excused, because the case was within the language of sect. 21, proviso (i), which enacts:

Failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that (1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid.

G It is quite clear from the plain words of the Act that the diligence there is the diligence of the police, and if the police, showing due diligence, are unable to find either the name and address of the accused or the name and address of the registered owner of the vehicle, they are excused from the obligation laid upon them to serve in this case the notice within 14 days. On the facts it is quite clear that the police applied with proper expedition to the proper place, *viz.*, to the person charged with the duty of keeping this register, and

H from him they received an answer which was not an accurate answer. They were told that this firm of Mould and Bloomer were the registered owners of this motor car, and it was in accordance with that information so received that the police officer sent the registered letter to that firm. Had the information been correct, the police officer would have done all that was necessary. I do not, therefore, see how the police could have acted otherwise than in the way in which they did act. Perhaps the magistrates may have thought that the telephone was not an entirely satisfactory method of communication in a matter of that kind, and at one time it occurred to me that it might be so; but I am

certainly not going to say that it was a wrong method to telephone in a case of this kind. I think all proper safeguards should have been made to ensure that the correct information was received, but with these safeguards it may well be that the telephone was a proper instrument to use, having regard to the fact that it is a far less lengthy process than correspondence by post. Therefore it cannot be said that the employment of the telephone is in any sense a lack of diligence, especially where, as here, the duty appears to have been placed upon the police to act with expedition and to complete a certain process within a certain period if possible. Upon that point, therefore, I think the justices came to a wrong conclusion. In the facts which have been so carefully set out by the justices in the case, I can find no evidence from first to last of anything like a lack of diligence on the part of the police; on the other hand, it seems to me that the evidence shows that they showed all due diligence. A

The fourth point which counsel for the appellant sought to take was that the facts stated at the end of para. (vii) of the case (*i.e.*, that "the respondent has caused or permitted the applications to be made" and signed on behalf of the firm of Mould and Bloomer by their accountant) was in some way conduct contributing to the failure of the police [see sect. 21, proviso (i) (2)]. I should need much stronger evidence of conduct contributory, than the fact that the cheque which was forwarded with the application for the yearly licence was made out in that way. It appears that you only had to look at the file to see who truly was the registered owner; that has been found as a fact by the justices, and I do not think there is anything to justify me in saying that the justices came to a wrong conclusion upon that further point. I find that nothing was done by Reginald Cecil Lane Mould which was conduct contributing to the failure of the police, to give notice within the 14 days. B

For these reasons I think the appeal ought to be allowed. C

OLIVER, J.: I agree, and I have little to add. Counsel for the appellant in his lucid and attractive argument, took three points. The first was: "We did send the notice by registered post to the registered owner." The second point was that there was no evidence on which the justices could find that the police had not shown reasonable diligence. The third point was that the appellant came within sect. 21, proviso (ii): D

The requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved. E

With regard to the first point, counsel for the appellant argued that when you address a notice to a firm you are addressing it to every individual in that firm. I agree with my Lord; I do not think that that can be right. This is a penal section and has got to be very strictly construed. It is the fact that a firm-name need not possess the name of a single person in it. It may consist of ten or a dozen people none of whom bears a name like that of the firm, and it cannot surely be taken that a letter so addressed can be said strictly to come within the section of the Act; it has to be addressed to the person summoned. I cannot, for instance, think that a cheque drawn to a firm can be treated as or regarded as a cheque drawn in favour of every individual in the firm. That I think sufficiently covers that point. F

With regard to the last point, that the requirement of the section shall be deemed to have been complied with, and, if it was not, that the accused by his own conduct contributed to the failure, I do not think that that point can avail counsel for the appellant, because there is no finding in the case that the respondent ever gave any instructions to put the registration of the car in the name of the firm. Someone called Johnston had done that, but there was no evidence, or no finding at any rate, that the respondent had instructed him to do so. Therefore, I can see no evidence at all that the accused by his own conduct had contributed to what happened. G

On the second point, however, I agree with my Lord that counsel for the appellant succeeds. What the respondent has to show is that the police could with reasonable diligence have ascertained in what name the car was registered. I have searched the case in vain for any evidence that there was anything which the police could have done beyond what they did. They applied to the proper authority for information. They are not given any statutory power of search; they have to accept what they are told by the proper authority in the district H

for the registration of motor cars. They applied, it is true, by telephone; but they applied for the information, and were given it. There is nothing to suggest that if they had sent a police officer, at considerable expense, to the place he would have been given any different information; he would presumably have been given the same information; and when it is said that the telephone was not a proper way of making the inquiry, I can well envisage a case in which, where the police were late with their notice, it would have been said:

A "Why did you not ring up on the telephone? What was the use of writing a letter on the Saturday which took about three days to get there?" I can see no trace here of any lack of diligence on the part of the police. The mistake was not their mistake; it was the mistake of the local taxation officer. There is no finding of fact in the case that the police were in any manner negligent. Nothing is found in the way of saying there was something they ought to have done which they have not done, or something which they did which they ought not to have done, and in the circumstances I think counsel for the appellant is right in saying that on the case there was no evidence before the justices upon which they could find that the police had lacked diligence.

For these reasons I agree with my Lord that this appeal succeeds.

Appeal allowed.

Solicitors: *Lee, Bolton & Lee*, agents for *Roythorne & Hammond*, Spalding (for the appellant); *Cunliffe & Airy* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

LEWYS v. BURNETT AND DUNBAR AND ANOTHER.

E [KING'S BENCH DIVISION (Croom-Johnson, J.), July 5, 1945.]

Negligence—Licensee—Concealed danger or trap—Passenger in lorry—Railway bridge over road—Headroom of bridge reduced—Passenger killed by contact with low bridge—No warning given to deceased—Duty of lorry driver to warn passenger.

F *Highways—Nuisance—Railway bridge over road—Headroom reduced below statutory limit by highway authority in repairing road—Negligent exercise of statutory powers—Passenger in lorry killed—Liability of highway authority.*

The first two defendants, a lorry driver and his mate, offered a soldier a lift in their lorry. The route they were about to take passed beneath a railway bridge which, to their knowledge but not to that of their passenger, had a headroom of only 8ft. 9ins. The bridge had originally a headroom of 9ft. 3ins., a minimum headroom of 9ft. having been prescribed by the statute under which it was erected. The headroom had become reduced to 8ft. 9ins. because the third defendants, a highway authority, in the course of maintaining the highway by spraying its surface with tar and stone chippings had raised its level by 6 inches. Although a fatal accident had occurred in 1940, when a passenger standing up in a lorry was killed while passing under the bridge, and in spite of two warnings given to the third defendants that the lack of sufficient headroom was dangerous, the third defendants had taken no steps to increase the headroom, but had merely placed signs on each side of the bridge stating that the headroom was 8ft. 9in. The first two defendants failed to warn their passenger of the danger ahead and when the lorry passed beneath the bridge his head was struck and he sustained fatal injuries. The widow of the deceased claimed damages under the Fatal Accidents Acts:—

H **Held:** (i) the first two defendants were negligent in failing to warn the deceased of the danger of which they knew and of which he did not know.

Even assuming that the duty to warn gratuitous passengers of impending dangers began only when a passenger actually entered the vehicle, the first two defendants had committed a breach of that limited duty because, once the deceased had embarked on the journey, they could neither see him nor give him any warning when they approached the bridge.

(ii) the third defendants had negligently exercised their statutory powers as a highway authority in raising the level of the road and thereby reducing the headroom of the bridge to a dangerous extent. The third defendants had, thereby, also created a nuisance and not the less so because they placed warning signs on either side of the bridge, which might not be observed by passengers in modern fast-moving vehicles. With knowledge, therefore, of their having created a nuisance, the third defendants had failed to abate it.

EDITORIAL NOTE. This case is of considerable importance to drivers of vehicles giving gratuitous lifts to members of the public. It was held in *Harris v. Perry* (2) that such persons, although bare licensees, have a right to a higher measure of duty than licensees passing across the property of the licensor, and that such right extends to a warning of dangers to be met with on the journey. It is said here that the driver has a duty to give warning of such perils known to him before the passenger enters the vehicle, and breach of the duty constitutes actionable negligence.

The actual cause of the accident was the reduced headroom between a highway and a bridge, due to the raising of the road level during repair. This is held to constitute misfeasance for which the highway authority is liable in damages. The authority is not bound by the provision in the relevant railway Act to leave a minimum headroom under the bridge, but is liable upon the principle laid down in *Shoreditch Corpn. v. Bull* (6) that a highway must be restored to such a condition that it may be used by the public without risk.

AS TO DUTY TO BARE LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 610-612, para. 860; and FOR CASES, see DIGEST, Vol. 36, pp. 46-49, Nos. 288-306.

AS TO LIABILITY OF HIGHWAY AUTHORITY FOR MISFEASANCE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 332-337, para. 455; and FOR CASES, see DIGEST, Vol. 26, pp. 404-408, Nos. 1267-1291.]

Cases referred to:

- (1) *Lygo v. Newbold* (1854), 9 Exch. 302; 36 Digest 49, 307; 2 C.L.R. 449; 23 L.J.Ex. 108; 22 L.T.O.S. 226.
- * (2) *Harris v. Perry & Co.*, [1903] 2 K.B. 219; 8 Digest 11, 44; 72 L.J.K.B. 725; 89 L.T. 174.
- (3) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 36 Digest 38, 223; 82 L.J.K.B. 258; 108 L.T. 4.
- (4) *Gautret v. Egerton, Jones v. Egerton* (1867), L.R. 2 C.P. 371; 36 Digest 36, 209; 36 L.J.C.P. 191; *sub nom. Gautret v. Egerton, Jones v. Egerton*, 16 L.T. 17.
- (5) *Corby v. Hill* (1858), 4 C.B.N.S. 556; 36 Digest 49, 304; 27 L.J.C.P. 318; 31 L.T.O.S. 181.
- * (6) *Shoreditch Corpn. v. Bull* (1904), 68 J.P. 415; 36 Digest 34, 202; 90 L.T. 210; *affg.*, S.C. *sub nom. Bull v. Shoreditch Corpn.* (1902), 67 J.P. 37.
- (7) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430; 13 Digest 399 1223.

ACTION by the plaintiff, the widow of the deceased for damages under the Fatal Accidents Acts, against the driver and mate of a lorry for negligence and against the highway authority for nuisance and for negligently failing to abate the nuisance after notice thereof. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *Leonard Minty* for the plaintiff.

F. H. Lawton for the first and second defendants.

Sir Shirley Worthington-Evans for the third defendant.

CROOM-JOHNSON, J.: There is a public highway in the borough of Beccles known as Ravensmere Road leading from Ravensmere to Beccles.

In 1860 the predecessors of the London and North Eastern Ry. Co. were authorised to construct over the said highway a railway bridge subsequently known as the Ravensmere Bridge, upon the condition that the headroom or clearance between the bridge and the surface of the highway should be at least 9ft. The bridge was duly constructed with headroom or clearance of 9ft. 3ins., the surface of the highway underneath it being lowered and the necessary slopes in its surface being made. Thereafter the bridge was maintained down to the present time by the London & North Eastern Ry. Co., or their predecessors. It was renewed in 1916 when the two centre girders were removed

and new ones inserted in their place, but this did not diminish the headroom. There was no record of any subsidence, nor was it suggested by anyone at the trial before me that there had been any subsidence of, or other alteration to, the bridge, or that the said railway company was, or its predecessors were, in any way responsible directly or indirectly for what subsequently happened.

The road underneath the bridge was originally a macadam road with a water-bound surface. In recent times the surface, in the course of maintenance by the Beccles corporation as the highway authority responsible for the upkeep of the bridge for the past 84 years, had been coated with tar and sprayed with stone chippings from time to time with the result that the headroom had been reduced to 8ft. 9ins. in the centre of the bridge.

On Oct. 10, 1940, one Atkinson was standing up in a motor lorry which was being driven along the highway in question, and as the lorry passed under the bridge his head came in contact with it, causing injury which resulted in his death; another soldier narrowly escaped the same fate at the same time, and it was alleged that there had been theretofore other accidents owing to the bridge having so little clearance.

An inquest on the body of the said Atkinson was held by the coroner for the district and thereafter on Oct. 18, 1940, he wrote a letter to the said railway company as follows:

I held an inquest at Beccles on Oct. 16 on the body of Private William Charles Atkinson. On Oct. 10 the deceased was standing up in the body of a motor lorry which was being driven along the road in Beccles called Ravensmere. As the lorry passed under the bridge, which carries the Waveney Valley line over Ravensmere, the deceased's head came into contact with the bridge causing injury which resulted in death. The bridge has a clearance of under 9ft. There is no warning on the bridge itself, but there are cautionary notices by the side of the road. In my opinion these notices do not sufficiently attract the attention of road users. The police tell me that there have been other accidents owing to this bridge giving so little clearance. Another soldier who was also standing on the lorry narrowly escaped the same fate. I hope that your company will consider the advisability of a more adequate warning. A notice painted on both sides of the bridge itself in sufficiently large lettering would be much more noticeable.

The railway company replied to such letter on Dec. 20, 1940:

The statutory requirement regarding the bridge in question is that a headroom of not less than 9ft. shall be maintained. The headroom originally provided on the construction of the bridge was 9ft. 3ins., but this headroom has now been reduced to 8ft. 8ins., on the north side and to 8ft. 10ins. on the south side owing to the making up of the roadway under the bridge by the highway authority who, I am advised, should be required to restore the original headroom. If, after such restoration, warning notices such as you suggest are desirable, the company will give the necessary facilities for the erection by the highway authority of such notices. I am accordingly forwarding a copy of your letter and this letter to the town clerk of the borough of Beccles and requesting that attention be given to the matter.

On the same day the railway company sent a copy of the two letters to the town clerk of Beccles with the following letter:

I shall be glad to hear from you in due course that the necessary steps will be taken by the highway authority to restore the original headroom under the bridge referred to,

The coroner wrote again to the said railway company on Dec. 23, 1940:

I feel rather strongly that warning notices on the lines which I have suggested are immediately desirable. It may take some time for the highway authority to restore the original headroom of 9ft. 3ins. and in the meantime, in my opinion, the users of the road in question will be in danger. Even when the original headroom is restored, I think there will still be an element of danger. Road vehicles to-day are different in construction from those in use when a headroom of not less than 9ft. was the statutory requirement, and travel at a much greater speed.

A copy of that letter they also sent to the town clerk.

Ultimately, the borough surveyor of the Beccles corporation gave instructions for the erection of more prominent cautionary notices, which was done, but nothing else was done for or on behalf of the corporation at any time. These cautionary notices consisted of one on each side of the bridge over the road containing the words and figures—"8ft. 9ins. Headroom." The original headroom of 9ft. 3ins. was not restored, and at all material times the headroom was approximately 8ft. 9ins.

On Jan. 29, 1944, the defendant Burnett was driving a motor lorry along the

Ravensmere Road having with him the defendant Dunbar as his mate. They were apparently together in control. The floor or platform of the lorry, as constructed, was 3ft. 6ins. above the road. There was an enclosed cabin for the driver and his mate, the top of the roof of which was 3ft. above the floor or platform and, therefore, 6ft. 6ins. above the road. A window at the back of the cabin was obstructed by certain boards so that the driver and his mate when seated in the cabin could not see into the cargo space or "buck," as it is called, of the lorry. Tied to the front and inside the cargo space of the lorry was a motor tyre and wheel upright, 2ft. 6ins., in height. Save for that it was not suggested that the cargo space was otherwise than empty. A

The route of the journey would take the lorry under the bridge with which the driver Burnett (and presumably his mate) was very well acquainted, the former having driven under it as many as 30 to 40 times a day. At a time when the first two defendants must have known the route they intended to take they were hailed by one Roy William Lewys, a corporal in the Royal Corps of Signals, who asked for a lift to Lowestoft. He was told by the defendant Burnett that "they (he and his mate) were only going as far as Beccles and that he could ride in the back of the lorry if he wished." Lewys thereupon climbed into the back of the lorry and sat upon, or leaned against the said motor tyre and wheel facing towards the rear of the lorry. There was no evidence that Lewys knew the road into Beccles, or was acquainted with the existence of the low bridge, or knew that it was dangerous by its lowness. No warning was given to him by either of the defendants as to the existence of the bridge, or that it was not safe to stand up in the lorry or to lean against or sit upon the said tyre and wheel, or that he would only be safe if he sat down on the floor of the lorry. On arrival at Beccles, Lewys was found on his knees in the cargo space of the lorry huddled up with his head down, facing to the rear of the lorry and unconscious. He had sustained a wound 4ins. long at the centre of the occiput, the top of the bulge of the back of the head, and a fracture of the occipital bone about 3ins. from the top of the head. As a result of these injuries Lewys died two days later, on Jan. 31, 1944. B C D

It was not disputed that the injuries and death were due to the head of the deceased coming into contact with the railway bridge. The deceased in life was 5ft. 9½ins. tall. If he had been standing upright on the floor of the lorry the top of his head would have been 9ft. 3½ins. from the ground, and I should have expected the wound to have been 3 or 4ins. below where it was in fact found. An inquest was held and the depositions of the first two defendants and Dr. Hill, a surgeon, were put in before me on behalf of the plaintiffs, as well as certain interrogatories and answers. The plaintiff, who is the widow of the deceased, now claims damages under the Fatal Accidents Acts against the driver and mate of the lorry for negligence and against Beccles corporation for nuisance and for negligently failing to abate the nuisance after notice thereof. A claim for damages for loss of expectation of life was not pursued. E F

At the conclusion of the plaintiff's case each of the defendants submitted no case and elected to call no evidence. The first two defendants expressly abandoned any defence based on the maxim *volenti non fit injuria*. All the defendants submitted that there was no evidence that any breach of duty, act or default by them caused the accident which resulted in the death of the deceased. On behalf of the first two defendants it was submitted that it was the duty of the deceased as a passenger in the lorry to take reasonable care of his own safety and to keep a proper look out and that there was no duty to warn the deceased in this particular case of the risk he was running. On behalf of the defendant corporation it was also submitted that there was no evidence that they had altered the level of the road. No distinction was sought to be raised between the position of the first two defendants and I do not, therefore, differentiate H

I directed myself that, although the first two defendants had gratuitously conveyed the deceased as a passenger in the lorry, they were bound to exercise reasonable care towards him. See *per* PARKE, B., in *Lygo v. Newbold* (1), at p. 305, and *per curiam* *Harris v. Perry & Co.* (2), at p. 226, although the question of *respondeat superior* decided in that case does not arise in the present one. No doubt the degree of reasonableness must vary according to the circumstances (see *Harris v. Perry & Co.* (2), at p. 226), and is impossible to define

exactly. It is not, of course, an absolute duty and is not such as to relieve the passenger on his part of the duty to take reasonable care of, and for, himself. If I were to treat him by analogy as a bare licensee he would be entitled to no more than permission to use the subject of the licence as he finds it; he must accept the permission with its conditions and perils, *per FARWELL, L.J.*, in *Lathom v. Johnson (R.) & Nephew, Ltd.* (3), at p. 404. Indeed, it has been said that if the licence involves a hidden peril there must be something like fraud in its suppression by the giver before he can be made answerable: *per WILLES, J.*, in *Gautret v. Egerton* (4), at p. 375. A test in the precise language of that statement I should hesitate to apply, but the occupier of premises, who grants a licence to be on the premises, must, no doubt, warn the licensee of a hidden or concealed danger when such danger is known to the occupier but not apparent to the licensee. See *Corby v. Hill* (5), and *Harris v. Perry & Co.* (2).

It has been held, however, that a bare licensee, when being carried, has a right to a higher measure of duty than one who is merely permitted to pass across the licensor's premises and possibly it is the duty of the licensor to warn a gratuitous passenger of the danger to be met with on the journey. In *Harris v. Perry & Co.* (2), SIR RICHARD HENN COLLINS, M.R., said, at p. 225:

I am unable to discover any flaw whatever in the summing-up. I think the learned judge, in his analysis of the evidence, put the facts quite as favourably for the defendant as they were capable of being put; and his exposition of the law leaves nothing to be desired. He suggested that the measure of duty towards a bare licensee is different where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises; and I think the cases support this view. But there is evidence in this case that Thacker was the person for whom the driver of the locomotive was bound to take his orders, and that Thacker was aware of the fact that the line had been taken up and was under repair between Charing Cross and Waterloo, and that he did not impart this fact to the plaintiff or the other occupants of the engine, probably having forgotten it for the moment himself. I think, therefore, that, even if the standard of liability were the same as it would have been to a bare licensee merely walking across the defendant's land, there was evidence upon which the jury might have found that a trap within the meaning of the authorities had been set for the plaintiffs; see *Corby v. Hill* (5). At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously.

This last case suffices to show that the two personal defendants owed a duty to the deceased, when they granted him permission to ride in the lorry, to warn him of the danger, by reason of the lowness of the bridge, of the route they were about to take, of which danger they must have known, and of which he did not know. I cannot think that the duty of gratuitous carriers to warn their passengers of impending perils only starts from the moment that the passengers actually enter the vehicle. Could it be said that if the route lay through an area where there were delayed action bombs, the carrier not for reward, who knew of them, owed no duty to warn his passenger, ignorant of the risk, before giving him a lift that way?

It must, I think, be common knowledge that during the war soldiers frequently ride standing up in motor vehicles on the road and that they are often necessarily, and, I should have thought, obviously, strangers to the locality through which they are being transported. Moreover, in the present case there was one obvious place upon which to sit or lean, namely the tyre and wheel inside the cargo space of the lorry, and a passenger so doing would necessarily have his back to the way in which he was going. I am forced to the conclusion that a reasonable man would have given a warning to the passenger of the danger to be encountered, so that at least he might have the opportunity of taking care of himself by keeping a look out. I have come to the conclusion that, even if it were established that the first two defendants only owed a duty to the passenger to take care once he was on board the lorry, they committed a breach of even that limited duty, because, once embarked upon the journey neither the driver nor his mate could see where the passenger was or what he was doing, nor were they able to give him any warning of the approaching danger as the lorry got near the bridge. There was a plea, on behalf of the first two defendants, of negligence or contributory negligence by the deceased. The onus of proof on that plea is on the defendants, and they have failed to discharge it. Nor can I see that the duty of the deceased to take care of himself in the

unusual circumstances of this case involved a duty to guard against a danger of which he obviously was unaware and which, I think, no reasonable man would have expected to exist. At most, it is, in my opinion, a question of fact in each case whether the knowledge in the particular circumstances made it so unreasonable for the deceased to do what he did so that he would have been debarred, had he survived, from recovering; see the cases set out in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 23, p. 684, para. 967, note (n).

I do not think it is open for the first two defendants to plead that, had they given the warning, the accident might still have happened. In my judgment the first two defendants were guilty of negligence which caused, or contributed to, the accident, and the plaintiff is entitled to succeed against them. A

The danger of which warning should have been given was the presence of the bridge in the condition in which it actually was at the time of the accident. Here, again, I do not think that it would be a good defence for the defendant corporation to say that, if the original headroom had been left, the accident to the deceased would still have happened. I find, however, on the narrow measurements in the case that it would not, since, in my opinion, the extra 6 ins. would probably have made all the difference. Even had the deceased been standing up in the lorry with 9 ft. 3 ins. headroom he might possibly, but barely, have escaped. B

The defendant corporation as a highway authority are not liable for acts of non-feasance, a proposition so well established that I do not propose to cite authority on it. On the other hand, it is equally well established that a highway authority may be liable to a passenger on the highway for injuries caused to him by their misfeasance. In the course of maintaining this highway the defendant corporation did a positive act; they raised the surface of the roadway under the bridge by no less than 6 ins. although, no doubt, not all at one time. While the statutory condition as to the minimum headroom of 9 ft. does not, I assume, bind the defendant corporation, yet, if they interfere with the ordinary structure and normal condition of the highway so as to create a danger, unless they have an absolute power enabling them to do so, they will be responsible for special damage resulting to a member of the public as for a misfeasance until the highway is restored to its proper and normal condition so that it can be traversed by the public without undue risk, see *Shoreditch Corpn. v. Bull* (6). C D

I do not propose in this judgment to examine the numerous authorities on the question whether particular acts or omissions amount in law to a public nuisance. It will be sufficient, I think, to refer to two passages in SALMOND ON THE LAW OF TORTS, 10th Edn., at p. 219: E

A public or common nuisance is a criminal offence, which has been defined as "an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects" . . . A public nuisance falls within the law of torts only in so far as it may in the particular case constitute some form of tort also. Thus, the obstruction of a highway is a public nuisance; but if it causes any special and peculiar damage to an individual it is also a tort actionable at his suit. F

Next, I bear in mind that the defendant corporation are authorised to repair the highway in question. It was not suggested before me that the defendant corporation had an absolute authority to repair the highway in any way that they chose notwithstanding that their method of so doing necessarily caused a nuisance or other injurious consequences. In general, no action will lie for doing that which the legislature has authorised if it be done without negligence, although it does occasion damage to someone. But an action does lie for doing that which the legislature has authorised if it be done negligently; see *Geddis v. Proprietors of Bann Reservoir* (7), at p. 435. I was not referred to any statute or decision to support the view that the defendant corporation was authorised if they chose, to repair the highway in such a way as to cause a nuisance or other injurious consequence. It was not suggested that there was any need to raise the level of the highway under the bridge or even that it was raised by reason of any plan, decision or resolution of the defendant corporation. The level was raised because no one, apparently, took the trouble to see or enquire whether that was happening or not, and no one considered whether the effect of the repairs done from time to time would be, or was, to reduce the headroom underneath the bridge either at all or to a dangerous extent. G H

In my judgment that was to exercise the statutory powers of the defendant corporation negligently. Even when the defendant corporation knew that they had by their repairs reduced the headroom and accidents had occurred, one fatal, they did nothing to restore the highway to its original level. In view of the fatal accident in 1940 and the present case, when the headroom has been decreased by the acts of the defendant corporation, I feel compelled to find that they created a nuisance and not the less so because they put up a warning sign on the bridge itself which passengers in modern, large and fast moving vehicles may not observe. With express knowledge of what they had done in the creation of the nuisance, they failed to abate it. Whether the plaintiff's claim against the defendant corporation is based on nuisance or negligence I think it succeeds; I find that the conduct of the corporation contributed to the accident.

The issue of the damages in this case is complicated. The plaintiff and the deceased were each at the time of his death 23 years of age. He was an electrician by trade and before the war was in responsible employment earning £4 11s. 3d. a week. He joined the army in Jan., 1940, and was promoted to the rank of corporal in the Royal Corps of Signals. He married the plaintiff on May 22, 1943; they had no children. She remained in employment thereafter earning about £15 7s. 0d. a month and received a separation allowance from the army authorities of £1 12s. 0d. for three months. After his death she was granted a pension of £1 1s. 8d., the duration and conditions of which are uncertain, but I take all these facts into consideration. The deceased left property of the value of £160. The actual pecuniary loss of the plaintiff at the present time and up to the date of the hearing is therefore not great; but in due course the deceased would have left the army and resumed his civilian work as an electrician. The deceased might then well have obtained high wages and a good position. In this connection I must have regard to the possibility of the plaintiff giving up her present employment after the war. Making the best assessment that I can in the circumstances I give judgment for the plaintiff against both defendants for the sum of £1,021 4s. 6d. to include the funeral expenses with costs.

Judgment for the plaintiff with costs. Damages to be apportioned in equal parts between the first two defendants and the third defendants.

Solicitors: Botterell & Roche, agents for Chamberlain, Talbot & Bracey, Lowestoft (for the plaintiff); Peacock & Goddard, agents for Hill & Perks, Norwich (for the first and second defendants); W. C. Crocker (for the third defendants).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

UNDERWOOD v. UNDERWOOD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), July 23, 1945.]

Husband and Wife—Desertion by husband—Order that wife should have custody of child and for payment of maintenance—Husband subsequently applying for discharge of order—Application amended for variation of amount of maintenance payable—Amended application based on evidence available at original hearing—"Fresh evidence"—"Cause shown"—Evidence available at original hearing not "cause shown"—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7—Criminal Justice Administration Act, 1914 (c. 58), s. 30 (3)—Money Payments (Justices Procedure) Act, 1935 (c. 46), s. 9.

On Apr. 14, 1944, a police magistrate, on the application of a wife on the ground of the husband's desertion, made an order under the Summary Jurisdiction (Married Women) Act, 1895, that (a) the wife should have the custody of the child of the marriage; (b) the husband should pay for maintenance, 10s. a week for the child and 25s. a week for the wife. The order did not contain a non-cohabitation clause. The husband's defence to the charge of desertion was that the wife had been guilty of adultery. Later the husband took out a summons before another magistrate in the

same court to have the order discharged on the ground that it should never have been made because the wife had committed adultery. Objection was taken to the application that the evidence by which the husband sought to establish his proposition had been available to him on the first occasion. The magistrate took the view that this summons was wholly misconceived because it was not founded upon "fresh evidence" within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, s. 7. It was suggested by the magistrate, however, that it was possible for him, if the summons were amended so as to be a summons not to discharge the order but to vary the amount payable to the wife, to deal with that issue, upon the same material. The summons, as amended, was heard with the result that, as there was uncontradicted evidence tending to show adultery on the part of the wife the order was varied by reducing the amount payable to the wife to 1s. a week. The wife appealed to the Divisional Court :—

HELD : (i) in an application by the husband or the wife to vary or alter the amount of money payable under an order, the effect of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, in conjunction with the Money Payments (Justices Procedure) Act, 1935, s. 9, was that such order could be varied without "fresh evidence" but upon "cause shown" to the satisfaction of the court.

(ii) a repetition of the identical evidence, or evidence of identical conduct, which was received before the order was originally made, and must necessarily have had its bearing not merely on the finding of desertion but on the amount to be awarded, could not be put forward at a later date as "cause shown" for varying the amount.

[EDITORIAL NOTE. The Money Payments (Justices Procedure) Act, 1935, s. 9, provides that fresh evidence is not required on an application to increase or diminish the amount of a weekly payment ordered by magistrates under the Summary Jurisdiction (Married Women) Act, 1895, s. 7. There must still be "cause shown" however, and it is here held that this is not limited to evidence of means; conduct of the parties must be taken into account. Where, however, the evidence was a mere repetition of the evidence led at the making of the original order for maintenance, which evidence must have been taken into account before the original order was made, this is held insufficient ground for varying the amount.

AS TO DISCHARGE AND VARIATION OF ORDERS, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565-568, Nos. 6237-6256.]

Cases referred to :

- * (1) *Timmins v. Timmins*, [1919] P. 75; 27 Digest 567, 6255; 88 L.J.P. 78; 120 L.T. 544.
- (2) *Johnson v. Johnson*, [1900] P. 19; 27 Digest 567, 6252; 69 L.J.P. 13; 81 L.T. 791.
- * (3) *Dodd v. Dodd*, [1920] 1 K.B. 71; 27 Digest 568, 6270; 89 L.J.K.B. 224; 122 L.T. 190.
- * (4) *Colchester v. Peck*, [1926] 2 K.B. 366; Digest Supp.; 95 L.J.K.B. 1038; 135 L.T. 32.
- * (5) *R. v. Copestake, Ex p. Wilkinson*, [1927] 1 K.B. 468; Digest Supp.; 96 L.J.K.B. 65; 136 L.T. 100.
- * (6) *Batchelor v. Smith* (1935), 79 Sol. Jo. 49; Digest Supp.

APPEAL by the wife from a decision of a metropolitan police magistrate made on June 8, 1945. On Apr. 14, 1944, the magistrate ordered that the legal custody of the child should be given to the wife, and that the husband should pay for the maintenance of his wife and child. On June 8, 1945, the husband applied by summons for a discharge of the order made on Apr. 14, 1944, to another magistrate sitting in the same court. The summons was, on the suggestion of the magistrate, amended to a summons to vary or alter the amount payable under the original order and forms the subject of the present appeal.

G. R. King Anningson for the appellant.

E. M. Gorst for the respondent.

LORD MERRIMAN : This case in my opinion raises a very interesting and I think important question. The earlier order was made upon the ground of desertion. There was no non-cohabitation clause, the custody of the child

of the marriage was awarded to the wife, and in respect of the child 10s. a week was ordered to be paid to the wife. She was also awarded 25s. a week in respect of herself. On the present application the only part of this order that has been varied is the amount ordered in favour of the wife. The 25s. has been reduced to 1s., and the question is whether in the circumstances of this case that reduction was right and proper.

A It is quite clear, and we have seen the notes of the evidence, that at the first hearing, on Apr. 14, 1944, the husband's defence to the charge of desertion was that the wife had been guilty of adultery with a named man. That suggestion was rejected by the metropolitan magistrate who heard the case, and accordingly he found that the husband, who admittedly had left the matrimonial home, was guilty of desertion. On the present hearing before another metropolitan magistrate at the same court the husband raised as the ground of his application to discharge the order—for that was his original application—precisely the same incidents. It was not suggested that he was alleging any subsequent act of adultery. He was trying to get the order discharged upon the ground that in effect it ought never to have been made because the wife had already committed adultery with the man named. Had it been possible by legitimate evidence to establish that proposition, it might no doubt have been open to the magistrate on this second occasion to discharge the order. I say upon proper evidence; the whole objection to the case which was presented C by the husband was this, that the evidence by which he sought to establish his proposition had all been available to him on the earlier occasion. Much of it was in fact, I think, the same evidence, but at any rate it was based upon material which was clearly in his possession at the time, and it is not really disputed for the purposes of this appeal that that was established.

D That being so, the magistrate took the view, the correctness of which or otherwise I will examine in one moment, that this summons to discharge the order was wholly misconceived, because it was not possible for the husband to assert that he was founding himself upon fresh evidence as those words have been interpreted in a well-known series of cases. But the magistrate suggested that it was possible for him, if the summons were amended so as to be a summons not to discharge the order but to vary the amount payable to the wife, to deal with that issue, and that issue only, upon the same material. He did so, and E decided to reduce the amount as I have said.

Before I go further I wish just to say one word about what actually happened in the court below. It appears that the suggestion emanated from the magistrate and was assented to by both sides. We are now told that in fact it was not assented to by the solicitor for the wife, though I think it is rather a question of degree than anything else, for the position appears to have been that he did not actually object, seeing that the only result of an objection would probably F have been that the case would have been adjourned and a fresh summons issued upon that ground, when the parties would have got to precisely the same position. But one mistake I think the solicitor did make. As the summons was amended, and nothing was thereafter being dealt with except the question of variation, he rested himself at the conclusion of the case upon a submission which was based entirely on the words "fresh evidence" and for that reason, G and because he was basing himself upon the proposition that it was not open to the magistrate to act upon evidence which was available at the previous hearing, he declined to call the wife. This led in effect to the result that the magistrate had uncontradicted evidence tending to show adultery, and has evidently based his decision on the assumption that adultery was proved.

As I say, the question is whether that was or was not the right way of dealing with this case. In the first instance it is I think necessary to examine quite H shortly the result of subsequent legislation upon the Summary Jurisdiction (Married Women) Act, 1895, s. 7. I propose to deal with this shortly, because I think the matter is concluded by authority, but I am bound to say, speaking for myself, that this is the first time—though the matter has arisen incidentally in other appeals—when it has been brought forcibly to my attention in one of these appeals under the Summary Jurisdiction (Married Women) Act. By sect. 7 of the 1895 Act, where an order has been made, the court:

... may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time,

alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made . . . so long as it does not in any case exceed the statutory limit of £2. It is undoubted as a matter of history that not merely the power to alter, vary or discharge the order was conditioned by the express words that it must be upon fresh evidence, but also there was imported into the second branch of that sentence—namely, that which dealt with the power to increase or diminish the amount of any weekly payment—the same restriction, that it must be upon fresh evidence.

I need not go at large into the meaning of the words "upon fresh evidence." Suffice it to say that the passage in *Timmins v. Timmins* (1), in which, relying upon the decision in *Johnson v. Johnson* (2), HILL, J., says, at p. 80 :

... "fresh evidence" . . . means evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing, and could not by reasonable means have come to his knowledge before that time . . .

has received favourable notice in the Court of Appeal. It is not necessary to dilate upon that because, as I say, it is not disputed for the purposes of this case that the evidence available to the husband on the second hearing did not fall within any acceptable definition of what is fresh evidence.

Upon that section, the meaning of which was thus established, two subsequent enactments have had effect. The first is the Criminal Justice Administration Act, 1914, s. 30 (3), which reads as follows :

Any order made either before or after the commencement of this Act by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the court, be revoked, revived, or varied by a subsequent order.

It is clear, of course, that that covers very much the same ground as is covered by sect. 7 of the 1895 Act, but it is established beyond any doubt in *Dodd v. Dodd* (3) that this sub-section, and indeed all other relevant matter in this part of the Act, applies with equal force to the Summary Jurisdiction (Married Women) Acts, and the effect, amongst other things, was to introduce into this particular legislation relating to married women the conception of revival of an order which had been discharged.

The other Act which affects the matter is the Money Payments (Justices Procedure) Act, 1935, whereby it is enacted by sect. 9 that in sub-sect. (3) of sect. 30 of the Criminal Justice Administration Act, 1914, "the words 'upon fresh evidence' shall cease to have effect"; and, incidentally, they are repealed by sect. 16 (2) and the Schedule; and then sect. 9 says :

... and fresh evidence shall not be required as a condition of the exercise of the power conferred on a court of summary jurisdiction by sect. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to increase or diminish the amount of a weekly payment.

In my opinion, without going through the authorities in detail, it is established beyond the slightest doubt in *Colchester v. Peck* (4), and *R. v. Copestake* (5), that the combined effect of these two sections is to deal only with that part of an order which relates to periodical payments, and to leave unaffected the limitations imposed by the words "upon fresh evidence" in relation to the substantive part of an order under the Summary Jurisdiction (Married Women) Act or any ancillary part of such order which is not connected with such periodical payments. From this it follows that the effect of sect. 7 of the 1895 Act may be thus stated, that on an application by the husband or wife to alter, vary or discharge any such order the words "upon fresh evidence" which actually appear in the section still remain in full force and effect, but in relation to an application merely to increase or diminish the amount the gloss which was placed upon the section by importing the words "upon fresh evidence" has disappeared. Those words are no longer to be treated as having any force or effect in connection with a mere question of amount.

Therefore it was not, as the magistrate rightly held, open to this husband to seek, as he originally did seek, to discharge this order upon the particular evidence of the wife's adultery, for the reason that by no possibility could it be held to be fresh evidence within the meaning of those words; but it was open to him

to get that amount varied upon cause shown to the satisfaction of the court, and in relation to that application he was untrammelled by the implication of the words "upon fresh evidence." I reject altogether the suggestion that "cause shown" in relation to an application to vary an amount can only be evidence relating to figures. I would say first of all, again referring to the judgment of HILL, J., in *Timmins v. Timmins* (1) that I am entirely in agreement with his way of approaching the matter. He says, at p. 80 :

A But they can discharge or vary their order only upon cause shown. In my judgment that means cause shown for discharging that part of the order which is sought to be discharged, and the order cannot be discharged as a whole unless cause is shown for discharging every part of it.

B Applying that passage, with every word of which I agree, to this case, that means that it is quite clear upon the authorities that once you put this particular evidence outside the category of "fresh evidence," the following things could not be attacked ; the finding of desertion, and, so far as it is relevant, the question of custody. That was not sought to be attacked, so the question is academic. The finding of desertion and custody and the amount for the maintenance of the child were not in question at all on this summons as it was eventually dealt with. The whole question was : What amount should be awarded to the wife ; should that be varied ?

C Agreeing as I do with HILL, J., that the cause which has to be shown must be cause relating to the particular issue, I am not, as I have already said, on the one hand prepared to limit that to a question of figures only, and indeed exactly the contrary of that was indicated by LORD HEWART, L.C.J., in *Batchelor v. Smith* (6). It is not limited to evidence of means. Equally, I am not prepared to say that, speaking generally, evidence of the conduct of the party attacked, whether before or after the making of the order, is necessarily to be excluded. D I think it may be very relevant on the question of amount. It is enough to say that in the section of the Judicature Act which regulates the jurisdiction for making maintenance orders in this Division the conduct of the parties is one of the things which is expressly mentioned, and it is really a commonplace that on the question of amount it is clearly a matter which has to be taken into account.

E Having said that, I feel very strongly that a mere repetition of the identical evidence, or evidence of identical conduct, which was received before the order was originally made, and must necessarily have had its bearing not merely on the finding of desertion but on the amount to be awarded, cannot be put forward at a later date as cause for varying the amount. In my opinion there was no evidence which was receivable by the magistrate as cause for varying this amount or reducing it in the way he did. This is quite a different proposition from the proposition with which I have been dealing upon the interpretation of the words "upon fresh evidence." That proposition prevents a man from bringing on an issue which has been determined evidence which was available to him before, but which was not produced. The view that I take of this matter is simply this, that when evidence has been produced upon which a certain result has been arrived at both on the merits and on the money, it is not open to the party to produce the same evidence again as cause for varying the amount of the money award. G I am bound to say that I think that once the magistrate had come quite correctly to the view that this application to discharge was barred by the implication turning upon the words "upon fresh evidence" in sect. 7 of the 1895 Act, it would have been wiser to leave things as they then were instead of suggesting an amendment which, to put it at the lowest, imported a certain air of unreality into the proceedings.

H In my opinion this appeal must be allowed. I only wish to say one thing. As I understand it, there may be divorce proceedings. That has been indicated on both sides in the course of argument. We are dealing with nothing but the proper interpretation of this section, and must be taken to express no opinion one way or the other upon the magistrate's finding, as it apparently was, that the wife had committed adultery.

WALLINGTON, J. : I agree, and I agree, if I may say so, with every word which has fallen from my Lord, and but for the importance of this matter, and some little confusion which has arisen in the minds of some in relation to it, I

would not have felt it necessary to add one word ; but I would like to state the matter in my own words in those circumstances. I can do it very briefly.

The Summary Jurisdiction (Married Women) Act, 1895, s. 4, specifies a number of grounds upon which a married woman may apply for an order or orders against her husband. Sect. 5 specifies the order or orders that may be made upon any such application. Anybody who likes to turn to the statute can see exactly what they are, and, therefore, I am not going to read them. They are under letters, (a), (b), (c), and (d). (c) is the only one with which the court is concerned in this case—that is, an order for payment of money. (d) is as to costs, (a) is as to non-cohabitation, and (b) provides for an order as to custody. Sect. 7 of the same Act provides that any order under this Act or the Acts within the schedule may be dealt with in the ways mentioned in sect. 7. I need not read the section. The words “any order or orders” in that section seem to me to be referring individually to the orders specified in sect. 5, so that any order or orders that may be made in favour of the wife in any case may be dealt with as mentioned in sect. 7. They need not all be ; some of them may be ; and only so far as they are all dealt with what I may call a composite order is effected. It may be that the money orders are regarded as distinct, and in that case a non-cohabitation order or an order for custody, if it had been made in the original order, would remain.

Then there is the Criminal Jurisdiction Administration Act, s. 30 (3), which I need not read. I need only say that the effect of it is, I think it right to say, limited to adding to the orders which can be made upon an application made under sect. 7 jurisdiction to revive an already discharged order.

Then the Money Payments (Justices Procedure) Act, 1935, s. 9, eliminates the words “upon fresh evidence” both where those words appear expressly or where those words have been implied in sect. 7 of the 1895 Act, so far as they relate to money payments, and only so far as they relate to them.

The result of it all seems to me to be that upon a second application to the justices, that is to say an application to vary or revoke an order, if the application relates to (a) or (b) of sect. 5, an order can be made only upon fresh evidence. If it relates to (c) in sect. 5—that is, a money payment order—an order can be made without any fresh evidence but upon cause shown to the satisfaction of the court. That I understand to be the effect of the various sections.

With regard to this case, I agree with my Lord that the magistrate was perfectly right in pointing out and holding that inasmuch as on the original application the issue raised by the husband by way of defence was, “My wife has committed adultery,” and on the application to discharge or vary the order the defence was, “My wife has committed adultery,” evidence available at the date of the earlier hearing that the wife had committed adultery would not be fresh evidence within the meaning of those words as they have been interpreted by the court in so many cases. With regard to the order that he made diminishing the amount of the payment, the question is whether there was cause shown for that order. It seems to me that it cannot be cause shown to the satisfaction of the court to say, “The original order was made despite a defence of adultery by the wife, but the fact that the wife had committed adultery, or the fact that we are now bringing forward evidence to show that what we alleged by way of defence on the second occasion can be cause shown to the satisfaction of the court.” In my opinion it could not be. In my opinion there must be some end to the matter, and the end seems to me to be reached, certainly in this case, is what had been urged, though unsuccessfully, when the order was originally made.

For those reasons, in my opinion, as my Lord has said, the appeal must be allowed.

Appeal allowed. Leave to appeal.

Solicitors : C. V. Young & Cowper (for the appellant) ; J. Clifford Watts (for the respondent).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

DORMAN LONG & CO., LTD. v. CARROLL AND OTHERS.

[KING'S BENCH DIVISION (Humphreys and Croom-Johnson, JJ.), June 19, 1945.]

Master and Servant—Coal mine—Contract of service—Employment terminable on 14 days' notice—Scheme of working re-organised—Alteration in scheme of working not part of original contract—Employees terminating altered scheme by less than 14 days' notice—Notice reasonable—No breach of contract by employees—Employers and Workmen Act, 1875 (c. 90), s. 9.

The respondents were workmen, employed as fillers at the appellants' colliery. Their contract of service was terminable by 14 days' notice only, each of the workmen having signed a document to that effect. In Jan., 1943, with the object of increasing the output of the mine, a scheme of reorganized working was introduced by mutual agreement, whereby the respondents undertook to work double shifts on Saturdays instead of one as before. This agreement was oral and no definite time for its duration was fixed. The altered system of working was adhered to for some eighteen months. In June, 1944, the respondents decided to revert to their former practice of working one Saturday shift only and, since the appellants failed to agree, the respondents gave eight days' notice to terminate the altered system, and did not present themselves for work in the second shift on the Saturday next following. It was contended on behalf of the appellants, who had instituted proceedings before justices under the Employers and Workmen Act, 1875, that the respondents had been guilty of a breach of their contracts of service, since the agreement of January, 1943 was a variation, and had become part of the original contracts of service whereby 14 days' notice for termination was required :—

HELD : on the evidence before them, the justices were entitled to come to the conclusion that the altered system of working was temporary only and did not constitute a variation, or became part of the original contracts of service. The altered system could, in the circumstances, be terminated by reasonable notice, and the eight days' notice given was reasonable.

[**EDITORIAL NOTE.** This case shows the distinction between a variation of a contract of employment in a mine and a mere variation of a scheme of working. The need for increased output owing to the war, of which the justices were entitled to take judicial notice, constituted a reason for a variation in method, which could be terminated by reasonable notice instead of the 14 days' notice required for a termination of the contract.]

AS TO SUMMARY PROCEEDINGS UNDER THE EMPLOYERS AND WORKMEN ACT, 1875, see HALSBURY, Hailsham Edn., Vol. 22, pp. 171-173, paras. 285-290 ; and FOR CASES, see DIGEST, Vol. 34, pp. 111-113, Nos. 830-847.]

APPEAL by way of case stated by the plaintiffs, Dorman Long & Co., from the decision of the justices for the county of Durham. The plaintiffs claimed damages under the Employers and Workmen Act, 1875, against a number of persons employed in their colliery ; and by arrangement it was agreed that three of the persons (who are the respondents to this appeal) should be representative for all the employees affected. The facts and arguments are sufficiently set out in the judgment of HUMPHREYS, J.

J. B. Herbert for the appellants.

E. Holroyd Pearce for the respondents.

HUMPHREYS, J. : The claim was for damages against the respondents for breach of contract ; the form of the summons being that the appellants claimed damages from each of the defendants for breach of contract in absenting themselves from work in the second shift on Saturday, July 8, and Saturday, July 22, 1944, at the appellants' Sherburn Hill colliery. The matter was heard by the justices, who dismissed the application, that is to say, they found in favour of the respondents, but they stated a case for the consideration of this court, on the assumption that there was a question of law to be raised which they had decided.

The case states that, the respondents being workmen employed as fillers at the colliery, the terms of their employment were those customary in the county of Durham. We are not told what are the terms of employment customary in the county of Durham, except for one term, which provided for the termination

of the contract of employment by 14 days' notice, and each of the workmen signed a document so stating. In and prior to Jan., 1943, the practice of working at the Sherburn Hill colliery varied in the three seams which were being worked. In the main coal seam certain shifts were worked from Monday to Friday, and one shift on Saturday : in the Five Quarter seam, certain shifts were worked from Monday to Friday, and one shift on Saturday : in the Busty seam certain shifts were worked from Monday to Friday, and again one on Saturday. That arrangement lasted up to Jan., 1943. The case states that :

In January, 1943, with the object of increasing the output of the colliery to meet the demand for coal, a scheme of re-organised working was proposed by the appellants, put before the workmen's representatives, accepted by them, and submitted to the workmen, who approved the new scheme of working.

It should be observed that the case, which is very carefully drawn, does not say that any new contract was entered into, or that the contract was varied. It merely states that the scheme of re-organised working in the colliery was approved, and that from Jan., 1943, until July, 1944, this scheme for the re-organised working was in force. There was one alteration in the scheme of working which, I think, it is necessary to mention, namely, that two shifts were worked on Saturday, instead of one. The case goes on to say that at that time nothing was said as to terminating the existing contract of service, and apparently nothing was said as to the length of time during which the new arrangement was to continue.

The court is bound to take judicial notice of the state of war then existing, and the case states that the object of the alteration was to increase the output of coal because of the war. The workmen in June, 1944, while the war was still persisting, made up their minds that they would not in future work two shifts on Saturday ; and, after certain meetings were held, at which the appellants or their manager protested against any alteration of the scheme of working (which had now been in force for something like 18 months), a letter, which is dated June 30, 1944, signed by the secretary of the Sherburn Hill Lodge of the Durham Miners' Federation, was written. The letter says this :

At our general meeting held last night I was instructed to notify you of the following resolution that was passed at the meeting. The resolution is as follows : That on and from Saturday, July 8, only the foreshift will present themselves for work on Saturdays.

If that requires any interpretation, the interpretation appears to be that on and after Saturday, July 8, the men will not present themselves for work at the second shift on Saturday. That is what took place, because on Saturday July 8, the men did not present themselves for work in the second shift, and presumably the same thing happened on the other Saturday, which is apparently July 22, on which the men did not present themselves.

Proceedings were then instituted before the magistrates, and upon those facts it was argued, on behalf of the appellants, that what happened in Jan., 1943, was that a new system of working was agreed to by the representatives of the workmen and by the workmen themselves, that the new system was put into operation—all that is quite true—and also (and this is contested) that these provisions became, and were, part of the workmen's contracts of employment. I am far from saying that there was not evidence upon which the justices might have come to the conclusion that that contention was made out. The further contention for the appellants was that the contract was terminable as a whole by 14 days' notice, and that its terms could not be varied by one party, or otherwise than by mutual agreement, and that the men had terminated the contract in the sense that they had been guilty of a breach of one of its terms, namely, the new scheme of working the mine. No doubt, if the contention of the appellants is right, then the men were guilty of a breach of their original contract, and, as 14 days' notice was required before they could terminate the contract, no doubt they were liable to pay damages.

The case then states the arguments made on behalf of the respondents :

That the terms of the written agreement between the parties were never varied but remained in force ; that the arrangement or agreement to work two shifts on Saturday did not vary or terminate the written agreement ; that the arrangement or agreement did not become binding on the parties or become part of the contract ; or, that if it

did, it was a temporary agreement only and was terminable on reasonable notice and the letter of June 30, 1944, was reasonable notice.

The justices came to a conclusion favourable to the contention of the respondents, being of the opinion that the agreement referred to, that is the agreement of Jan., 1943, was temporary only; that it could be properly terminated by reasonable notice; and that the letter of June 30 was reasonable notice.

A In my opinion it is a perfectly reasonable method of construing the acts of the parties to say that the original contract of service, which obtained in the case of each of these workmen, was never varied, and that in Jan., 1943, when this scheme of re-organised working was adopted, by which the men for an unnamed time agreed to work longer hours on Saturdays, *i.e.*, two shifts on Saturdays, that was not a variation of their contract of service at all, but merely an alteration of the method of carrying out the original agreement into which they had entered, and by which they were still bound. That is what the magistrates appear to have found, and, if they have, that is an end of this matter. If B the agreement by which the respondents could only terminate their service by giving fourteen days' notice still stands, they have not purported to give any notice terminating their contract. The respondents have done nothing more than what, in the view of the justices, has ample justification in the facts, saying to the appellants in effect: "For a time we agreed to work longer hours than the ordinary custom of Durham required, and longer than you have required C us, or than we had agreed with you, to work. Now the time has come, in our view, when it is no longer necessary for us to work those longer hours; so far as the altered scheme of arrangement is concerned, it is at an end, and we revert to the old arrangement which obtained when we became your servants and entered into our written contracts of employment."

D I cannot myself see that it is possible for this court to say that the magistrates misdirected themselves in law in taking the view which they did of the facts of this case and for that reason, without discussing the matter any further, I am of opinion that this appeal must fail.

E CROOM-JOHNSON, J.: I am of the same opinion. Without seeking for a moment to depreciate the value of the argument of counsel for the appellants I think that this point is only raisable by confusing two things, a variation of the terms of the contract of employment (which this is not) with a variation in the scheme of organised working (which this is). A bench of magistrates F in a mining county, presumably conversant with some, at all events, of the things which go on in the mining world, and having the right, and, indeed, the duty, of taking judicial notice of all the circumstances existing in Jan., 1943, and applying (as I think they were entitled to apply) their local knowledge, have come to the conclusion that the arrangement in Jan., 1943, was a scheme of re-organised working. They have further come to the conclusion that that scheme was not intended by the parties to be one which effected a variation of the contractual terms, nor was it intended by the parties to operate so long as the contract of employment operated, or until some new arrangement was mutually arrived at.

G If this had been a written contract, the justices would have been entitled, and, indeed, as I think, obliged, to consider the surrounding circumstances in order to construe the terms of the contract document. Having found what the terms and objects of this oral arrangement were, the justices could, apart altogether from evidence, apply their own knowledge of those facts, of which they must take judicial notice as part of the surrounding circumstances, in order to enable them to come to a conclusion as to what the intention of the parties was as manifested by what they said and did. That is what the justices have done in this case, and, I think, there was ample material upon which they could H accordingly come to the conclusion that the arrangement was a temporary arrangement and did not provide for any date of termination. If it was a temporary arrangement, the parties, if they had not been sensible and business-like, might have put an end to it by the time the next Saturday night shift came to be worked. That is not the way they behaved. The employees gave a notice which was an 8 days' notice. The magistrates came to the conclusion that, in the circumstances of this case, that was in any event a reasonable notice entitling them unilaterally to put an end to this modified or reorganised scheme of working which the respondents had arrived at in consultation with

the employers in Jan., 1943. I can only express my regret that the parties did not reduce into writing their arrangement made in Jan., 1943. In an industry, in which one cannot pretend not to know that there are at times sharp clashes of opinion, both as to rates of wages and conditions of employment, it is a great pity that the simple expedient was not adopted of having someone to take notes so that there would be something in writing which would possibly have avoided all this discussion and this large number of summonses which has unfortunately resulted.

Appeal dismissed with costs.

Solicitors: *Crossman, Black & Co.*, agents for *William Bell & Sons*, Sunderland (for the appellants); *Corbin, Greener & Cook*, agents for *J. E. Brown-Humes & Co.*, Bishop Auckland (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

BENTS BREWERY CO., LTD. AND OTHERS v. LUKE HOGAN.

[LIVERPOOL SPRING ASSIZES (Lynskey, J.), May 16, 1945.]

Trade and Trade Unions—Torts arising out of operations of trade unions—Employee-managers of on-licensed premises—Questionnaire of trade union seeking information of managers' terms of employment—Managers asked, inter alia, to state weekly sales and total wages bill—Express or implied terms of employment not to disclose confidential information—Inducement to disclose information—Interference with existing contractual obligations—Incitement to commit breach of contract of service—Whether questionnaire issued in contemplation or furtherance of a trade dispute—Trade Disputes Act, 1906 (c. 47), s. 3.

Each of the seven brewery companies were the owners of a number of on-licensed houses in the Merseyside area. In many of these houses the licence was held by a manager who was employed by the brewery company in question under a service agreement. Some of the managers were members of the National Union of Distributive and Allied Workers. At a meeting of the union, on Mar. 12, 1944, it was resolved that the defendant, their divisional officer for the Liverpool district, should send out to the managers a questionnaire containing a number of questions relative to their terms of employment, some of the questions dealing with the expenses of the manager's house and of its takings, trade and total wages bill. That document was sent out by or on behalf of the defendant early in Apr., 1944. A letter preceded the questionnaire requesting the managers to answer all the questions asked "so as to enable the union to prepare a suggested programme of wages and conditions which will be commensurate with the responsible position held" by a manager. It was an express term of the service agreement of the managers of two of the plaintiff companies that under no circumstances was any information as to trading or conduct of the business to be given without the companies' authority. The plaintiff companies, seeking a declaration that the defendant was not entitled to the information requested to be given by the questionnaire, contended (i) that the sending of the document to the persons to whom it was addressed constituted an unlawful interference with the contractual obligations existing between them and their respective managers; (ii) that the employee-managers were incited or induced to commit a breach of the terms of their contract of service, or to commit a breach of trust or to abuse the confidence which existed between the employer and the employees. It was contended on behalf of the defendant (i) that there was no term, express or implied, in the agreements between the respective plaintiffs and their respective managers that the managers should not disclose confidential information, or that such disclosure of information was an abuse of confidence; (ii) that the information requested was not of a private or confidential character; (iii) that the questionnaire was not an interference with the contractual relations between the plaintiffs and their employees, nor did it amount to an incitement or inducement to the employees to break their contracts; alternatively, such interference, incitement or inducement was not unlawful and justified; (iv) that the questionnaire was issued in contemplation or

furtherance of a trade dispute, and the defendant was, therefore, protected by the provisions of the Trade Disputes Act, 1906, s. 3 :—

HELD : (i) an employee was under an obligation to his employers not to disclose confidential information obtained by him in the course of and as a result of his employment, and such obligation arose, apart from any express term, from a term to be implied in the contract of service.

Robb v. Green (1), *Merryweather v. Moore* (2) and *Kirchner & Co. v. Gruban* (3) applied.

(ii) so far as the questions asked related solely to the terms and conditions of the manager's employment, he was entitled to answer them. The information as to the weekly sales and total wages bill, being information which the manager could only acquire as a result of and in the course of his services, was confidential and by its disclosure the manager would commit a breach of his contract with the employer.

(iii) the letter preceding the questionnaire constituted a clear inducement to the manager to whom it was addressed to give the information requested and, in so far as it involved the giving of confidential information, amounted to an inducement to the manager to commit a breach of contract. In the circumstances of the case there was no duty on the defendant which would justify such inducement.

(iv) there was no trade dispute, either imminent or existing, when the document was sent out, and the Trade Disputes Act, 1906, s. 3 afforded therefore, no protection to the defendant.

Conway v. Wade (8) applied.

(v) the plaintiffs were, accordingly, entitled to the declaration asked for.

Semle : although no damage had been proved to have been sustained by any of the plaintiffs, they were likely to sustain damage and have their common law rights infringed if the defendant persisted in, and should be successful in, his efforts to obtain the confidential information he sought.

[EDITORIAL NOTE.] This is a case of considerable importance arising out of trade union activities. It is held that the giving of information obtained in the course of service by an employee in reply to a questionnaire by a trade union official is a breach of contract induced by the trade union, because the union's letter promising improved conditions of service as a result of the questionnaire amounted to an inducement. There was sufficient proof of potential damage to justify the granting of a declaration restraining the union from seeking the information since the improved conditions must be at the expense of the employer. Such acts were not protected by the Trade Disputes Act since nothing in the nature of a trade dispute was "imminent or existing" within the test laid down by LORD LOREBURN, L.C., in *Conway v. Wade* (8).

AS TO TORTS ARISING OUT OF THE OPERATIONS OF TRADE UNIONS, see HALSBURY, *Hailsham Edn.*, Vol. 32, pp. 516-520, paras. 813-818; and FOR CASES, see DIGEST, Vol. 43, pp. 113-116, 120-122, Nos. 1184-1198, 1237-1243.

AS TO DISCLOSURE OF CONFIDENTIAL INFORMATION BY SERVANT, see HALSBURY, *Hailsham Edn.*, Vol. 22, pp. 183, 184, paras. 307, 308; and FOR CASES, see DIGEST, Vol. 34, pp. 121, 122, Nos. 923-935.]

Cases referred to :

*(1) *Robb v. Green*, [1895] 2 Q.B. 315; 34 Digest 121, 928; 64 L.J.Q.B. 593; 73 L.T. 15.

*(2) *Merryweather v. Moore*, [1892] 2 Ch. 518; 34 Digest 121, 926; 61 L.J.Ch. 505; 66 L.T. 719.

*(3) *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413; 34 Digest 121, 931; 78 L.J.Ch. 117; 99 L.T. 932.

(4) *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q.B. 147; 17 Digest 80, 13; 65 L.J.Q.B. 262; 74 L.T. 83.

(5) *Brimelow v. Casson*, [1924] 1 Ch. 302; 43 Digest 115, 1194; 93 L.J.Ch. 256; 130 L.T. 725.

(6) *Camden Nominees, Ltd. v. Forcey*, [1940] Ch. 352; Digest Supp.; 109 L.J.Ch. 231; 163 L.T. 88; *sub nom. Camden Nominees, Ltd. v. Slack*, [1940] 2 All E.R. 1.

(7) *Smithies v. National Asscn. of Operative Plasterers* [1909] 1 K.B. 310; 43 Digest 115, 1197; 78 L.J.K.B. 259; 100 L.T. 172.

*(8) *Conway v. Wade*, [1909] A.C. 506; 43 Digest 120, 1237; 78 L.J.K.B. 1025; 101 L.T. 248.

ACTION by the plaintiffs, seven brewery companies, against the Divisional officer for the Liverpool district of the National Union of Distributive and Allied Workers. The plaintiffs sought a declaration that the defendant was not

entitled to seek certain specified information from the plaintiffs' servants relative to their conditions of employment, and an injunction against the future seeking of such information on his part. The declaration was finally agreed in the following terms :

Declared that the defendant was not and is not entitled to seek from managers and manageresses employed by any of the plaintiff companies the information as to weekly sales and total wages bill (which have been numbered respectively (7) and (9) sought by the circular or questionnaire, the subject matter of this action.

Liberty was given to apply for an injunction.

The facts are fully set out in the judgment.

Valentine Holmes and *A. E. Baucher* for the plaintiffs.

F. A. Sellers, K.C., and *Allister Hamilton* for the defendant.

LYNSKEY, J. : This is an action brought by seven brewery companies carrying on business in Merseyside and district against Alderman Luke Hogan who is, and was, the divisional officer for the Liverpool district of the National Union of Distributive and Allied Workers, which is a registered trade union. The Union has been called, in the course of these proceedings, N.U.D.A.W. The action arises out of a circular letter and questionnaire which was sent out in Apr., 1944, to a number of managers of on-licensed premises, who were servants of one or other of the plaintiff brewery companies. In the course of the proceedings before me it was admitted that this circular letter and questionnaire were sent out by or on behalf of the defendant.

The circular letter and the questionnaire are in the following terms :

The National Union of Distributive and Allied Workers.

N.U.D.A.W.

Liverpool Division.

Divisional Officer : Alderman Luke Hogan, M.B.E., J.P.

To the Manager or Manageress named in the address.

There will be a meeting of the on-licensed trade section of the union . . . we are desirous of securing all the information possible so as to enable us to prepare a suggested programme of wages and conditions which will be commensurate with the responsible position held by you. We, therefore, request that you complete this questionnaire, contents of which will be strictly confidential, and return it to the above address.

- (1) Name :
- (2) Address :
- (3) Employed by :
- (4) Wage :
- (5) Are you a temporary manager/manageress ?
- (6) If so, do you know what wages the regular manager was receiving ?
- (7) Weekly sales :
- (8) Number of Staff—full time or part time :
- (9) Total Wages Bill :
- (10) Hours of labour—Winter : Summer :
- (11) Weekly half-day :
- (12) Annual holidays :
- (13) What amount of time are you allowed off on your half-day ?
- (14) Are you paid wages during sickness ?
- (15) Living accommodation. (Please state the extent and condition).
- (16) How much is rent, coal, light and power assessed at.
- (17) Have you any superannuation fund, either compulsory or at the discretion of the firm.
- (18) Any other point that you think will be of importance :

(Signed) Luke Hogan.

Hereinafter I will refer to this document as "the document."

Each of the managers or manageresses to whom this document was sent was engaged under contract of employment.

For the plaintiffs it was said that in each of such contracts there was a term, either express or implied, that the employee would act in all things arising in connection with such employment in good faith towards the employer and would use such information as was gained by the opportunities of and during such employment for the benefit of the employer only, and, further, that the employees by reason of their position as such employees, were in a fiduciary relationship and were trustees of any confidential information which they would receive, and were under an obligation to their employers not to disclose such information.

It was further contended on behalf of the plaintiffs that to disclose any confidential information that any such employee received as such employee would be a breach of such employee's duty as such employee, and amount to an abuse of the confidential relationship which exists between the employer and the employee. It was further alleged on behalf of the plaintiffs that the document was sent to the manager-employees of the plaintiffs with the intention of seeking information of a private and confidential character which the latter could only
A give in breach of their employment agreements, and that the document was an unlawful interference with the contractual obligations and relationships between the manager-employees to whom it was addressed and their employers. Alternatively, it was contended that the document was an incitement or inducement to the manager-employees to commit a breach of their employment contract with their employers or to break the trust the employer had reposed in the employee, or abuse the confidence reposed by the employer in the employee.
B As a result of sending out the document the defendant did obtain certain information, and the plaintiffs say that he has expressed his intention of continuing to seek such information.

In these circumstances the plaintiffs seek a declaration (1) that the defendant was not entitled to seek the information requested in the document ; (2) that the sending of the document to the persons to whom it is addressed constituted an unlawful interference with the contractual obligations existing between
C the plaintiffs and their respective managers ; (3) was an incitement or inducement to the employee-managers to commit a breach of the terms of their contracts of service, or to commit a breach of trust or to abuse the confidence which existed between the employer and the employees. The plaintiffs further claim an injunction to restrain the defendant from committing the acts which the prayer requests should be declared to be wrongful, and such further orders
D as to the court may seem just and expedient.

The defences put forward before me on behalf of the defendant were that :
(1) There was no express or implied term in the agreements between the respective plaintiffs and their respective manager-employees that such employees should not disclose such confidential information, or that to disclose such information was a breach of trust, or that such disclosure of information was an abuse of confidence.

E (2) The information requested was not of a private or confidential character.
(3) The document was not an interference with the contractual relations between the plaintiffs and their employees, nor was it an incitement or inducement to the employees to break their contracts, or act in breach of trust, or to abuse the confidence reposed in such employees. Alternatively, the defendants say that if the document did constitute such an interference, incitement or inducement that interference, incitement or inducement was not unlawful and was
F justified.

(4) Finally the defendants say the said document was issued in consequence of a trade dispute and by virtue of the Trades Disputes Act, 1906, s. 3, the defendant is protected.

As a result of these various contentions between the parties it would appear that the issues which I have to decide are :

G (1) Is it a term, express or implied, between each of the plaintiff companies and their respective manager-employees in on-licensed premises that the latter would act in all things arising in connection with the employment in good faith towards their employers and would use such information as was gained by the opportunities of and during such employment for the benefit of the employer only ?

H (2) Was the employee-manager in a fiduciary position, and bound not to disclose any information which he obtained as a result of such fiduciary position ?

(3) Was the employee in virtue of his position as such under a duty not to disclose any confidential information received by him as a result of his occupying his position ?

(4) Was the information sought by the document information of a character confidential as between each of the plaintiffs and their respective employers ?

(5) Did the defendant offer inducement to the manager-employees, either in the said document itself, or otherwise, to disclose information of a confidential character ?

(6) Have each of the plaintiffs, or any of them, suffered damage, or are they likely to suffer damage, if the defendant's efforts had been or should be successful?

(7) Is the defendant likely to continue in his efforts to obtain confidential information from the plaintiffs' employees?

(8) Was the defendant justified in taking the action that he did?

(9) Was the document sent out by the defendant a document sent out in contemplation of or in furtherance of a trade dispute, and accordingly protected by the Trade Disputes Act, 1906?

Before dealing with these issues I think it would be wise to set out certain facts which form the background of this case.

Each of the plaintiff brewery companies are the owners of a number of on-licensed houses in the Merseyside area. In many of these houses the licence is held by a manager who is employed by the brewery company in question under a service agreement. In many of the houses barmen and barmaids are employed who are also servants of the particular brewery company.

From time to time different trade unions have endeavoured to secure these brewery employees, both barmen and barmaids, as members, but with indifferent success. In 1939 the National Union of General and Municipal Workers succeeded in inducing a number of the employees to join that union, and that union approached some of the plaintiffs with a view to obtaining an interview to discuss the position of their bar assistant members but not their manager members. This attempt having failed that union invoked the help of the Liverpool Trades Council and Labour Party, which also approached some of the plaintiffs in 1940, but again with no result.

In 1939 the defendant, on behalf of his union, N.U.D.A.W., also approached some of the plaintiffs, and, in particular, the Walker-Cain Brewery Co. An interview took place between the defendant and the managing director of that company but nothing seems to have resulted from that meeting.

In Nov., 1942, the Ministry of Labour were desirous of setting up some form of machinery to regulate the conditions of employment on a minimum basis in the catering and licensing trades, and the defendant wrote to the plaintiffs, Messrs. Peter Walker & Son (Warrington and Burton), Ltd., Higgsons Brewery, Ltd., and Threlfalls Brewery, Ltd., on Nov. 19, 1942, suggesting an interview to discuss matters generally.

About this time the plaintiff brewery companies and other brewery companies formed themselves into an association called the Liverpool Brewers' Association, and began to act together in matters affecting their common interests. It was apparently decided at that time that until some indication was given of the intentions of the Government no useful purpose would be served by meeting the defendant.

In 1943 the Catering Wages Act, 1943, was passed. Under this Act an effort was made to set up a Joint Industrial Council to deal with employees in the on-licensed trade, but this effort was not successful. While the effort was being made, in Jan., 1944, the defendant and his union decided to organise the managers of on-licensed premises with a view to such managers all becoming members of the National Union of Distributive and Allied Workers. A circular letter dated Jan. 10, 1944, was sent to all managers. A meeting was held on Jan. 16, 1944. At that meeting a number of managers agreed to join the union, and a committee was formed, and was known as the Licensed Trade Committee of the union. In Liverpool there was another organisation known as the Licensed Victuallers' Association. Up to this time that association was an association of licensees who were tenants of houses of the various brewery companies and did not include managers among its members. The Licensed Victuallers' Association decided to form a managers' section and to invite managers to join them.

The attitude, according to the evidence before me, taken by each of the plaintiff brewery companies was that they had no objection to their managers joining the Licensed Victuallers' Association or N.U.D.A.W., or if any manager preferred not to join any union or association they did not mind.

The defendant apparently objected to this attitude, and wrote a letter dated Jan. 19, 1944, to the then chairman of the Liverpool Brewers' Association, suggesting a meeting. The Liverpool Brewers' Association's reply to this letter was that the breweries had no objection to managers taking up member-

ship with the Licensed Victuallers' Association, but ignoring the suggestion of a meeting. Further meetings were held by the defendant and his union to try and induce further managers to join the union.

On Mar. 12, 1944, the Licensed Trade Committee of the union held a meeting. By that date the effort to set up a Joint Industrial Committee for the Licensing Trade had failed. A commission had been set up under the Catering Wages Act, 1943, to deal with conditions of employees in the on-licensed trade.

A At a meeting of Mar. 12, 1944, the Licensed Trade Committee of N.U.D.A.W. apparently gave consideration to the possibility of evidence being submitted to the commission set up under the Catering Wages Act, and a general discussion of the varying position in the trade ensued. It was resolved that the divisional officer, that is the defendant, should issue a questionnaire on lines then approved, to managers and manageresses members of the union and that a report be submitted to the committee at a later date. The divisional officer was to circularise all members in regard to a meeting to be held on Mar. 25. Emphasis is laid on the fact that managers as well as staffs can become members in N.U.D.A.W. without fear of victimisation. A programme of conditions was to be drawn up, such to cover rates for women. At this meeting the general heads of the document giving rise to these proceedings were settled. It was subsequently drafted by one of the defendant's assistants and the draft approved by him. 750 copies of the document were printed. The defendant suggested
C that the document was only sent out to managers who were members of his union, but I am satisfied on the evidence that it was sent out by post to and delivered to many managers who were not members of the union. The document was not addressed to the manager by name, but simply to the licensee of the particular house of which he was licensee. The document was sent out early in Apr., 1944.

D As soon as it came to the knowledge of each of the plaintiff brewery companies they strongly objected to some of the questions asked, particularly those dealing with the expenses of the manager's house and of its takings and trade. The plaintiffs, Bents Brewery Co., and the Birkenhead Brewery Co., circularised their managers instructing them not to give information in respect of these matters. Although at least 117 copies of the document were received by various managers employed by one or other of the plaintiff brewery companies, only
E 20 of the questionnaires were returned to the defendant. In some of these 20 returned questionnaires particulars were not given of the weekly takings or were only partially filled up. Of the 20 questionnaires returned, eleven were returned by managers employed by the plaintiff Peter Walker & Son (Warrington) and Robert Cain, Ltd., and three were returned by managers employed by the Birkenhead Brewery Co., Ltd. None of the returns were made by managers employed by either of the four remaining brewery companies.

F On May 2, 1944, the first six plaintiffs consulted their solicitors, who wrote a letter of that date to the defendant. That letter is addressed to Alderman Luke Hogan, Divisional Officer, National Union of Distributive and Allied Workers. The reply received to that letter is dated May 5, 1944.

G On May 18 a writ was issued on behalf of the first six plaintiffs. On June 6, after the writ was issued, the defendant wrote to the Birkenhead Brewery Co. The Birkenhead Brewery Co., as I have indicated before, had taken steps to circularise their managers asking them not to give certain information asked for to the defendants. I think I ought to read that letter. It is dated Apr. 26, 1944. It was sent to the managers of on-licensed premises :

H It has come to my knowledge that circular letters are being sent from a certain quarter to the managers and manageresses of licensed houses in this area. The letter asks for certain information which includes particulars of trade and expenses of the houses concerned. You will realise that you are not at liberty to give information to any person about the trade or expenses of the house of which you are the manager or manageress on behalf of the company, and you should therefore refrain from giving such information in any reply that you may make to the circular letter, whilst the fact that you have received such a letter should be immediately reported to this office.

On June 6, as I have already indicated, the defendant wrote this letter to the Birkenhead Brewery Co :

Our attention has been directed to a communication you have addressed to our

members, informing them that they are not at liberty to give information to any person about trade or expenses of a house and stating that they must inform you if they receive any such request.

The questionnaire issued from this office has been issued to our members and for a purpose which this union regards as essential. We shall continue to issue circulars to our members on any matter we think is of interest or importance to their welfare and I shall be obliged if you will allow this union to conduct its own business in its usual efficient way.

That letter was written after the issue of the writ in these proceedings and clearly contains an intimation by Hogan that he is going to seek the information by means of this questionnaire, as he was doing before the issue of the writ.

The Birkenhead Brewery Co. were not parties to the action originally, but on June 27, 1944, in consequence of the receipt of that letter, they were added to this action as plaintiffs.

I have given the general facts as I find them, and I will now consider the various issues raised before me. The first issue I have to consider is really threefold, and may be looked at as the same question judged from different angles. Was it a term express or implied between each of the plaintiff companies and their respective manager-employees on on-licensed premises that the latter would act in all matters connected with such employment in good faith towards the employer? Was the employee-manager in a fiduciary position and bound not to disclose any information which he obtained as the result of such fiduciary position? Was the employee, in his position, under a duty not to disclose any confidential information received by him as the result of occupying such a position?

So far as the managers employed by the plaintiffs Higsons Brewery, Ltd., and Ind Coope & Allsopp, Ltd., the position is clear. It is provided in the rules which form part of the manager's contract in Higson's case :

Any person other than an official of the company who seeks information regarding the amount of trade or other matter appertaining to the business must be referred to the head office.

In the Ind Coope and Allsopp case :

Under no circumstances should the manager give any information as to trading or conduct of the business to any person without in the first instance obtaining the authority of the company's district manager.

In the case of the remaining five plaintiff companies, as there is no express term in their managers' contracts the question I have to consider is whether a term is to be implied in each manager's contract that the manager should not disclose information obtained by him as a result of his employment.

In my view, it is quite clear that an employee is under an obligation to his employers not to disclose confidential information obtained by him in the course of and as a result of his employment. Different judges, in various cases, have given different grounds for the existence of this obligation. Sometimes it has been said that the obligation was the result of an implied term in the contract of service ; sometimes that it was an obligation arising out of the employee's position or status as such, and sometimes that the obligation arises because of the trust or confidence which an employee owes of necessity to his employer.

Whatever the true ground may be, in my view the obligation exists upon an employee not to disclose such confidential information. In my opinion, such obligation arises from an implied term in the contract of service, but for the purpose of this case it does not matter so long as it is clear that the obligation, apart from any express term, exists, and I think it does.

My grounds for taking this view are the authorities of *Robb v. Green* (1), *Merryweather v. Moore* (2), and *Kirchner & Co. v. Gruban* (3). They are sufficient authority for this proposition.

The second issue I have to consider is whether the information sought by the document was of a character confidential as between each of the plaintiffs and their respective manager-employees. The questionnaire set out in the document contained in all some eighteen questions, which have been numbered in the course of the trial. Many of these questions seek information which is not confidential.

A representative of the directorate of each of the seven plaintiff brewery companies was called to give evidence before me. Some of these witnesses objected to all the questions asked as seeking confidential information, but the majority restricted their objections to questions 6, 7, 8 and 9. Those are the questions seeking information :

(6) If so do you know what wages the regular manager was receiving ? (7) Weekly sales . . . (8) No. of staff. (9) Total wages bill . . .

A In considering what questions asked seek confidential information it seems to me that the terms and conditions of the individual manager's employment are contained in the contract of service made by such manager. Such information is not acquired as a result of the opportunities afforded by his service or acquired in the course of such service. In my view, therefore, the terms and conditions of the particular manager's service cannot be treated as confidential information which the manager is under an obligation not to disclose. Most of the questions asked relate to the terms and conditions of the manager's employment, which, in my opinion, he is quite entitled to disclose to his trade union or to any person to whom he thinks it is to his advantage so to do. Having considered the questions of the questionnaire contained in the document carefully, and considered such questions in the light of the evidence called before me, I have come to the conclusion that the questions the answers to which would disclose confidential information are those contained in questions 7 and 9, that is weekly sales and total wages bill. The information sought in the remaining 16 questions is information which an applicant for the position of manager would seek to know before making his contract of service. I do, however, feel that information as to the weekly sales and the total wages bill for the licensed house of which he is manager is information which the manager could only acquire as a result of and in the course of his service. It is also information of a confidential character which the brewery company employer would not desire to be disclosed. Having come to the conclusion that there was an obligation on the manager-employees not to disclose confidential information acquired by them as a result of and in the course of their service, and that the questionnaire contained in the document requested information of a confidential character in so far as it related to weekly sales and total wages bill of each particular house, it follows, in my view, that if any manager should disclose such information to the defendant the manager would be committing either a breach of his contract with his employer or a breach of the duty he owed to his employer.

The question then arises : Did the defendant offer inducement to the managers to give the information required in 7 and 9, and so break their respective contracts of service ?

F There is no evidence before me of any inducement being offered by the defendant to any manager of any of the plaintiff companies beyond such inducement as may be found in the document. When one reads the letter which is contained in the document, and which precedes the questionnaire, it seems to me that the third paragraph of the letter constitutes a clear inducement to the manager to whom it is addressed to give the information requested. It reads :

G Now that the membership is steadily increasing we are desirous of securing all the information possible so as to enable us to prepare a suggested programme of wages and conditions which will be commensurate with the responsible position held by you. We therefore request that you complete the questionnaire, contents of which will be strictly confidential, and return it to the above address.

H In my view, the meaning of the paragraph is that if you, the manager, give the information requested in the questionnaire, I, the defendant, will be enabled to prepare a programme of wages and conditions which will be commensurate with the responsible position of manager held by you, and much better for you than your present wages and conditions, and by reason of our steadily increasing membership we will be able to obtain from your employers their acceptance of this programme. This, it seems to me, is a clear inducement to the manager to whom it is addressed to give the information requested, and in so far as it involves the giving of confidential information, an inducement to the manager to commit a breach of his contract of service with his employers or a breach of his duty.

The next issue with which I propose to deal, although it may not be necessary for me to decide this issue on one view of the authorities, is the question of how far each of the plaintiff companies has suffered or may suffer damage. None of the plaintiffs has proved, or has sought to prove, that it has so far suffered any special damage. Before a common law action will lie against a third person for inducing a breach of contract by a party to a contract at the suit of the other party to the contract there must be some damage to support the action. Where a declaration is claimed that an attempt to induce a breach of contract is wrongful or unlawful, or where an injunction is claimed to restrain such attempt, the plaintiff must satisfy the court that the attempt, if persisted in, will result in an infringement of the plaintiff's common law rights, and, in particular, will cause damage to the plaintiff. A

The question of what proof of damage must be given was considered in *Exchange Telegraph Co. v. Gregory & Co.* (4). I need not set out all the facts in that case. I respectfully adopt the view of LORD ESHER, M.R., in that case, when he stated in his judgment, at p. 153 : B

Though I think there must be some damage to support an action for the infringement of the plaintiff's common law right, it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiff, though proof of specific damage be not given.

I am quite satisfied in this case that the information as to takings and total wages bill was sought by the defendant to be used by him to compel the plaintiff brewery companies to pay more for the services of their managers. The information obtained by the questionnaire in the document, according to the minute of the Licensed Trade Committee meeting of Mar. 12, 1944, was to be used as evidence before the commission under the Catering Wages Act, 1943, to seek to remedy the varying conditions in the licensing trade. According to my reading of the letter contained in the document the information was required to improve the wages and conditions of the managers. Any improvement of the wages and conditions of the managers could only be achieved at the expense of the brewery company employer, and at his expense and to his detriment. If the defendant had succeeded in obtaining the information as to takings and total wages bills I am satisfied that such information, when obtained by the defendant, would be used by him, and would be likely to damage the plaintiffs and each of them. It is not the information obtained which is the cause of damage to a party to the contract, but it is the use of the information when obtained which causes the damage. I am of opinion, therefore, although no damage has been proved to have been sustained so far by any of the plaintiffs, they are likely to sustain damage and have their common law rights infringed if the defendant persists in, and should be successful in, his efforts to obtain the confidential information he seeks from the manager-employees of the plaintiffs. C D E F

The next issue I have to consider is whether the defendant is likely to continue his efforts to obtain the confidential information requested in questions 7 and 9 of the questionnaire.

In the course of the early proceedings in this case the plaintiffs applied for an interlocutory injunction. Upon this application the defendant gave an undertaking upon the usual terms not to persist in his efforts to obtain confidential information from the managers employed by any of the plaintiffs. If it had not been for this undertaking given to avoid an interim injunction it is quite clear that the defendant would certainly have made further efforts to obtain such confidential information requested in the questionnaire. One has only to read the letter from the Birkenhead Brewery Co., Ltd., to its manager-employees of Apr. 26, 1944, and defendant's letter to the Birkenhead Brewery Co., Ltd., of June 6, 1944, to realise this. G H

The defendant when giving evidence at the trial said, in terms, that apart from his undertaking he would certainly have made further efforts to obtain the information requested in the questionnaire. He stated that he regarded the information a manager had as to the takings of his house as confidential as between employer and employee. The defendant further said that although he agreed the manager should not disclose such information to a third person he ought to do so to the defendant as a trade union official. I am satisfied that the defendant intended at the date of the issue of the writ herein to continue.

his efforts to obtain confidential information from the managers of the plaintiff companies.

On behalf of the defendant it was next contended that the defendant was justified in inducing the managers to commit a breach of their contracts. It was said that in doing so the defendant was acting in the interest of the managers, in the public interest, and in pursuance of a duty which he owed to the members of his union. In support of this contention I was referred by counsel for the defendant to the decision of *Brimelow v. Casson* (5). In answer to this, counsel for the plaintiffs relied upon the decisions in *Camden Nominees, Ltd. v. Foncey* (6), and *Smithies v. The National Association of Operative Plasterers* (7).

Having considered these authorities, it is my view that unless the defendant was under a duty to take action to procure a breach of contract his action cannot be justified. I can see nothing in the facts of this case that gave rise to any such duty on the part of the defendant, and this plea of justification fails.

The next question I have to decide is whether the document was sent out by the defendant, or on his behalf, in contemplation or furtherance of a trade dispute. Long and detailed particulars were given by the defendant as to trade disputes alleged to be existing or in contemplation. I do not propose to go through these particulars or the evidence relating to them, as, in my opinion, they do not disclose any dispute either in being or imminent. The document was sent out to managers of brewery companies. No demand has been made for either better conditions or increased wages by any manager to any of the plaintiff brewery companies. No such demands had been made by the defendant, or his union, on behalf of such managers. The defendant in his evidence before me said he sent out the document containing the questionnaire to find out whether there was a trade dispute, and to find out whether the conditions and wages were satisfactory. In my opinion, a dispute cannot exist unless there is a difference of opinion between two parties as to some matter. There is no evidence before me that any dispute existed. The highest that it can be put on the evidence in favour of the defendant is that the document was sent out to obtain information which, after consideration of the information obtained, might lead to a request which, if not granted, might result in a dispute.

In *Conway v. Wade* (8), LORD LOREBURN, L.C., at p. 512, dealt with the meaning of the words "an act done in contemplation or furtherance of a trade dispute." In his speech he said :

I think they mean that either a dispute is imminent and the act is done in expectation of and with a view to it, or that the dispute is already existing, and the act is done in support of one side to it. In either case the act must be genuinely done as described and the dispute must be a real thing imminent or existing.

There was no dispute when the document was sent out which was a real thing, either imminent or existing. There was a possibility of a dispute at some future time, but no certainty that such a dispute would arise.

In my view there was no dispute existing at the time this questionnaire was sent and the result is that the protection given by sect. 3 of the Act does not help the defendant.

Counsel for the defendant took this further point, that whatever may be the position of the three brewery companies, some of whose managers did answer the questionnaire, the four remaining plaintiffs, none of whose managers had returned the questionnaire, could have claimed either for a declaration or an injunction.

In my view, this is not correct. If a defendant attempts to induce a servant to disclose confidential information in breach of his contract with or his duty to his employer, and the defendant is determined to continue such attempts which, if successful, will result in damage to the employer, I take the view that, even although such attempts have for the time being proved unsuccessful, the employer is entitled to a declaration that such action on the part of the defendant is wrongful. In a proper case the employer is also entitled to an injunction to restrain the defendant from continuing his efforts to obtain such information and so infringing the plaintiff's common law rights. In my view the plaintiffs are entitled to a declaration against the defendant. The declaration must be limited. The declaration will be that the defendant was not entitled to seek the information requested in questions 7 and 9 of the questionnaire, that is, the details of the weekly sales or of the total wages bill.

With regard to the claim for an injunction, the injunction is a discretionary remedy. Although I am satisfied the defendant intended to persist in his efforts to obtain this confidential information, I am also satisfied that he did so in the belief, at that time, that he was rightfully entitled to claim this information. In the circumstances of this case, now the court has held it was wrongful on his part to try and obtain the information, I do not propose to grant an injunction immediately. But I will give the plaintiffs liberty to apply for an injunction if it should be necessary as the result of any further action on the part of the defendant. A

Judgment for the plaintiffs in the terms of an agreed declaration.

Solicitors: *Edwin Berry & Co.*, Liverpool (for the plaintiffs); *John A. Behn, Twyford & Reece*, Liverpool (for the defendant).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

PERKS v. PERKS. B

[COURT OF APPEAL (Lord Greene, M.R., du Parc and Morton, L.JJ.), October 12, 1945.]

Husband and Wife—Summary jurisdiction—Maintenance order—Husband's application for discharge of order—Magistrate certifying that application "would be more conveniently dealt with by the High Court"—Jurisdiction of High Court with regard to maintenance orders—No original jurisdiction of High Court—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 4, 7, 10, 11. C

Maintenance, when not ancillary to matrimonial relief, being a matter for the court of summary jurisdiction, the High Court can only deal with it on appeal under the Summary Jurisdiction (Married Women) Act, 1895, s. 11. There is no original jurisdiction in the High Court in a case of pure maintenance and sect. 10 of the Act did not vest a new jurisdiction in the High Court, which is empowered to grant maintenance orders only as ancillary to some substantive relief sought. The words in sect. 10 "matters in question . . . more conveniently dealt with by the High Court" mean such matters which, independently of the section, could have been brought before the High Court. The section, therefore, contemplates a case of concurrent jurisdiction and of alternative *fora* only where such concurrent jurisdiction originally existed, i.e., in separation orders and orders for custody of children. D E

Decision of DENNING, J. ([1945] 2 All E.R. 491) reversed on other grounds.

[EDITORIAL NOTE.] The Court of Appeal here reverse the court below on the ground of want of jurisdiction. The Summary Jurisdiction (Married Women) Act, 1895, s. 10, has not previously been the subject of judicial interpretation, and it is held that that section must be confined to matters over which there is concurrent jurisdiction. Before the passing of the 1895 Act even a summary court had no jurisdiction to make an order for maintenance alone, as was held in *Woodhead v. Woodhead* ([1895] P. 343), and matters of pure maintenance are generally more suitable for determination by a summary court. It is, therefore, most improbable that the legislature intended by the words "more conveniently dealt with" to confer upon the High Court a jurisdiction which would be unsuitable and which it did not otherwise possess. F

The whole of the proceedings were misconceived, but LORD GREENE, M.R., points out that even if the High Court had had jurisdiction, it was incorrect to proceed by originating summons, since no rules of the Divorce Division existed dealing with the issue of a summons in such a case. G

AS TO CASES FIT FOR THE HIGH COURT, see HALSBURY, Hailsham Edn., Vol. 10 pp. 851, 852, para. 1362; and FOR CASES, see DIGEST, Vol. 27, pp. 554, 555, Nos. 6081-6088.]

APPEAL by the wife from an order of DENNING, J., dated July 3, 1945, and reported ([1945] 2 All E.R. 491). On September 24, 1943, the wife had been granted a separation order by a court of summary jurisdiction against her husband on the ground of persistent cruelty, and an order for maintenance. The husband appealed to the Divisional Court and the order for maintenance was varied, while that part of the order directing separation was struck out. On Apr. 5, 1944, the husband applied to a court of summary jurisdiction to have the order for maintenance discharged because of his wife's refusal to accept his *bona fide* offer to return to him. The magistrate took the view that the matter could be more conveniently dealt with by the High Court and issued a certificate H

to that effect. On Feb. 28, 1945, an *ex parte* application was made by the husband and the parties were summoned to show cause why directions should not be given to proceed under the Summary Jurisdiction (Married Women) Act, 1895, s. 10. Pursuant to this application, DENNING, J., made an order directing, *inter alia*, that an originating summons in the form in the schedule to the order be issued and the matter be heard in open court. This summons was duly issued and, at the hearing, the maintenance order was discharged. The wife

A appealed. The facts are fully set out in the judgment of LORD GREENE, M.R. *H. Glyn-Jones, K.C.*, and *D. A. Fairweather* for the appellant wife. *P. R. Hollins* and *D. Loudoun* for the respondent husband.

LORD GREENE, M.R. : This appeal raises a rather curious question as to the jurisdiction of the High Court under the Summary Jurisdiction (Married Women) Act, 1895, s. 10.

B The short facts are as follows. On Sept. 24, 1943, the wife obtained from the court of summary jurisdiction an order that she be no longer bound to cohabit with her husband, an order conferring the legal custody of the infant son upon her, and an order for payment of the weekly sum of 30s. for her maintenance, and 10s. for the maintenance of the infant until he should attain the age of 16. The ground alleged by her, and found to be substantiated by the magistrates, was that the husband had been guilty of persistent cruelty and had wilfully

C neglected to provide reasonable maintenance for her and her infant child. The husband appealed to the High Court pursuant to sect. 11 of the 1895 Act, and the Divisional Court of the Probate, Divorce and Admiralty Division, varied, by consent, the order of the magistrates. They struck out the part of the order which directed separation of the spouses. They also varied the amount of maintenance (which apparently was not done by virtue of any consent) by reducing the 30s. a week to 20s. a week. The order for custody of the infant

D was not affected. The position, therefore, was this. After that order by the Divisional Court, there was on foot an order for maintenance, and an order for the custody of the infant. There was not on foot any order for separation. On Apr. 5, 1944, the husband applied to the court of summary jurisdiction by a summons in which he alleged that since the making of the order for maintenance, he, the husband, had made a *bona fide* and genuine offer to provide a home for his wife and to resume cohabitation, which offer she had unreasonably

E refused. He asked that the order should be discharged, that is, the order for the maintenance of the wife and the maintenance of the child. Whether it was an oversight or not, or whether it was thought immaterial, he did not ask for the order for the custody of the child to be discharged.

At this point it is necessary to look at one or two sections of the 1895 Act in order to understand how it came about that the stipendiary magistrate took the action that he did. Under sect. 4 of the Act, a married woman, in

F certain circumstances there stated, may apply for an order or orders to a court of summary jurisdiction. The orders which the court is empowered to make are a non-cohabitation order, which has the effect of a decree of judicial separation on the ground of cruelty, an order relating to the custody of children, an order for maintenance of the wife up to a sum not exceeding £2, and an order for costs. Those are the orders which a court of summary jurisdiction was

G empowered by that Act to make. The circumstances in which a wife could obtain such an order are set out in sect. 4, and include persistent cruelty or wilful neglect to provide reasonable maintenance.

Under sect. 7 of the Act, a court of summary jurisdiction, on the application of either party, is empowered to alter, vary or discharge its previous order. It was under that section that the husband in this case invited the court of summary jurisdiction to discharge the maintenance order which had been made

H in Sept., 1943, as varied by the order of the Divisional Court. The stipendiary magistrate had to consider sect. 10 of the Act, which says this :

If in the opinion of the court of summary jurisdiction the matters in question between the parties or any of them would be more conveniently dealt with by the High Court, the court of summary jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the court of summary jurisdiction . . .

Then there is a proviso which I do not think really helps us.

The stipendiary magistrate took the view that the husband's application could more conveniently be dealt with by the High Court. The question here

really is whether he was entitled to take that view, having regard to the nature of the relief that was being asked. That is the real point at issue on this appeal, but, before I deal with it, I will proceed with the history of the case. The husband, in order to bring himself before the High Court, issued, on Feb. 28, 1945, a document in the form of an *ex parte* summons, purporting to be in a cause entitled *Stanley John Perks v. Beryl Perks*. But there was no such cause, and, therefore, there was no foundation on which an *ex parte* summons of this kind could possibly be set. In my view, the procedure was wrong from beginning to end. A

The relief asked for was this. The parties were summoned to show cause why directions should not be given how to proceed under sect. 10. That really was inviting the judge to express an opinion as to what the proper procedure of the applicant should be. On the summons an order was made by DENNING, J., which, with all respect, I cannot see that he had any jurisdiction at all to make. But an order was actually drawn up and dated Mar. 12, 1945, and duly sealed with the seal of the court. It purports to give the following directions : (i) that a certificate signed by the stipendiary magistrate was to be lodged in the Divorce Registry : (ii) an originating summons in the form in the schedule to the order was to be issued out of the Divorce Registry : (iii) the wife was not to be required to enter an appearance, and the hearing was to be with witnesses giving evidence orally in open court. As I have said, with all respect to the judge, he had no jurisdiction to make any such order ; but, relying upon it, the husband, having obtained a certificate from the stipendiary magistrate, issued what is called an originating summons in order to get before the court his application for discharge of the maintenance order. This summons recites the maintenance order, the husband's application to have it discharged, the refusal of the stipendiary magistrate to deal with it, and the direction given by DENNING, J.. Then it proceeds to require the attendance of the wife to answer the application, and to show cause why the order for the payment of 30s. a week should not be discharged. I cannot find any ground, even if the court had had jurisdiction (which is the point here) to hear the application, for making the application by originating summons. An originating summons is the creature of rules. It is only where the rules of the relevant Division provide that proceedings may be initiated by originating summons that an originating summons can be issued. There is no such provision in relation to the alleged jurisdiction in this case. However, as I have formed the view that there was no jurisdiction to entertain the application at all, the question what would have been the right form of getting the matter before the court does not arise. C D E

The substantial question is, has the High Court, by virtue of the action of the stipendiary magistrate, power to entertain an application for the discharge of an existing order for maintenance ? The existing order, so far as is relevant for the purposes of this application, is an order for maintenance and nothing else. There is not on foot any order relating to matrimonial relief in the shape of judicial separation, and the question of the custody of the infant is not raised. The husband is, therefore, inviting the High Court to deal with a pure question of maintenance, and nothing else. He says that the stipendiary magistrate under sect. 10 of the Act had power to decline to make an order in respect of maintenance, on the ground that he thought it would be more convenient if dealt with by the High Court. If the husband's argument is right, it means that sect. 10 has conferred upon the High Court a jurisdiction which is to be found nowhere else in respect of a pure question of maintenance not associated with any matrimonial relief at all. The position (which, I understand, counsel on both sides agree is a correct one) would appear to be this with regard to maintenance. Maintenance orders can, of course, be made by the High Court, but only as ancillary to some substantive relief. Pure maintenance, that is to say, maintenance granted merely because the husband is not maintaining his wife, is a matter for courts of summary jurisdiction, and the only jurisdiction of the High Court in such a case is on appeal under sect. 11 from a court of summary jurisdiction. F G H

It is said that, quite apart from an appeal, sect. 10 has the effect of giving to the High Court an original jurisdiction in the matter of maintenance. It would be curious if that were really the case ; but, when I come to look at the

language of sect. 10 in its context, it appears to me quite clear that it is not the case. The matter on which the court of summary jurisdiction is to form an opinion under sect. 10 is whether or not the matters in question between the parties could be more conveniently dealt with by the High Court. Those words "more conveniently dealt with" alone clearly suggest, to my mind, that the legislature was considering a case of concurrent jurisdiction and the question which was the more convenient *forum*. With regard to the more important matters there is concurrent jurisdiction, *i.e.*, separation orders and custody of children. Quite clearly, if the wife is asking for relief under either of those heads, that is a matter in respect of which the High Court has jurisdiction. This statutory jurisdiction conferred upon the magistrates is a collateral jurisdiction, and, therefore, the question becomes one of which is the more convenient *forum*. The whole language of the section appears to me, as I say, to be contemplating a case of alternative *fora*, and the words "matters in question" mean the matters in question in so far as those matters could independently of this section, be brought before the High Court. A pure question of maintenance by itself never could be brought before the High Court by original application. The result, in my opinion, is that it is not correct to say that sect. 10 by this obscure language and in some curiously indirect way has succeeded in vesting the High Court with a jurisdiction which it never possessed otherwise. It seems to me that very much clearer language would be necessary because the result would be this. Whenever the court of summary jurisdiction thought that a pure question of maintenance could be more conveniently dealt with by the High Court, it could take steps to see that the High Court would have to deal with it. Anything more inconvenient I cannot imagine because questions of maintenance which are brought before stipendiary magistrates are, in general, entirely unsuitable for determination by the High Court. When the question of maintenance is ancillary to some matrimonial relief, the position is entirely different, but pure maintenance is essentially a matter for the court of summary jurisdiction. That is what I should have thought would have been the approach of the legislature, and that, it seems to me, is the effect of the language which is used.

In the result, the order of DENNING, J., on the originating summons cannot stand. The order discharged the order of Sept. 24—I suppose that means the order as varied by the Divisional Court—it does not say so, but that undoubtedly is what it means—and the husband had to pay to the wife her taxed costs, leave to appeal being given. In my opinion, the judge had no jurisdiction to discharge the order, and the matter ought to have been dealt with by the stipendiary magistrate. The stipendiary magistrate had no power to issue his so-called certificate refusing to entertain the application. He ought to have entertained it and decided it. If either party had been aggrieved by his decision, there was a right of appeal under sect. 11. That is the proper procedure.

DU PARCQ, L.J.: I agree. Sect. 10 of the Summary Jurisdiction Act refers to matters which can be dealt with, and more conveniently be dealt with, in the High Court. In my opinion, it confers no new jurisdiction on the High Court. If there is no existing jurisdiction in the High Court to deal with the matters in question, then it is wrong to say that those matters may more conveniently be dealt with by the High Court. It is to be observed that the High Court, when dealing with proceedings in its jurisdiction, may find that it has to deal with the same subject-matter which the magistrates have refused to deal with, on the ground that it would be more conveniently dealt with in the High Court, and it may not share that view. There is a proviso then that the court of summary jurisdiction may be directed to "re-hear and determine the same." But, for the reasons given by my Lord, I agree that the stipendiary magistrate here was in error, and that DENNING, J., was wrong in considering that he had jurisdiction to entertain this matter.

MORTON, L.J.: I agree.

Appeal allowed with costs. Order of DENNING, J., set aside.

Solicitors: *Amery-Parkes & Co.*, agents for *Kendrick Williams & Feibusch*, Wolverhampton (for the appellant); *Stafford Clark & Co.*, agents for *O. L. Bergendorff*, Dudley (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

JAMES v. AMALGAMATED ANTHRACITE COLLIERIES, LTD.
 [COURT OF APPEAL (Scott, MacKinnon and Lawrence, L.JJ.), July 27, 1945.]

Workmen's Compensation—Partial incapacity—Claims as for total incapacity—Workman never unfit for any kind of work—Necessity for previous total incapacity—Workmen's Compensation Act, 1925 (c. 84), s. 9 (4)—Workmen's Compensation Act, 1931 (c. 18), s. 1—Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943 (S.R. & O., 1943, No. 885), art. 9 (2).

The respondent workman, a miner, had been, until Feb., 1944, in the employ of the appellants as a collier and repairer. Thereafter he worked as a screenman on the surface. On June 15, 1944, he was examined by the Medical Board and was certified, on June 24, 1944, as suffering from pneumoconiosis to such a degree as to make it dangerous for him to continue to work in the coal industry. Consequently, he was suspended from work from July 8, 1944, but certified fit for light work. His pre-accident wages having been £4 6s. 10d. per week and his earning capacity having been assessed at £4 1s. 7d., he was paid compensation at the rate of 2s. 7½d. per week. On Jan. 23, 1945, the respondent filed a request for arbitration claiming that his partial incapacity should be treated as total incapacity within the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Workmen's Compensation Act, 1931, s. 1. The county court judge made an award in favour of the respondent. On appeal, it was contended for the appellants that the injury not having caused total incapacity, and there having been no evidence before the county court judge that the respondent had "so far recovered from the injury as to be fit for employment of a certain kind," the said sections of the 1925 and 1931 Acts did not apply to the respondent's case:—

HELD: in order to come within the meaning of the subsection, the injury suffered must be one which caused total incapacity. Therefore, a workman could only claim the benefit of the subsection if he had been rendered unfit for any kind of work and had recovered from such unfitness so far as to be fit for some work.

Williams v. New British Rhondda Colliery Co., Ltd. (1) distinguished.

[EDITORIAL NOTE.] It is here held that the provision of the Workmen's Compensation Act whereby partial incapacity may be treated as total does not apply unless there has been at some time total incapacity resulting from injury, followed by recovery so as to be fit for some work. The medical certificate was here given under the Coal Mining Industry (Pneumoconiosis) Scheme, which only applies to partial incapacity, and it is held that this cannot be treated as total.

AS TO PARTIAL INCAPACITY TREATED AS TOTAL INCAPACITY, see HALSBURY, Halsham Edn., Vol. 34, pp. 926-928, paras. 1271, 1272; and FOR CASES, see DIGEST, Vol. 34, pp. 401-406, Nos. 3280-3306.

See also WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., pp. 317-337.]

Case referred to:

*(1) *Williams v. New British Rhondda Colliery Co., Ltd.* (1932), 25 B.W.C.C. 75; Digest Supp.

APPEAL by the employers from an award of His Honour JUDGE TEMPLE MORRIS, K.C., made at Ammanford County Court and dated May 2, 1945, whereby the workman was awarded workmen's compensation under the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Workmen's Compensation Act, 1931, s. 1, on the basis of total incapacity. The facts are sufficiently set out in the judgment of the court, delivered by LAWRENCE, L.J.

F. W. Beney, K.C., and G. Owen George for the appellants.

Gilbert Paull, K.C., and Gerwyn P. Thomas for the respondent.

LAWRENCE, L.J. [delivering the judgment of the court]: The respondent was a miner who had worked for the appellants for many years up to Feb., 1944, as a collier and repairer, and thereafter up to June 15, 1944, as a screenman on the surface. On June 15, 1944, a medical board examined him under the Pneumoconiosis Scheme, 1943, and on June 24, 1944, certified that, though not totally disabled, he was suffering from pneumoconiosis to such a degree as to make it dangerous for him to continue to work in the coal industry, and suspended him from July 8, 1944, and further certified that he was fit for light work. The respondent's pre-accident wages having been £4 6s. 10d. per week

and his earning capacity assessed at £4 1s. 7d., he was paid compensation at the rate of 2s. 7½d. per week.

On Jan. 23, 1945, the respondent filed a request for arbitration claiming compensation for total incapacity, and the appellants by their answer, whilst denying all liability, said that there were no grounds upon which the respondent's partial incapacity could be deemed to be total incapacity under the Workmen's Compensation Act, 1931.

A The question before us and before the county court judge turns upon the construction of the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Workmen's Compensation Act, 1931, s. 1, which is as follows :

If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the county court judge either (i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident ; or (ii) that his failure to obtain employment is a consequence, wholly or mainly, of the injury, the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions as may be provided by the order, without prejudice, however, to the right of review conferred by this Act . . .

B On behalf of the appellants it is contended that this subsection has no application to an injury which has never caused total incapacity and that in any event there was no evidence before the county court judge that the respondent had so far recovered from the injury as to be fit for employment of a certain kind within the meaning of the subsection.

C On behalf of the respondent it is contended that *Williams v. New British Rhondda Colliery Co.* (1) establishes that the subsection applies even in cases of partial incapacity and that the respondent's evidence at the hearing that he now felt better entitled the judge to find that he had recovered within the meaning of the subsection.

D We are of opinion that the contention of the appellants is correct. The words of the subsection seem to us to imply that the workman who is entitled to claim the benefit of the subsection must have been unfit for any kind of work and must have recovered from such unfitness so far as to be fit for some work. Here the workman was never unfit for any kind of work but was always fit for light work. It may be that the subsection does not operate quite fairly as between a man whose injury has totally incapacitated him and a man whose injury partially incapacitates him where both would, but for their injuries, be able to obtain the same class of employment as before the accident ; but the words of the subsection seem to us to be clear, and the contrary view would lead to the anomaly that a man who was partially incapacitated, and therefore only entitled to the appropriate compensation, could, on some slight recovery, obtain full compensation owing to that recovery, whilst a man whose condition remained stationary could not.

E We do not think that *Williams v. New British Rhondda Colliery Co.* (1) is an authority in favour of the respondent for it does not appear, either from the facts or the judgment, whether the workman in that case had been totally incapacitated or not. The certificate of the certifying surgeon in that case apparently certified that the workman was "thereby disabled from earning full wages," leaving it uncertain whether the incapacity was total or partial, whereas in the present case the certificate of the medical board was given under art. 9 (2) of the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, which only applies to partial incapacity, and the certificate expressly stated that the workman was fit for light work. It may very well be that the Court of Appeal in that case assumed that the medical referee's certificate of Sept. 11, 1931, was evidence of a recovery from total incapacity which had commenced on Dec. 28, 1930, as established by the certifying surgeon's certificate of Aug., 1931. However this may be, the point as to the true construction of sect. 9 (4) was not taken or dealt with in the judgment.

H Our decision on the first question renders it unnecessary for us to decide the question whether there was any evidence of recovery within the meaning of the subsection.

The appeal will be allowed with costs here and below.

Appeal allowed with costs.

Solicitors: *Botterell & Roche*, agents for *Llewellyn & Hann*, Cardiff (for the appellants); *John T. Lewis & Woods*, agents for *Randell, Saunders & Randell*, Swansea (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re THOMAS, PUBLIC TRUSTEE v. FALCONER.

[CHANCERY DIVISION (Uthwatt, J.), June 5, July 27, 1945.]

Executors—Legacies—Abatement—Annuity—Direction to appropriate fund—Annuity charged on income and capital of appropriated fund—Rights of annuitant and those entitled to fund on cesser of annuity—Value of annuity fund to enter into abatement computation—Annuitant not entitled to be paid capital sum in respect of annuity.

By her will the testatrix gave a certain annuity free of duty, income tax and all charges of the Public Trustee, who was executor and trustee of the will. She authorised her trustee to appropriate a fund sufficient by its income to satisfy the annuity in exoneration of the rest of her estate and she provided that the capital of the fund might be resorted to if at any time the income was insufficient to pay the annuity. On the death of the annuitant, there was a gift over, free of duty, of the capital of the appropriated fund. The testatrix also gave certain pecuniary legacies free of duty. The estate being insufficient to pay in full the legacies, arrears of the annuity and either to set up the annuity fund or to pay the actuarial value of the annuity, the court was asked for directions as to the proper administration of the estate. The principal question at issue was whether an abated fund ought to be set aside or whether the annuitant was entitled to be paid the abated value of the annuity :—

HELD : (i) upon the proper construction of the will, although the provision as to setting aside the annuity fund was in terms a mere power, those interested in the capital of the fund after the cesser of the annuity had rights which could not be defeated by the failure of the trustee to set aside a fund and, if the trustee failed to set aside a fund, those persons would have a claim against residue for the appropriate amount. The setting aside of the fund was not in this case merely ancillary to the gift of the annuity.

(ii) this being the proper construction of the will, the setting aside of a fund must enter into the abatement computation and it would not be proper to value the annuity and pay the value, abated if necessary, to the annuitant.

Re Nicholson (1) followed.

Re Farmer (2) and *Re Wilson* (3) not followed.

(iii) to ascertain the amount of the annuity fund, the capital sum should be ascertained on the basis of an investment in Consols (brokerage being disregarded).

Re Hollins (4) followed.

(iv) the abated annuity fund should be first applied in paying to the annuitant any arrears of the annuity not already provided for, and the balance in paying instalments of the annuity in full as they accrued due. (*Wright v. Callender* (5) applied). Those entitled to the corpus of the fund after the cesser of the annuity could take only what remained after the annuity had been satisfied in full.

(v) in this case valuation of the annuity would impose a charge on the abated annuity fund for an amount different from that intended by the testatrix. The rule as to valuation is not a rule of law and should be applied only where circumstances require it. The fact that income tax

was (for the time being, at any rate) leviable at a high rate and that this was a case where, under the rule in *Re Pettit* (8), the annuitant would be bound to account for tax recovered, were further reasons against valuation and paying the amount of the valuation to the annuitant.

Re Hill (7) applied.

[EDITORIAL NOTE. There is a conflict of authority upon the course to be adopted when an estate is insufficient to pay legacies, and either the setting up of an annuity fund or payment of the actuarial value of the annuity. In *Re Nicholson* (1) it was held that for the purposes of an abatement computation a value should be attributed to the annuity fund, while in *Re Farmer* (2) and *Re Wilson* (3) the annuitant was paid the actuarial value of the annuity. UTHWATT, J., here prefers the decision in *Re Nicholson* (1) and holds that the sum allocated to the annuity fund must be employed in paying instalments of the annuity as they fall due, those interested in the corpus taking nothing until the annuitant has been completely satisfied.

AS TO ABATEMENT OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669, and Supplement; and FOR CASES, see DIGEST, Vol. 23, pp. 420-423, Nos. 4913-4937, and Supplement.]

Cases referred to:

- * (1) *Re Nicholson, Chadwyck-Healey v. Crawford*, [1938] 3 All E.R. 270; Digest Supp.
- * (2) *Re Farmer, Nightingale v. Whybrow*, [1939] Ch. 573; [1939] 1 All E.R. 319; Digest Supp.; 108 L.J.Ch. 197; 160 L.T. 59.
- * (3) *Re Wilson, Hurlley v. Marie Curie Hospital*, [1940] Ch. 966; [1940] 4 All E.R. 57; 109 L.J.Ch. 413.
- * (4) *Re Hollins, Hollins v. Hollins*, [1918] 1 Ch. 503; 39 Digest 126, 188; 87 L.J.Ch. 326; 118 L.T. 672.
- * (5) *Wright v. Callender* (1852), 2 De G.M. & G. 652; 23 Digest 421, 4922; 21 L.J.Ch. 787; 19 L.T.O.S. 308.
- * (6) *Re Bradberry, National Provincial Bank, Ltd. v. Bradberry, Re Fry, Tasker v. Gulliford*, [1943] Ch. 35; [1942] 2 All E.R. 629; 112 L.J.Ch. 49; 167 L.T. 396.
- * (7) *Re Hill, Westminster Bank, Ltd. v. Wilson*, [1944] Ch. 270; [1944] 1 All E.R. 502; 113 L.J.Ch. 241; 170 L.T. 317.
- * (8) *Re Pettit, Le Fevre v. Pettit*, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491.

ADJOURNED SUMMONS asking for the directions of the court as to the proper administration of the estate of the testatrix. The facts and the relevant clauses of the will are fully set out in the judgment.

Hubert A. Rose for the Public Trustee.

Geoffrey Cross for R. M. Falconer, the annuitant.

I. J. Lindner for I. M. Walker (interested in the capital of the annuity fund after the cesser of the annuity).

H. E. Salt for M. M. Walker (interested in the capital of the annuity fund after the cesser of the annuity) and for the Public Trustee of Australia.

Cur. adv. vult.

UTHWATT, J.: By her will dated July 21, 1937, the testatrix, who died on Jan. 31, 1940, appointed the Public Trustee to be the sole executor and trustee thereof and provided as follows:

I bequeath (free of duty) to my niece Mrs. Ruby May Falconer . . . an annuity of £104 free of income tax and all charges of the Public Trustee and I direct my trustee to pay such annuity (free of income tax and all charges as aforesaid) to the said Ruby May Falconer by equal quarterly payments . . . And I authorise my trustee to provide for the payment of such annuity by setting apart and appropriating in respect of such annuity such part of my estate as shall in his opinion be sufficient by the income thereof to pay such annuity And I declare that when such appropriation shall have been made the said annuity shall be wholly charged on the investments so appropriated (hereinafter referred to as "the annuity fund") in exoneration of the rest of my estate but that the capital of the annuity fund may be resorted to in case at any time the income thereof is insufficient to pay such annuity and upon the death of the said Ruby May Falconer I bequeath (free of duty) the said annuity fund (that is to say the capital of the said fund and not by way of annuity) to my niece Mrs. Irene Marie Walker . . . absolutely but if the said Irene Marie Walker predecease the said Ruby May Falconer then on the death of the said Ruby May Falconer I direct that the said annuity of £104 shall be accumulated and the accumulations and the capital of the annuity fund paid to Marie Margaret Walker . . . the daughter of the said Irene Marie Walker on her attaining the age of 21 years,

The testatrix then, in addition to various specific legacies, bequeathed free of duty a legacy of £700 to Mrs. Walker, two legacies of £3 to friends and the residue of her estate to Mrs. Walker. The net estate of the testatrix available to meet the pecuniary bequests is now of the value of approximately £3,500.

Mrs. Falconer was born in Sept. 1885, and is resident in Australia. The provisions of the Finance Act, 1941, s. 25, apply to her annuity. The result is that as from Apr. 6, 1941, the annuity is reduced to £71 14s. 6d. tax free and taking into account the necessity of providing for the Public Trustee's income fee, the gross amount of the annuity, assuming tax to be 10s. in the £, is £143 10s. Mrs. Falconer's expectation of life is now about 17 years. The sum now required to purchase an annuity of £143 10s. gross for the residue of Mrs. Falconer's life is £2,242 3s. 9d. The sum required to set up an annuity fund sufficient by its income to produce £143 10s. is approximately £4,122, on the assumption that the annuity fund is to be composed of Consols purchasable at £80. The arrears of the annuity to date are approximately £520.

It is clear that full effect cannot be given to the provisions of the will. The available funds do not permit payment in full of the legacies, arrears of the annuity and either the setting up of the annuity fund or payment of the actuarial value of the annuity. Abatement must take place. If the abatement computation takes the form that there enter into it legacies, arrears to date of the annuity and the annuity fund, the abated annuity fund would be roughly £2,700 (subject to legacy duty). If the balance of that sum remaining (after meeting such of the arrears of the annuity to date as are not satisfied out of the sum attributed to those arrears on the abatement computation) were invested in funds at 80 and Consols were at all times realisable at 80, the annuity could be met in full for more than the actuarial life of the annuitant. On the other hand, if the actuarial value of the annuity enters into the computation in lieu of the annuity fund and no regard is paid in the abatement computation to the interests of those interested therein subject to the rights of the annuity, the sum attributed to the annuity is short of the actuarial value by something of the order of 10 per cent.

The first question raised is whether the sum required to set up the annuity fund is to enter into the abatement computation at all. Upon the construction of the will, the provision as to the setting up of the annuity fund is no doubt in terms only a power and the annuity fund finds its origin and amount in the annuity given to Mrs. Falconer. But in light of the bequest of the capital of the annuity fund—itself given free of duty—it is to my mind clear that a non-exercise of the power would not prejudice those to whom the capital was expressed to be bequeathed and that, if the power were not in fact exercised, those persons would have had against residue a claim for the appropriate amount. And I see no reason for accepting the view that, because the amount of assets precludes an exercise of the power, the bequest of the annuity fund fails. The provision as to setting up the fund is not merely ancillary to the gift of the annuity. The value of the annuity fund must, in my view, enter into the computation. Upon this point there is a conflict of authority. In *Re Nicholson* (1) CROSSMAN, J., for purposes of the abatement computation attributed a value to the annuity fund. With his decision on this point I agree. FARWELL, J., in *Re Farmer* (2) and BENNETT, J., in *Re Wilson* (3) did not do so. In *Re Farmer* (2) the rights of the persons interested in the corpus of the annuity fund were treated as postponed not merely to the annuity—which clearly is right—but to the other legacies—a course for which no reason was given. Those legacies were paid in full and the annuitant was paid in full the actuarial value of the annuity. The balance—obviously less than the immediate value of the annuity fund—was paid to the persons interested in the corpus of the annuity fund.

In *Re Wilson* (3) BENNETT, J., approved of *Re Farmer* (2) and put aside entirely the provision as to setting up an annuity fund and the direction as to its ultimate disposal. His decision proceeds on the footing that the direction to set up the annuity fund was merely subsidiary to the annuity and, in light of the insufficiency of the estate to provide for the value of the annuity and the direct legacies, of no effect. The result was that not only was the bequest of the fund treated as worthless to those to whom it was bequeathed subject

to the annuity, but the annuitant (in regard that the value of the annuity was less than the value of the fund) was in competition with the legacies deprived of the value to her of the rights against the annuity fund directed to be set up. I find myself unable to agree with either decision for the reason that in each case I think that the bequest of the corpus of the annuity fund was a substantive bequest for what it was worth.

A The second question is whether, for the purpose of ascertaining the amount of the annuity fund, the capital sum should be ascertained on the basis of an investment in Consols or on the basis that the fund is to be composed of investments yielding, say, $3\frac{1}{2}$ per cent. CROSSMAN, J., appeared to have proceeded on the latter footing in *Re Nicholson* (1) but the point does not appear to have been argued. In my view the rule of practice recognised in *Re Hollins* (4) should apply in this case, and, accordingly, the cost of an investment in Consols —brokerage being disregarded, since no investment is in fact made—should be the basis. B The value of the annuity fund is on this basis necessarily greater than the purchase price of the annuity from the Government (a result which would not in the case of a very youthful annuitant be true if a $3\frac{1}{2}$ per cent basis were taken for the annuity fund) and accordingly it is that value which enters into the computation. That value embraces the value of the annuity.

C The third question is as to the disposition of the sum allocated on the abatement calculation to the annuity fund. Obviously those interested under the gift of the corpus of the annuity fund can receive nothing unless and until the annuitant has been completely satisfied. It is not disputed that the arrears of the annuity—so far as not satisfied by the sum allocated to those arrears on the abatement calculation—have to be paid to the annuitant. The question is whether the balance—which is less than the actuarial value of the annuity —should be paid to the annuitant or whether that balance should be applied D in paying instalments of the annuity in full as they accrue due. In my opinion, the latter is the correct course. There is in hand an isolated fund that represents the annuity plus the expectant rights of those ultimately interested in corpus. Is there any reason for splitting up the fund into two distinct parts? I can see none. The position as regards the abated annuity fund is the same as that which obtains where a will contains merely a gift of an annuity (whether E or not with a provision for setting up a fund) and a gift of residue. In such a case, if the estate is insufficient to enable the directions contained in the will to be carried out, the annuitant is not entitled to receive the value of his annuity but only to receive the instalments of his annuity as they accrue due: (*Wright v. Callender* (5)). The circumstances of the case here do not necessitate a valuation of the annuity or payment to the annuitant of a capital sum in respect of her annuity. F Without a valuation of the annuity the available fund has been ascertained. Without payment on the basis of a valuation the rights of the annuitant can be fully met—so far as funds admit. To make a valuation imposes on those interested in the corpus of the annuity fund the burden of paying an annuity for an average life—and an average life is as rare a thing as the average man—whereas the testatrix contemplated the burden of paying an annuity G during the lifetime of this particular annuitant. Valuation is, therefore, not only unnecessary for purposes of administration, but imposes a charge on the abated annuity fund for an amount different from that intended by the testatrix. The rule as to valuation is not a rule of law: it is a rule of administration in which effect should be given to the dictates of common sense: (*Re Bradberry* (6)). *Re Hill* (7) is not directly in point, but the whole trend of the judgment of the Court of Appeal is directed to confining valuation to cases where circumstances require it. For these reasons I think the residue of the available fund should H be applied in paying the instalments of the annuity as they accrue due. In *Re Nicholson* (1) CROSSMAN, J., adopted the course which I propose to follow. In *Re Farmer* (2) and *Re Wilson* (3) disregard of the provision as to the annuity fund entailed the former course [*i.e.*, of paying the value of the annuity to the annuitant] for on the basis followed no one but the annuitant was interested in the fund allocated in respect of the annuity.

These general considerations are, to my mind, sufficient to decide the point, but in the particular case there are features present which show the unreality of the valuation of the annuity. The annuity is given tax free and the rule

in *Re Pettit* (8) applies to it. The valuation will assume under the present practice (a) continuance of income tax at the rate of 10s. in the £ during the life of the annuitant and the consequent continuance of the Finance Act, 1941, s. 25, and (b) that the annuitant or other owner for the time being of the annuity will not at any time during the life of the annuitant be entitled to claim any repayment of British income tax and so come under an obligation to account to the trustees for a proportion of overpaid tax. Valuation on these assumptions—or some such assumptions—may in certain cases be necessary but the guesses involved in the assumption do not invite adoption when another course is practicable and fair. It was urged that tax considerations suggested the propriety of satisfying the annuity by a capital sum. No doubt if the annuitant lives long enough, and tax remains at 10s. in the £, half the capital and income will be applied—in argument the word used was “dissipated”—in income tax. That no doubt is true. But the incidence of income tax is a matter which comes into play when rights are ascertained; it is not a matter to be taken into account in ascertaining rights. Tax considerations are irrelevant in deciding the point involved.

Declaration accordingly.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Leaning & Carr*, Clacton-on-Sea (for the Public Trustee); *Freshfields, Leese & Munns* (for the annuitant); *Hopgood & Co.* (for I. M. Walker); *The Official Solicitor* (for M. M. Walker and the Public Trustee for Australia).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

SOUTHWELL v. ROSS.

[KING'S BENCH DIVISION (Singleton, Oliver and Birkett, JJ.), July 23, 1945.]

Food and Drugs—Proceedings against manufacturer—Sample taken at retailer's premises at retailer's request—Sample divided into three portions—No portion of sample delivered to retailer—Procedure—Food and Drugs Act, 1938 (c. 56), s. 70 (1), (2)—Defence (Sale of Food) Regulations, 1943 (S.R. & O., 1943, No. 1553), art. 1.

The Food and Drugs Act, 1938, s. 70 (2) laid down the procedure to be followed when a sample of food was taken from a retailer's premises for the purpose of analysis and with a view to proceedings against the original seller or consignor. Since proceedings were not contemplated against the retailer and since the samples were taken at his request, there was no necessity to inform him that the sample was being taken for analysis by the public analyst or to deliver to him a portion of the sample so taken, as would be the procedure required under sect. 70 (1) of the Act.

[EDITORIAL NOTE. In this case a sample of goods for the purpose of analysis under the Food and Drugs Act, 1938, was taken at the request of the consignee and on his premises. It is held that in such circumstances notice of intention to submit the sample for analysis as required by sect. 70 (1) is not needed.

FOR THE FOOD AND DRUGS ACT, 1938, s. 70, see HALSBURY'S STATUTES, Vol. 31, p. 296.]

APPEAL by way of case stated by the defendant from the decision of the justices sitting in the Petty Sessional Division of Dorking. The defendant, F. A. Southwell, sold to a firm of grocers, Stapley & Sons, some bottles of wine, labelled “British Pale Golden Sherry Type” and “British Wine Port Type.” At the request of the grocers' manager, H. R. S. Wickens, a sample bottle of each type of wine was taken by the complainant, an inspector of weights and measures, for the purpose of analysis. In accordance with the procedure under the Food and Drugs Act, 1938, s. 70 (2), the complainant divided the sample into three parts. He sent one part to the defendant, another part to a public analyst and retained the third part. After taking the samples, the complainant reimbursed the grocers' manager the wholesale value of the bottles of wine, but he did not deliver a part of the samples to the manager nor did he inform

him that the samples were being taken for analysis by the public analyst. The defendant was then charged under the Defence (Sale of Food) Regulations, 1943, art. 1, with having sold two bottles of wines with labels calculated to mislead as to the nature, substance or quality of their contents. The justices convicted and fined the defendant, the following facts, *inter alia*, having been found by them :

A . . . The samples were not " British Pale Golden Sherry Type " nor " British Wine Port Type." They were coloured and flavoured cider of an alcoholic content much below British Wine."

R. L. Parry for the appellant.

Gerald Howard for the respondent.

B SINGLETON, J. : The whole of the argument before this court has been as to whether or not that which was done was a proceeding under sect. 70 (1) of the Food and Drugs Act, 1938, or whether it was under sect. 70 (2). Sect. 70 (1) provides :

C A person purchasing a sample of any food or drug with the intention of submitting it to be analysed by a public analyst, or taking a sample of food on any premises with the intention of submitting it to be so analysed, shall, after the purchase has been completed or the sample has been taken, forthwith inform the seller or his agent who sold the sample, or, as the case may be, the occupier of the premises or the person D for the time being in charge thereof, of his intention to have the sample analysed by the public analyst, and shall then and there divide it into three parts, each part to be marked, and sealed or fastened up, in such manner as its nature will permit, and shall (a) if required so to do, deliver one part to the seller or his agent, or, as the case may be, to the occupier of the premises or the person for the time being in charge thereof ; (b) retain one part for future comparison ; and (c) if he thinks fit to have an analysis made, submit one part to the public analyst ; provided that, in relation to samples taken in such circumstances as are mentioned in either of the two next succeeding subsections, the foregoing provisions with respect to the giving of information and the manner of dealing with samples shall have effect as modified by those subsections.

E It is to be observed that sect. 70 (1) is dealing with the ordinary case of a sample being taken from a retailer against whom it might be thought fit in certain circumstances to take proceedings. It is true that it deals both with the purchasing of a sample and taking a sample, but it is in quite different terms to sub-sect. (2) of the Act. Counsel for the respondent, the inspector, submitted to us that this case was properly taken as a case under sect. 70 (2), of the Act, and he submitted further that even if it was not such a case but was a case under sect. 70 (1), there was still compliance with the requirements of that section, and he pointed out that the necessity to deliver one part to the seller or his agent only arose if the inspector at the time of the taking of the sample was required so to do, and he added there was no such requirement or request ; F indeed, there could not well be because the sample was taken at the request and on the suggestion of Wickens, the manager of the firm who had received the goods as consignees. Further, he submitted that on the facts of this case there was a sufficient notice of intention to have the sample analysed by the public analyst because Wickens had gone to the inspector of food, the officer who was there to attend to such matters, and had requested him to take a sample for that purpose. It seems to me that it is not necessary to go into the later G part of that argument because I am clearly of opinion that this was a proceeding which was properly taken under sect. 70 (2) of the Act, which provides that :

H A person taking a sample of any food while it is in transit or at the place of delivery to the purchaser, consignee or consumer shall, if he intends to submit it to be analysed by a public analyst, deal with it in the manner provided by the preceding subsection, except that he shall retain the first-mentioned part of the sample unless the name and address of the consignor appear on the container containing the article sampled, in which case he shall forward that part of the sample to the consignor by registered post or otherwise, together with a notice informing that person that he intends to have part of the sample analysed by the public analyst.

Sect. 70 (2) is intended to deal with a case in which a sample is taken when the goods are either in transit or at the place of delivery to the purchaser or consignee. In the present case the goods had reached the consignee and it was indeed at the consignee's request that the goods were sampled. A sample was taken. The submission of counsel for the appellant was that, when the findings of fact are considered and examined, this was not a taking of a sample

but that it was a purchasing of a sample, and, therefore, must be held to fall within sect. 70 (1). I do not think that is so. It is right to say that in para. 4 (3) of the case stated the word "purchase" is used but it is used in a negative way :

The respondent did not hand any of the portions of either of the samples to the said Wickens, nor did he inform him that the two bottles of liquids were purchased for analysis.

There is no finding that there was a purchase. Para. 4 (5) of the case stated A
says :

After the samples had been taken and before leaving the premises of the said Messrs. Stapley & Sons, the respondent reimbursed the said Wickens the sum of 22s., the wholesale value of the two bottles of liquid, which said sum the said Wickens placed in the till.

It is to be noticed that the sub-paragraph begins : " After the samples had been taken." The samples were taken ; after they had been taken as the justices find, " the respondent reimbursed the said Wickens the sum of 22s." It seems to me that they were careful to find that there was not a purchase within the meaning of sect. 70 (1), but there was a taking of samples, and thereafter the inspector reimbursed the shopkeeper with the wholesale price of the goods. If they had been sold in the shop, they would not have been sold wholesale, one imagines, but, be that so or not, the finding is that there was a taking of samples. Sect. 70 (2) of the Act applies, and the case finds that all that was necessary to be done under sect. 70 (2) was in fact done. B C

Counsel for the appellant argued further that even if this was a case under sect. 70 (2), it was still necessary, by reason of the words in sect. 70 (1), that notice of his intention to have the sample analysed by the public analyst should be given forthwith. I do not think so. The proviso to sub-sect. (1) is something which has to apply if either of the two next succeeding sub-sections come into play, and in that event " the foregoing provisions," that is the provisions of subsect. (1), " with respect to the giving of information and the manner of dealing with samples shall have effect as modified by those subsections," and subsect. (2) provides a modification of this kind. A person taking a sample " shall, if he intends to submit it to be analysed by a public analyst, deal with it in the manner provided by the preceding subsection"—that is, deal with the sample or the food and it matters not which—" except that he shall retain the first mentioned part of the sample unless the name and address of the consignor appear on the container containing the article sampled, in which case he shall forward that part of the sample to the consignor by registered post or otherwise, together with a notice informing that person that he intends to have part of the sample analysed by the public analyst." The duty under subsect. (2), if the name of the consignor appears upon the container, is to send him that part which under subsect. (1) would have been delivered to the seller and to give him, the consignor, by registered post the notice which, if it was a case under subsect. (1), would have been given verbally to the seller—I do not think it is necessary to say anything on that matter—or to the person on whose premises the sample is taken if this is a case under subsect. (2). Moreover it is abundantly clear that this is a highly technical objection which is taken. It has no merits. The person at whose premises the sample was taken was the person who asked that it should be taken. There was no need whatever for notice to be given to him in any event ; he knew the purpose of the proceeding which was at his request. Of course, that would provide no answer if the requirements of the section had not been complied with, but this being a proceeding under sect. 70 (2), it seems to me to be quite clear that all was done that was required to be done under the statute, and that the requirements of that sub-section were strictly complied with. D E F G H

OLIVER, J. : I agree and I have nothing to add.

BIRKETT, J. : I agree.

Appeal dismissed with costs.

Solicitors : J. N. Nabarro (for the appellant) ; Clerk of the Surrey County Council (for the respondent).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

NATIONAL UNION OF GENERAL AND MUNICIPAL WORKERS v. GILLIAN AND OTHERS.

[KING'S BENCH DIVISION (Birkett, J.), July 5, 6, 31, 1945.]

[COURT OF APPEAL (Scott and MacKinnon, L.JJ., and Uthwatt, J.), October 16, 17, 25, 1945.]

- A *Trade and Trade Union*—Registered name—Defamatory statements relating to reputation of trade union—Trade union suing in registered name for damages for libel—Right to sue—Issue raised as preliminary point of law under R.S.C., Ord. 25, r. 2.

The respondent, a trade union registered under the Trade Union Acts, 1871-1927, was the plaintiff in an action for damages for libel brought in its registered name against the defendants (appellants). The preliminary point was raised by the defendants that the action was not maintainable in law at the suit of the plaintiff union. Judgment having been given that a registered trade union might sue in its own name for libel where the defamatory statements touched its collective reputation, the defendants appealed:—

HELD: (i) a trade union, duly registered under the Acts, was a lawful body entitled to sue for tort in its own registered name.

C *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900) (4) applied. *Fivaz v. Nicholls* (10) distinguished.

(ii) since a trade union could, therefore, sue for tort, and there being no reason to exclude an action for defamation, the respondent union was entitled to claim for libel affecting its functions and business as a trade union.

D *D. & L. Caterers, Ltd. v. D'Anjou* (9) applied.

[EDITORIAL NOTE. The Trade Union Acts created a *persona juridica* not, it is true a corporation, but, as FARWELL, J., pointed out in the *Taff Vale* case (4), having the qualities of a corporation essential to liability for tort, namely, capacity to act by agents and capacity to own property out of which it can be made to pay. The liability for tort established in that case connotes a correlative right to sue for tort and this includes libel upon the union in respect of the conduct of its activities. No distinction can be drawn between the trading activities of a company and the industrial activities of a trade union in respect of defamatory statements. If a union were unable to obtain redress for these the whole strength of trade unions as an element in collective bargaining would be undermined, and this would be contrary to the purpose of the legislature.

AS TO DEFAMATORY STATEMENTS CONCERNING CORPORATIONS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 390, 391, para. 473; and FOR CASES, see DIGEST, Vol. 13, p. 408, pp. 1282-1285.

AS TO ACTIONS BY OR AGAINST TRADE UNIONS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 529-533, paras. 829-831; and FOR CASES, see DIGEST, Vol. 43, pp. 125-127, Nos. 1277-1297.]

Cases referred to:

* (1) *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421; 43 Digest 94, 987; 81 L.J.K.B. 619; 106 L.T. 433; *affg.*, [1910] 1 K.B. 506.

* (2) *Rigby v. Connol* (1880), 14 Ch.D. 482; 43 Digest 98, 1035; 49 L.J.Ch. 328; 42 L.T. 139.

G * (3) *Amalgamated Society of Carpenters, Cabinet Makers and Joiners v. Braithwaite, General Union of Operative Carpenters and Joiners v. Ashley*, [1922] 2 A.C. 440; 43 Digest 100, 1043; 91 L.J.Ch. 688; 128 L.T. 65.

* (4) *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900), [1901] A.C. 426; 43 Digest 92, 957; 70 L.J.K.B. 905, n; 83 L.T. 474; *revsd.*, [1901] 1 K.B. 170; *restored* [1901] A.C. at p. 434.

(5) *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A.C. 107; 43 Digest 123, 1259; 82 L.J.K.B. 232; 107 L.T. 722.

H * (6) *South Hetton Coal Co. v. North-Eastern News Assocn.*, [1894] 1 Q.B. 133; 32 Digest 148, 1795; 63 L.J.Q.B. 293; 69 L.T. 844.

(7) *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 87; 13 Digest 408, 1283; 28 L.J.Ex. 201; 32 L.T.O.S. 283.

* (8) *Manchester Corpn. v. Williams*, [1891] 1 Q.B. 94; 13 Digest 408, 1284; 60 L.J.Q.B. 23; 63 L.T. 805.

* (9) *D. & L. Caterers, Ltd. v. D'Anjou*, [1945] 1 All E.R. 563; [1945] 1 K.B. 364; 114 L.J.K.B. 386; 173 L.T. 21.

* (10) *Fivaz v. Nicholls* [1846], 2 C.B. 501; 42 Digest 991, 202; 15 L.J.C.P. 125; 6 L.T.O.S. 319.

ACTION for damages for libel. The plaintiffs are the National Union of General and Municipal Workers, suing in their registered name. The first two defendants are Arthur J. Gillian, the general secretary of the Chemical Workers Union, and Bob Edwards, an area officer of that union. The third defendants are J. W. Brown & Co., the printers of the official organ of the union, called the *CHEMICAL WORKER*. The defendants raised the preliminary point of law that the action was not maintainable at the suit of the plaintiff union and the issue was tried under the provisions of R.S.C., Ord. 25, r. 2. A

G. O. Slade, K.C., and Valentine Holmes, K.C., for the plaintiffs.

Gilbert Parull, K.C., and E. Ryder Richardson for the first two defendants.

R. L. Travers for the third defendants.

Cur. adv. vult.

BIRKETT, J. : The question which I have to determine is simply : Can the plaintiff, a registered trade union, sue in its own name for a tort, and if so, can it sue for libel, and if so, can it sue for *this* libel. It is important to remember that the issue which I have to determine is confined to that matter. In those circumstances it is not necessary for me to read the libel, certainly not in full, but I shall have cause to refer to it. B

The plaintiff in this case is a trade union, registered under the Acts of 1871 to 1927. The rules of the union were put in for the purpose of showing that, if these rules are read as a whole, as indeed they must be, the conclusion to which I ought to come is that they are substantially in restraint of trade, that is to say contrary to public policy, and that the union itself was, therefore, an unlawful or illegal association at common law. C

I have read the rules and I need not refer to them in full here. In *Russell v. Amalgamated Society of Carpenters and Joiners* (1), there was a most elaborate discussion of the rules of the trade union there concerned, and it is interesting, although I do not propose to cite it, to look at various passages in that report which are dealing with the question of the rules. LORD MACNAGHTEN, for example, said ([1921] A.C. 421, at p. 430) : D

The only question, therefore, seems to be this. Is this trade union, apart from the Act of 1871, a lawful association ? The answer must depend on a consideration of its purposes as manifested in its rules. E

Then LORD SHAW OF DUNFERMLINE made a most elaborate examination of the rules in that case, and perhaps I may just cite this passage ([1921] A.C. 421, at p. 435) : F

Nor can it be denied in the general case that the occurrence here and there of certain passages in the rules of such societies which would point to action outside of the law may not be of itself sufficient, so to speak, to taint the objects of the society as a whole. Further, the reference to the occurrence of strikes in the rules or the provisions for the support of members during a strike does not *per se* make the association illegal. Strikes may be perfectly legal or they may be illegal. It depends on the nature and mode of the concerted cessation of labour. If this concerted cessation is in breach of contract, then it could not be said to be within the law any more than could a breach of contract by a single workman. If, on the other hand, a strike be a cessation of labour on the expiry of contract, there is no necessary illegality there, any more than in the case of an individual workman completing his current bargain and then choosing to remain idle. But, of course, in this latter case, the concert for the cessation of labour may be for the sole or deliberate or obvious purpose of restraining trade, in which case different legal consequences might ensue, and to this I have referred. G

I only refer to that case for the purpose of showing that the rules of the society upon this matter must be looked at as a whole, and therefore, without reading them, perhaps I may just refer to the material rules. R. 1 sets out the name and registered office of the union, and r. 2 sets out the objects, which are : H

To regulate the relations between employer and employed, and endeavour to adjust any difference between them by amicable and conciliatory means.

R. 3 (1) vests the supreme authority of the union in the congress composed of delegates from the districts of the union. R. 5 (17), provides that :

Any matter not provided for in these rules shall be decided by the general council.

R. 14 (5), which deals with the management of district councils, gives powers to the district councils to suspend from benefit, or expel from membership, any

member who in its judgment is guilty of attempting to injure the union or acting contrary to the rules or who makes, or in any way associates himself with, any detamatory, scurrilous or abusive attacks. Further, it says :

It shall have power to debar for any reason which it deems good and sufficient, any member or members from participating in the conduct of the business of a branch.

R. 15 (7), in dealing with the district committees, says :

A Between meetings of the district council, the district committee shall have power to suspend from benefit or expel from membership, in its absolute discretion, any member guilty of attempting to injure the union or acting contrary to the rules, or for any reason which it deems good and sufficient.

R. 21 (1), says :

B The general officials specified in r. 20, cl. (2), shall, for the purpose of this rule, be under the jurisdiction of the National Executive and General Council, who may, in their absolute discretion suspend, dismiss, or place on superannuation, any of the said officials for any reason deemed good and sufficient. The General Council or National Executive may refuse at their discretion to state any reason for their action.

Then in r. 28 there are provisions with regard to disputes, and paras. 1, 3 and 5 may be referred to in that connection. R. 29 (1) deals with strike benefit, and the only other one to which I think I need refer deals with finance. Then there is r. 59, which is :

C War-time Emergency Powers of the General Secretary and Treasurer.

I have considered these rules, and I was expressly asked by counsel for the first and second defendants to make a finding about them. The conclusion to which I have come is that before the 1871 Act it would be impossible, I think, to resist the conclusion that these rules were in restraint of trade. Indeed, the Trade Union Act, 1871, as I read it, was framed in express terms, that as the law then stood trade unions were very generally, though not universally, in restraint of trade ; but having looked at these rules and considered them as a whole, I feel that certainly before the 1871 Act they would have been brought into that same category.

Counsel for the first and second defendants referred me to *Rigby v. Connol* (2), where SIR GEORGE JESSEL, M.R., said (12 Ch.D. 482 at p. 491) :

E The question, therefore, which I have to consider is, what would have happened without the Act ? And it appears to me that without the Act it is clearly an unlawful association ; it is an association by which men are not only restrained in trade, but they are bound to do certain acts under a penalty. Take the very act for which this man was expelled. He was expelled because he bound his son apprentice in a shop where the workmen did not belong to this union but to another union. That is the allegation. And the rule is that any man binding his son in a "foul shop," which, as it has been explained to me, includes a shop of this description, where the members employed belong to another union and not to this union, shall be fined £5, and so on, according to the rules. I see a great number of other stipulations of a character which are not only a restraint in trade, but so much in restraint of trade, limiting the subject of it, that I have no doubt that before this Act was passed these rules would have been altogether illegal ; and if nothing in the Act, therefore, will assist the plaintiff, he must still be in the position of a member of an illegal association coming to a court of justice to assist him to enforce his rights under that illegal association.

G Therefore, on the first matter, I should hold that these rules taken as a whole came within that prohibited category.

The next matter that I have to determine is the nature of the libel for the purpose of this issue. It is only important because counsel for the first and second defendants submitted that no damage to property of the union was alleged. Counsel for the plaintiffs, said the contrary, and some legal consequences, it may be, would follow from the view taken upon that point.

H I do not need to read this libel *in extenso*, as I say, but it is undoubtedly a very grave and serious allegation against the plaintiff union. There are passages that I might pick out :

We recognise that both General Labour Unions, as willing tools and lackeys of reactionary employers—prepared at all times to sacrifice the interests of all chemical workers to the impudent domination of chemical employers—but openly if chemical workers are members of their appropriate union, the C.W.U.—and although this flagrant indecency relates to the Municipal and General Workers Union, it is in keeping with the consistent policy of both General Labour Union, in their opposition against the C.W.U.

Then a little later, underlined :

Tell the world. Expose the Municipal and General Workers' Union as open enemies, not only of Chemical Workers but the entire Working Class.

A little later :

This indecent action exposes nakedly the role the M. & G. plays in relation to employers in the chemical industry and leaves no doubt in anyone's mind that *they are the open enemies of chemical workers everywhere. That in exchange for employers' patronage and rights against C.W.U., they are prepared to betray every interest of chemical workers.* That this action is a part of the general policy of all General Labour Unions in defence of their revenue collecting interests—that whilst other General Labour Unions have not been openly caught out as in this case—they probably will be in time. A

The innuendo which was placed upon the words by counsel for the plaintiffs, in para. 6 of the statement of claim, was this :

By the words set out in para. 3 hereof the defendants Gillian and Edwards and each of them, and by the words set out in para. 5 hereof the defendants and each of them meant and were understood to mean that the plaintiff union was a menace to the working classes and worked in secret collusion with employers, however unjust to their employees such employers might be and assisted employers to exploit their employees and was always ready to sacrifice and betray the interests of the working classes, particularly for its own financial benefit and that it would commit any crime or outrage against the trade union principles which it pretended to uphold and that it was a union to which no decent worker should belong. B

As I say, the view that I have taken of it for this purpose is that it was an exceedingly grave allegation. It was, I think, made quite plain that no self-respecting trade unionist could or should belong to such a trade union, and I think the logical consequence of that would be that, if followed, there would be neither subscriptions to, nor membership of, this union, and to that extent certainly the property of the union, I hold, would be adversely affected. I think, further, that there can be no doubt that this was a most severe and most critical attack upon the manner in which the business of the plaintiff trade union was conducted. It was an attack upon the plaintiff trade union by name, and the suggestion was that this trade union should be exposed, as a name. C

In that state of affairs, the first point taken by counsel for the first and second defendants was that this trade union is an illegal association at common law, and it, therefore, cannot sue in respect of its common law rights. The argument went to this length, that despite the 1871 Act this trade union, attacked in this way, and attacked in its name in which it is registered, was powerless to sue in the courts for damages for libel, even though the libel be of the grave character which is alleged in this case, and even though the consequences of such a grave libel might indeed be disastrous. D

That was the first point, and the case to which I have already referred, *Rigby v. Connol* (2) was very strongly relied upon. It is but just to say that at a later stage in the hearing another case was produced, namely, *Amalgamated Society of Carpenters, Cabinet Makers and Joiners v. Braithwaite, General Union of Operative Carpenters and Joiners v. Ashley* (3). E

In that case, which was brought to my notice whilst the argument was proceeding, LORD BUCKMASTER said of *Rigby v. Connol* (2) ([1922] 2 A.C. 440, at p. 449) :

Had the matter been free from authority, these circumstances would, in my opinion, have disposed of the appeal, but authorities on the section are numerous and, unfortunately, difficult to reconcile. One of the earliest is *Rigby v. Connol* (2), a decision the authority of which can only be maintained as against subsequent cases by regarding the actual words of the claim as those which support the decision. For in that case, a claim brought by a workman to prevent expulsion based on a breach of a rule with regard to the apprenticeship of his son asked that the plaintiff might be declared entitled to participate in the enjoyment of the property of the union and an injunction restraining the union from excluding him from such participation, a claim that appears to have been framed in direct opposition to the words of the statute ; and it was on these words that SIR GEORGE JESSEL based his judgment, for he said : " If I decide in favour of the plaintiff I . . . declare him entitled to participate in the property of the union . . . and I restrain the society from preventing that participation." It is, however, impossible not to see that the learned judge might, if he had thought fit, have moulded the injunction so that it merely followed a declaration as to membership, and I cannot resist the impression that he thought such a claim was also barred. It may be out of respect to the great authority of SIR GEORGE JESSEL that this decision F

has never been definitely overruled. Technically, it is true that the judgment may be supported, but in substance it cannot.

The case which was relied upon by counsel for the plaintiffs principally, was *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (4), and I am bound to say that, having given that case quite prolonged consideration, it seems to me to be the most important case which was cited in the argument before me.

A It was there held that :

A trade union, registered under the Trade Union Acts, 1871 and 1876, may be sued in its registered name.

That was a decision which was originally made by FARWELL, J., which had been reversed in the Court of Appeal and was restored in the House of Lords. The judgment of FARWELL, J., contains so many matters which are important upon the issues that I have decided to make a few citations from the judgment, without reading the whole of it. He says ([1901] A.C. 426, at p. 427) :

The defendant society have taken out a summons to strike out their name as defendants, on the ground that they are neither a corporation nor an individual [that is one of the points raised by counsel for the first and second defendants here] and cannot be sued in a quasi-corporate or any other capacity. Failing this, they contend that no injunction ought to be granted against them. I reserved judgment last week on these two points, because the first is of very great importance, and counsel were unable to assist me by citing any reported case in which the question had been argued and decided. Now it is undoubtedly true that a trade union is neither a corporation, nor an individual, nor a partnership between a number of individuals ; but this does not by any means conclude the case. A trade union, as defined by sect. 16 of the Trade Union Act, 1876, " means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." It is an association of men which almost invariably owes its legal validity to the Trade Union Acts, 1871 and 1876. In the present case the foundation of the argument that I have heard on behalf of the society is that it is an illegal association [which was, of course, the argument that I heard at length in this case] an argument that would have more weight if the action related to the enforcement of any contract, and were not an action in tort. The questions that I have to consider are what, according to the true construction of the Trade Union Acts, has the legislature enabled the trade unions to do, and what, if any, liability does a trade union incur for wrongs done to others in the exercise of its authorised powers ? The Acts commence by legalising the usual trade union contracts, and proceed to establish a registry of trade unions, give to each trade union an exclusive right to the name in which it is registered, authorise it through the medium of trustees to own a limited amount of real estate, and unlimited personal estate " for the use and benefit of such trade union and the members thereof " ; provide that it shall have officers and treasurers, and render them liable to account ; require that annual returns be made to the registry of the assets and liabilities and receipts and expenditure of the society ; provide that it shall have rules and a registered office, imposing a penalty on the trade union for non-compliance ; and permit it to amalgamate with other trade unions and to be wound up.

I have read that at length because it relieves me from going through the sections of the Act of Parliament. It is a summary of the powers given by statute to trade unions.

Then the judge made references to SIR GEORGE JESSEL, M.R., in *Rigby v. Connol* (2), and went on ([1901] A.C. 426, at p. 429) :

But these limitations merely restrict the actual enforcement of trade union contracts by action or suit, and do not affect the question of the status of the association to which such members belong. Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature.

Then FARWELL, J., goes on ([1901] A.C. 426, at pp. 429, 431) :

This is not a case of suing in contract to which the provisions of s. 4 of the Act would apply; it is an action in tort, and the real question is whether on the true construction of the Trade Union Acts the legislature has legalised an association which can own property and can act by agents by intervening in labour disputes between employers and employed, but which cannot be sued in tort in respect of such acts. Now, the legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property . . .

It would require very clear and express words of enactment to induce me to hold that the legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil. Not only is there nothing in the Acts to lead me to such a conclusion, but ss. 15 and 16 of the Act of 1871 imposing penalties on the trade unions, and ss. 8 and 15 of the Act of 1876 point to a contrary intention; nor do I see any reason for saying that the society cannot be sued in tort in their registered name . . . it is not a question of the rights of members of the society, but of the wrong done to persons outside the society. For such wrongs, arising as they do from the wrongful conduct of the agents of the society in the course of managing a strike which is a lawful object of the society, the defendant society is, in my opinion, liable. I have come to this conclusion on principle, and on the construction of the Acts, and there is nothing to the contrary in any of the cases cited by the defendants' counsel. They were all cases relating to the limitation of the right of enforcing contracts to which I have already referred.

Those were the material matters, so far as the point I have to deal with is concerned, in the judgment of FARWELL, J. When the case went to the House of Lords, it is exceedingly important and significant to notice that everybody seemed to concede that although the issue in that case was: "Can a trade union be sued?", nevertheless the whole argument, and I think the judgments, proceeded upon the basis that there was no distinction between the question: "Can it sue?" and the question: "Can it be sued?", although the only point for determination was: "Can it in fact be sued?"; and, therefore, I will make one or two more references to the case in the House of Lords.

The argument of Sir Edward Clarke, K.C., begins with the following words, ([1901] A.C. 426, at p. 434):

A trade union, though not a corporation, is a legal entity, capable of suing and being sued in its own name . . .

Apparently he made no distinction whatever between the two matters. Then ([1901] A.C. 426, on p. 435), there is the argument of Mr. Haldane, K.C.:

If the Act intended to enable the union to sue and be sued in its registered name, why should trustees be allowed to sue or be sued?

This is exactly the same point. LORD MACNAGHTEN said ([1901] A.C. 426, at p. 439):

The further question remains: May a registered trade union be sued in and by its registered name? For my part, I cannot see any difficulty in the way of such a suit. It is quite true that a registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is nothing more than a collective name for all the members. The registered office is the place where it carries on business. A partnership firm which is not a corporation, nor, I suppose, a legal entity, may now be sued in the firm's name. And when I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases for penalties by its registered name, as a trade union, and does not say that the cases specified are the only cases in which it may be so sued. I can see nothing contrary to principle, or contrary to the provisions of the Trade Union Acts, in holding that a trade union may be sued by its registered name. I am, therefore, of opinion that the appeal should be allowed and the judgment of FARWELL, J., restored . . .

Then LORD SHAND said ([1901] A.C. 426, at p. 440):

. . . with great deference, in my opinion, the power of suing and liability to be sued in the society's name is clearly and necessarily implied by the provisions of the statutes . . . I am clearly of opinion that these and the provisions generally of the statutes imply a liability on the society to be sued in its trade union name, and a privilege of thus suing.

Although that was not a matter to be determined, LORD SHAND said:

. . . a liability on the society to be sued in its trade union name, and a privilege of thus suing.

Later, LORD BRAMPTON said ([1901] A.C. 426, at p. 442):

The very omission from the statute of any provision authorising and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the legislature that by that name and by no other it should be known and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees' . . .

A Finally LORD LINDLEY observed ([1901] A.C. 426, at p. 445):

My Lords, a careful study of the Act leads me to the conclusion that the Court of Appeal held, and rightly held, that trade unions are not corporations; but the court held further that, not being corporations, power to sue and be sued in their registered name must be conferred upon them; and further that the language of the statutes was not sufficient for the purpose. Upon this last point I differ from them. The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used.

B
C I have made those quotations for the purpose of showing that the argument before FARWELL, J., was, in part, at least, the argument before me; and further that, although in the House of Lords the question that I have to determine, namely, can a trade union sue in its registered name, was not the express point of the decision, nevertheless on a careful reading of the case it is impossible to resist the conclusion that the power to be sued and the power to sue were matters before the House of Lords, and in which their Lordships seemed to make no distinction; and it is plain, I think, that that case is a case which may properly be called a decisive case.

D In *Russell v. Amalgamated Society of Carpenters and Joiners* (1) I was much pressed by counsel for the first and second defendants by quotations from the speeches, notably from LORD ATKINSON and LORD SHAW ([1912] A.C. 421, at pp. 431 and 433), and I think it is exceedingly important to observe what the nature of *Russell's* case (1) was. The head-note is:

E The rules of a society registered under the Trade Union Acts, 1871 and 1876, combined provisions for the militant purposes of a trade union, which were admittedly in restraint of trade, with provisions for the provident purposes of a friendly society, and the subscriptions of the members were applicable to all the purposes of the society. One of the rules provided for the expulsion of members for non-compliance with the decisions of the managing or branch committees directing the militant operations of the society or for violating the recognised trade rules of the district: *Held*, that an action against the society and its trustees for payment of moneys alleged to be due to a member under the rules in respect of superannuation benefit was not maintainable under the Act of 1871, and was not maintainable apart from the Act; by EARL LOREBURN, L.C., and LORD ATKINSON, because the society, being a voluntary association, could not have been sued in such an action in its own name; by LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON, because the society was an illegal association at common law, inasmuch as its main purposes were in unreasonable restraint of trade and the rules relating to those purposes were not severable from the rules relating to its provident purposes.

G It was in that case that an order was made for the preliminary issue to be tried, and the passage upon which counsel for the first and second defendants expressly relied was in the speech of LORD SHAW ([1912] A.C. 421, at p. 432), where he said:

H My Lords, by s. 3 of the Act of 1871, "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or avoidable any agreement or trust." Were it not for the elaboration of the appellant's pleading it would need no saying that if the purposes of this association be in restraint of trade the union is treated by the statute as one which would be unlawful at common law. Then the Act (s. 3) steps in to declare that they shall not for that reason be unlawful, but (s. 4) that nothing in the Act shall enable a court of law to entertain legal proceedings to enforce the agreements which it cites. *Quoad* these, things remain as they were. That is to say, if the association be illegal on account of its purposes being in restraint of trade, it remains the case, just as it was before, that the law cannot be invoked to support it, to regulate it, or to control it, in the particular matters set out in s. 4 of the Act—these matters including the present claim. Accordingly the argument stated to the House was very simple, namely, if the association's purposes

were in restraint of trade, then the action is excluded by the statute, just as, but for the statute, it would have been excluded by the common law. The whole of this argument appears to me to be unassailable.

Various other cases were cited, including *Vacher & Sons, Ltd. v. London Society of Compositors* (5), but I do not think that I need take up time by going through the other cases in much detail.

I should like to add that in *GATLEY ON LIBEL AND SLANDER*, 3rd Edn., on p. 460, the matter is put in this way :

A registered trade union, though not a corporation, is a statutory legal entity capable of holding property which may be the source of income or revenue and of suing in respect thereof in its registered name. [The authority for that paragraph is said to be the *Taff Vale* case (4).] It is conceived that the transaction of the business incidental to the holding and management of such property creates a reputation analogous to that of a trading corporation, and entitles the union to maintain an action for libel in respect of any words which tend injuriously to affect its property or its financial position.

In *FRASER ON LIBEL AND SLANDER*, 7th Edn., art 20, the matter is put in this way, at p. 91 :

There does not appear to be any reported case on the question whether a trade union can sue for defamation, but on principle there seems no reason why it should not do so. A corporation or company is, subject to certain qualifications, entitled to maintain such an action. The analogy between a trade union and a corporation or company is in relation to this question very close. *FARWELL, J.*, in his judgment in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (4), which was reversed by the Court of Appeal and restored by the House of Lords, considered this analogy in dealing with the question then before him, namely, whether a trade union could be sued for tort. . . .

Having cited the passage I have already cited, the text-book continues, at p. 92 :

It is submitted that the principle upon which, in certain cases, an action for defamation is maintainable by a corporation or company is equally applicable in the case of a trade union, and that if the written or printed words complained of as the libel injuriously affect the corporate or collective reputation of the trade union, the trade union can maintain an action, *e.g.*, where the alleged libel attacks the trade union in the method of conducting its affairs or accuses it of fraud or mismanagement or accuses it of being guilty, through its agents, of misconduct or any other wrongful act.

In *SPENCER BOWER ON ACTIONABLE DEFAMATION*, 2nd. Edn., when dealing with the question of a body of persons, it is said, in art. 4 (2), on p. 2 :

A "body of persons" means and includes any association of persons which, whether incorporated for all purposes or not, has a continuous identity, apart from the individuals composing it, and a corporate or collective name conferred or recognised by law, and which, by statute, grant, or other lawful authority, is expressly made capable, or is not expressly made incapable, of suing or being sued in such corporate or collective name, or which by such lawful authority is empowered to sue, and made liable to be sued, in the name of any specified officer or representative thereof.

In a note added to that article it is said :

It is believed that an examination of all the authorities collected in the treatises on corporations will justify the statement in the text, and that any body of persons, possessing the marks therein enumerated, *viz.*, (i) continuous identity, (ii) a corporate or collective name, and (iii) an expressly conferred, or not expressly withheld, capacity to sue and be sued in such name, or an expressly conferred capacity to sue and be sued in the name of any officer, is, for purposes of actions of tort, and therefore of defamation, in the same position as a natural person, whether it be in strictness a corporation or what (in the earlier decisions) is called a quasi-corporate body, or a corporation by prescription, custom, or implication only. The term "corporation" has been avoided because the use of it would exclude several bodies of persons (such as trade unions, boards of guardians, sewers or works commissioners, road trustees, river conservators, and the like) which can sue, and are suable, in their collective name, and yet are not in law (except in a very liberal and extended sense) deemed corporations.

The conclusion to which I come is that the first point of counsel for the first and second defendants in this matter fails. I think the 1871 Act did in fact create a new legal entity, namely, a registered trade union, and on the authority of the *Taff Vale* case (4), I think that that registered trade union certainly can sue in its registered name.

The next point made by counsel for the first and second defendants was that this trade union was not a corporate body, and, therefore, could not sue except for the purposes set out in the 1871 Act. The contrary view, as I have already indicated, is set out in SPENCER BOWER ON ACTIONABLE DEFAMATION, on p. 2, which I have read, and I think the whole of the argument and the judgment in the *Taff Vale* case (4) are contrary to that contention, and I hold, again, that this second point of counsel for the first and second defendants fails.

A Perhaps I might refer in this connection to *South Hetton Coal Co., Ltd. v. North-Eastern News Assocn* (6). The head-note to that case is :

An action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damage.

B And LORD ESHER, M.R. ([1894] 1 Q.B. 133, at pp. 138, 139), said :

I have considered the case, and I have come to the conclusion that the law of libel is one and the same as to all plaintiffs ; and that, in every action of libel, whether the statement complained of is, or is not, a libel, depends on the same question—*viz.*, whether the jury are of opinion that what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule, or to injure his character. The question is really the same by whomsoever the action is brought—whether by a person, a firm, or a company. But though the law is the same, the application of it is, no doubt, different with regard to different kinds of plaintiffs . . .

C With regard to a firm or a company, it is impossible to lay down an exhaustive rule as to what would be a libel on them. But the same rule is applicable to a statement made with regard to them. Statements may be made with regard to their mode of carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. If so, the law will be the same in their case as in that of an individual, and the statement will be libellous. Then, if the case be one of libel—whether on a person, a firm, or a company—the law is that the damages are at large.

D Then LOPES, L.J. ([1894] 1 Q.B. 133, at pp. 141, 142), said :

E With regard to the first point I am of opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage. The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals who compose it . . .

F The limits of a corporation's rights are those suggested by POLLOCK, C.B., in *Metro-politan Saloon Omnibus Co. v. Hawkins* (7), where he says, "That a corporation at common law can sue in respect of a libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong ; and, if its property is injured by slander, it has no means of redress except by action. Therefore, it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured " Again, in *Manchester Corpn. v. Williams* (8) this matter was dealt with by DAX, J., In that case an action of libel was brought by a corporation, in which the statement of claim alleged that the defendant had charged the plaintiffs with corrupt practices. There was no allegation that the plaintiffs had suffered any special pecuniary damage in consequence of such imputation. It was held that, inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, the statement of claim disclosed no cause of action. The learned judge said, in giving judgment, "The question is whether such an action will lie. I think it will not. It is altogether unprecedented, and there is no principle on which it could be founded."

H All that I desire to say further upon this matter is that *Manchester Corpn. v. Williams* (8) has been the subject of very severe criticism, some of which was read to me, and it was also submitted to me that, being a decision of the divisional court, it was not binding upon me. What I desire to say is that it neither helps nor hinders me in this case, because I think it must be applied strictly to cases which are within its ambit, and I do not think the present case is ; and it is clear from the decision in the *South Hetton Coal Co.* case (6), which I have

just read, that if this trade union, although not a corporate body, as submitted by counsel for the first and second defendants, is yet the kind of body which I have indicated, the language employed by LORD ESHER, M.R., would be applicable in this case.

It would indeed be strange if this trade union was unable to come to the courts to claim redress for something which might most vitally and most materially affect its true interests, and I am of opinion that this second point of counsel for the first and second defendants has no validity, either.

Then the third matter which counsel for the first and second defendants submitted was that the plaintiff trade union had not a character which could be defamed, and, therefore, it could not sue in an action for defamation. He based that upon his first point, that it was an association illegal at common law, and he said further that it was a mere association of persons.

Upon that, I should just like to make one reference. In SPENCER BOWER ON ACTIONABLE DEFAMATIONS, the following words are used, on p. 244 :

It is obvious that "reputation" in the sense in which alone it concerns the topic of defamation, has relation to the particular person enjoying it. But it must not be forgotten that "person" for this purpose includes an artificial person; that is to say, it includes both "a body of persons," and a firm, as defined in art. 4 (2) of the Code, which states the marks or *indicia* of these juridical entities. That a commercial "body of persons" has a "trading character" and can sue in respect of a publication tending to injure that trading character, is now clearly established; see note (p) to art. 5 (1) (b), and note (r) to art. 19 (2). But it is submitted that a "body of persons" has a collective character independently of the question whether it is a mercantile body or not, which the law is bound to protect; in other words that any such body can sue in respect of an imputation of any conduct whatsoever of which its agents, and, therefore, itself by its agents can be guilty. At present the authorities have not gone so far as this.

South Hetton Coal Co. v. North Eastern News Assn. (6) and *Manchester Corporation v. Williams* (8) are then discussed in full.

The view that I myself hold upon this matter is that this trade union has a character which can be defamed, and that it is an imputation in this particular case, as I read it, upon that trade union in its collective name, as distinct from the individuals who compose it.

The 1871 Act, in my opinion, designedly created registered trade unions for the first time, and designedly created a new entity in law, a new *persona*, and I think it must follow that that new entity is in the same position as any other creature of the legislature. It must be taken to possess all the rights which belong to a natural person, so long as they are not inconsistent with the position of a corporation, and, if not expressly withheld, the registered trade union is given all the rights, I think, of a natural person, and it can sue in its registered name for defamation when the defamation touches its corporate or its collective reputation, as I hold that this alleged libel does.

The final point made by counsel for the first and second defendants was that the trade union could not sue because no damage to the property of the company was alleged. I think that these words were a direct attack upon property in the sense which I have indicated, and I think that there can be no manner of doubt that it was a very harmful attack indeed upon the manner in which this trade union conducted its business.

For all those reasons I think this action is maintainable, and should go forward to be heard.

Judgment for the plaintiffs with costs.

From this judgment the defendants appealed.

Gilbert Paull, K.C., and *E. Ryder Richardson* for the first two appellants.
R. L. Travers for the third appellants.

G. O. Slade, K.C., and *Valentine Holmes, K.C.*, for the respondents.

Cur. adv. vult.

SCOTT, L.J.: This case is in reality a battle between two trade unions. The appellants are officers of the Chemical Workers Union. They appeal from the decision of BIRKETT, J., who held that an action for libel brought against them by the respondent union is competent, and ought not to be dismissed *in limine* under R.S.C., Ord. r. 2. By leave of this court the respondents added to their statement of claim a reference to their book of rules. The appellants' contention below and before us is that a trade union registered under the Trade Union

Acts has no right in law to bring any action for tort. I agree so completely with the reserved judgment of BIRKETT, J., that I should have been content to adopt it as my own but for the far-reaching importance of the legal questions at issue. Counsel for the first two appellants invited us to say "No" to each of these questions: (i) Can any trade union sue in respect of any tort? (ii) If generally it can, can it sue for a libel? (iii) If in some cases some trade union may be at liberty so to sue, can the plaintiff union sue for the libels set forth in the statement of claim? I will discuss these three questions in that order.

A (i) All the Trade Union Acts, from 1871 to 1927, are according to their terms to be read as one; but the only two which are directly relevant are those of 1871 and 1876, although sect. 4 of the Trade Disputes Act, 1906, which prohibits actions for tort against trade unions, may have some indirect relevance. Counsel for the first two appellants says, justly, that a registered trade union as defined by the Trade Union Act Amendment Act, 1876, s. 16, is neither a natural person, nor a corporation; and contends that, because it is neither of those, it can have no powers, and indeed no existence, except what may have been conferred in express terms by Parliament in the relevant statutes affecting registered trade unions. But that argument is fallacious. There is a *tertium quid*. A trade union has many activities; it has some existence: and it is something. B The omission of Parliament to christen it with some new generic name is immaterial; for Parliament has absolute sovereignty and can make new legal creatures if it likes. C It is able, for instance, to create a *persona juridica* not previously known to law if it so chooses; or to clothe an existing association of natural persons with what I may call co-operative personality, so as to give it the status of a *persona juridica*. D In my view, that is just what it did in 1871. It expressly assumed the possession by every trade union, when duly registered, of so many of the main attributes of judicial personality that I find any other inference of the intention of Parliament impossible. E First of all the primary object of the legislation was to validate and encourage the exercise by trade unions of a whole group of industrial functions, with a view to the establishment and maintenance of good relations between employers and employed, an object of fundamental public importance to the United Kingdom which was in 1871 the leading industrial nation of the world, namely, those functions which fall under the general head of collective bargaining; and in construing trade union legislation it should never be forgotten that trade unions might consist only of employers, only of employees, or of both combined; for all three types of association might be, and often were, directed to the unlawful restraints of trade which the legislation was intended to validate. Secondly, the legislation contains many specific examples of attributes of legal personality expressly attributed by the legislation to the trade unions thereby legalised; such as F (i) the right to own property—only nominally vested in trustees; see sect. 8 of the 1871 Act:

All real and personal estate belonging to any trade union registered . . .

(ii) the right to register an identifying name, and to change it; (iii) the right to amalgamate with another trade union; (iv) the right to dissolve itself by appropriate machinery; (v) the right to bring or defend actions in the name of the trustees—the *cestui que trust* being *ex hypothesi* a person—to wit, the trade union itself (sect. 9); (vi) the right to hold its treasurer to account (sect. 11); (vii) the right to have complaints made "on its behalf" before a court of summary jurisdiction (sect. 12). G These illustrations from the 1871 Act are, in my opinion, conclusive of the intention of Parliament to attribute legal personality to trade unions; and that quality or characteristic must of necessity connote the general power to act—or in other words to do at any rate many of those things which H are inherent in the legal concept of personality.

That being the character of the legislation, I can see no *prima facie* ground for limiting by any implication the list of powers normally attendant upon legal personality. On the contrary, it is for those who contend for a limiting interpretation to state the reasons for that view. The main, if not the only, reason advanced by counsel for the first two appellants is that a trade union was an unlawful association at common law. That proposition is broadly correct; but his conclusion does not follow that the legalised trade union of the Acts can only do those things which the Acts specifically authorise: it

rests on a fallacy. In my view, the true interpretation of the Acts is that a trade union is given all powers of a *persona juridica* except (a) those solely characteristic of a natural person and (b) those which are expressly excepted by the creating or enabling statute.

This conclusion is strongly supported by a consideration of what must have been in the mind of Parliament. The policy of the Act was to encourage collective bargaining by legalising the position of trade associations formed for purposes which taken alone were obnoxious to the common law as being in restraint of trade. The main feature of collective bargaining is to collect the members on each bargaining side into coherent units which can speak or make agreements for the side. Therefore the more each side in an industry can be collected together so as to act with one mind, the better for the policy. Enthusiasm for joint action is the driving force; and disintegration of the union is the supreme danger. The men's union more especially must be able to protect itself against any form of attack calculated to arouse doubts and suspicions in the minds of members, and so to destroy the cohesion and will to act of the union. Against endeavours of this sort, the union must have powers of defence; and the most effective power of all is the right of action in the King's Courts. Indeed, that right seems to me vital, and I cannot think that Parliament could possibly have intended not to confer it.

In truth the principle involved has been decided by the House of Lords in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900) (4): for if the *persona juridica* is liable to be sued for breach of the rights of others, it must equally be able to sue to vindicate its own right. BIRKETT, J., has dealt with this aspect quite fully and I have nothing to add—except the obvious comment that the veto on any proceedings—either by or against a trade union—conducted for the purpose of enforcing various agreements, coupled with the absence of any reference to actions of torts, is wholly consistent with the above conclusion and support it. It follows that the first question must be answered in the affirmative: a trade union can, generally speaking, sue in tort.

(ii) It being assumed that a trade union can sue in tort, I can see no ground for excluding the action for defamation. The attack made in the present case—the merits of which are, of course, in no way before us—is a sufficient illustration of the disintegration of a trade union which might be produced by unjustifiable libels uncontrolled by the fear of action in the King's courts. Such disintegration may easily result and the object of the Acts—the trade union system of collective bargaining—be utterly defeated. That is to my mind more than a sufficient reason against making libel an exception to the general rule that a trade union may sue in tort. I see no reason why in this respect a trade union should be treated differently in law from a company under the Companies Act: see *D. & L. Caterers, Ltd. v. D'Anjou* (9).

(iii) For a proceeding under R.S.C., Ord. 25, r. 2, the allegations of the statement of claim must be assumed to be true. If the answers I have given to questions (i) and (ii) are well-founded, the answer to the last question obviously is that the case before us is typically one in which the above answers to questions (i) and (ii) apply.

I cannot refrain from saying in conclusion that the present attempt to deprive trade unions of the right to obtain redress in the King's courts for wrongs done to them seems to me hostile to the whole trade union movement in favour of collective bargaining, which is the main purpose of the trade union Acts.

The appeal must be dismissed with costs. If it is wanted, leave to appeal to the House of Lords is given.

MACKINNON, L.J.: I agree.

UTHWATT, J.: I agree. The point decided in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900) (4) was that a registered trade union might properly be named as a defendant to an action. That decision involves to my mind that a registered trade union is recognised by the law as a body distinct from the individuals who from time to time compose it. It is not a corporation: but it is very like one. The association is not merely the aggregate of the persons who compose it and the presence of the corporate fiction is not necessary to secure its individuality. In an age of neologism it might be called a "near-corporation."

Subject to the question of the illegality of the plaintiff I think that upon this footing the plaintiff as a body has the ordinary rights of persons recognised by law as respects freedom from unlawful attacks and is in a position in its own name to seek redress in the courts in respect of any such attack.

In these proceedings the plaintiff claims redress in respect of a libel which clearly relates to its conduct in carrying out the objects for which as a trade union it was properly formed and registered.

A It is well established that in certain cases a trading corporation may bring suit in respect of an imputation on its trading reputation and I see no reason why a non-trading corporation should not have the same rights as respects imputations on the conduct by it of its activities. A trade union to my mind stands in the same position. It too has its reputation. Why should it not be protected? The social duty so to conduct the affairs of the union as not to invite well-founded criticism is hardly forwarded by a denial of the right to seek redress for an unjustified disparagement of its activities. The circumstance that the property and claims to property of a registered trade union are by the 1871 Act required to be vested in trustees for the union and its members appears to me to be irrelevant. The claim in the action is not a claim to property. With this claim the trustees have no concern, whatever may be their position as regards any damages recovered and paid.

B There remains the question of illegality. It was strenuously contended that the plaintiff union was in the eye of the law an illegal association and that it therefore could not sue in the courts as plaintiff in a libel action or indeed in respect of any other matter. In support of the first part of this contention it was argued—and I am content to assume the argument to be right—that the rules of the plaintiff while not at common law involving the parties to those rules in a criminal conspiracy, were according to the conception of the common law, in unreasonable restraint of trade. The plaintiff union was there, it was said, an illegal association at common law. As regards the second part of this contention it is, of course, a well established principle that the law will not aid the enforcement of any transaction tainted with illegality, but I do not accept the proposition that an illegal association cannot for any purpose be a suitor in the courts: see the cases cited in LINDLEY ON PARTNERSHIP, 10th Edn., at p. 136. But I find it unnecessary to discuss this matter, for it appears to me that the position this trade union would occupy at common law does not enter into the picture at all. In my view, a registered trade union to whose purposes the only objection taken is that some of its rules are in unreasonable restraint of trade is, as the result of the Trade Union Act, 1871, a lawful body. The point may be put quite shortly. Under the 1871 Act a body is not a trade union (see the definition in sect. 23) unless by reason of some of its purposes being in restraint of trade it would “if this Act had not been passed” be deemed to have been an unlawful combination. Unlawfulness at common law was, therefore, a condition precedent of the right to register and it was not till 1876 that a lawful combination might register. The practical consequences in law of the presence among the purposes of a trade union of provisions in restraint of trade are got rid of by sects. 2 and 3 of the 1871 Act. The sections relating to registered trade unions provide (sect. 6) that the registration of a trade union any of whose purposes is unlawful shall be void; (sect. 8) that the trade union as such is a body for which property may lawfully be held; (sect. 9) that its trustees may bring suit in respect of the property of the union; and (sect. 14) that the rules of a trade union shall contain specific provisions.

G Surely, when one finds that a creature is duly created by registration under an Act, that its affairs are in many respects subject to statutory regulation, that the illegality at common law of the association, present in such a creature, was in the mind of Parliament when passing the Act, and that the association is referred to in the Act as a combination “which if this Act had not been passed would have been deemed to be an unlawful combination,” and that its registration would be void if any of its purposes is unlawful—it is an impossible inference that Parliament has succeeded in creating an unlawful combination or illegal association. If that were Parliament’s intention, the method adopted was somewhat tortuous.

H In my opinion, therefore, a registered trade union is a lawful body entitled to sue in the courts and the plaintiff union in this action for libel can properly

rely on its objects as showing the proper scope of its activities notwithstanding that the objects are in restraint of trade. Upon that last point the principle of *Fivaz v. Nicholls* (10), has, in my view, no application. There is no *turpis causa*.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *A. L. Philips & Co.* (for the first two appellants (defendants)); *Robert Clayton & Co.* (for the third appellant (defendants)); *Syrett & Sons* (for the respondents (plaintiffs)).

[Reported by R. BOSWELL, ESQ., and C. ST. J. NICHOLSON, ESQ., Barristers-at-Law.]

ROSS v. THE ENGLISH STEEL CORPORATION, LTD.

[KING'S BENCH DIVISION (Humphreys and Croom-Johnson, JJ.), June 19, 1945.]

Factories—Breach of statutory duty—Fatal accident—Inquest—Limitation of time for laying information—Summary Jurisdiction Act, 1848 (c. 43), s. 11—Factories Act, 1937 (c. 67), ss. 24, 140 (1), (4).

On June 13, 1944, a man was killed as the result of an accident in the respondents' factory and a coroner's inquest was held on June 19. On Oct. 6, 1944, the appellant, a factory inspector, laid an information against the respondents alleging that they had committed an offence against the Factories Act, 1937, s. 24, in that the working parts of a travelling crane in their factory were not properly maintained and in consequence a person was killed. Sect. 140 (1) of the 1937 Act provides that all offences under the Act shall be prosecuted summarily, and by the Summary Jurisdiction Act, 1848, s. 11, where no time is specially limited for laying an information, it shall be laid within 6 months from the time when the matter of the information arose. Sect. 140 (4) of the 1937 Act provides that, where a coroner's inquest is held in consequence of an accident in a factory and it appears that the provisions of the Act were not complied with, summary proceedings against any person liable to be proceeded against for such non-compliance may be commenced any time within 3 months after the conclusion of the inquest. The respondents contended that the information was out of time, because, since there had been an inquest, sect. 140 (4) applied to cut down the time within which the information might be laid. The appellant contended that the information was in time because sect. 140 (4) was an extending or enabling provision: it might not be possible, where an inquest was held, to take proceedings within 6 months from when the matter arose, and sect. 140 (4), therefore, provided that proceedings might be commenced within 3 months after the inquest; sect. 140 (4), nevertheless, had full effect, and the Summary Jurisdiction Act, 1848, s. 11, applied:—

HELD: the words of sect. 140 (4) were of an enabling and not of a restrictive character; it was intended that not only should the Summary Jurisdiction Act, 1848, s. 11, apply, but that additional time should be given in a proper and necessary case. The information was, therefore, in time.

Felton v. Heal (2) applied.

[EDITORIAL NOTE. It may well be a matter of difficulty to commence criminal proceedings in consequence of accidents in mines and factories until after the conclusion of an inquest. It is held that the limitation period laid down in the Factories Act, 1937, s. 140, and calculated from the conclusion of an inquest, is an extending provision, unaffected by the general period of limitation on summary proceedings. This is in accordance with the reasoning in *Felton v. Heal* (2) in relation to coal mines.

AS TO TIME FOR PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 14, p. 672, para. 1280, and Supplement; and FOR CASE, see DIGEST, Vol. 24, p. 941, No. 289.

FOR THE FACTORIES ACT, 1937, see HALSBURY'S STATUTES, Vol. 30, p. 201.]

Cases referred to:

* (1) *Boydell v. Levant Mine Adventurers*, [1916] 1 K.B. 692; 24 Digest 941, 289; 85 L.J.K.B. 923; 114 L.T. 416.

* (2) *Felton v. Heal*, [1920] 3 K.B. 1; 34 Digest 747, 1212; 90 L.J.K.B. 85; 123 L.T. 394.

APPEAL by way of case stated from a decision of the justices for the city of Sheffield. The facts are fully stated in the judgment of HUMPHREYS, J.

Hon. H. L. Parker for the appellant.

H. R. Bramley for the respondents.

HUMPHREYS, J. : This is a case stated by the justices of the city of Sheffield raising a short point as to whether an information which was laid under the Factories Act was in time. The information was in respect of an alleged offence committed against the Factories Act, 1937, s. 24, by the respondents, the owners of a factory. That section provides :

(1) All parts and working gear . . . of every lifting machine . . . shall be properly maintained.

The allegation was that the working parts of a travelling crane in the stamp shop were not properly maintained, and that in consequence of such contravention a person was killed. The matter coming before the justices, the point was taken that, in accordance with the provisions of the Act in regard to the time within which information may be laid, the matter was out of time altogether. The dates are as follows : on June 13, 1944, a man was killed as a result of an occurrence in the factory, on June 19 an inquest was held on his body and concluded, and on Oct. 6 the appellant, who is a factory inspector, laid the information before the justices.

The law is to be found in the Factories Act, 1937, s. 140, which first provides:

(1) All offences under this Act shall be prosecuted and all fines under this Act shall be recovered summarily.

That means that the provisions of the Summary Jurisdiction Acts apply. Unless some other statute applies, the Summary Jurisdiction Act, 1848, s. 11, is the general provision applying to all offences punishable, as this was, on summary conviction. Sect. 11 is as follows :

In all cases where no time is already or shall hereafter be specially limited for . . . laying any such information . . . such information shall be laid within 6 calendar months from the time when the matter of . . . [the] information . . . arose.

It is quite clear that the appellant was within that 6 months, and, therefore, so far, was in time in laying his information. But sect. 140 of the Factories Act, 1937, goes on to say :

(4) Where, with respect to or in consequence of any accident in a factory . . . a coroner's inquest is held, and it appears . . . from the proceedings at the inquest, that any of the provisions of this Act . . . were not complied with . . . summary proceedings against any person liable to be proceeded against in respect of such non-compliance may be commenced at any time within 3 months after . . . the conclusion of the inquest.

The argument is that that 3 months applies to cut down the time within which an information for an offence against sect. 24 may be preferred.

The matter was put by counsel for the factory inspector in the language which was used by LORD READING, L.C.J., in deciding *Boydell v. Levant Mine Adventurers* (1) which was quite different on the facts and on the section which was dealt with, but which raised the same point. LORD READING, L.C.J., dealt with the matter in this way ([1916] 1 K.B. 692, at p. 693) :

Prima facie the Act [i.e., the Factory and Workshop Act, 1901, with which he was dealing] allows a period of 3 months from the date at which the offence comes to the knowledge of the inspector, and the question is whether the provision that in case of an inquest the information may be laid within 2 months after the conclusion of the inquest was intended to cut that period down or to extend it. I think it was intended to extend it.

Agreeing, SANKEY, J., observed ([1916] 1 K.B. 692, at p. 693) :

I cannot read the second paragraph, relating to the case of an inquest being held, as cutting down the time. I think it is an extending provision.

The argument for the factory inspector here was that this is an extending or enabling provision ; in other words, that full effect is to be given to the words, at the commencement of sect. 140 of the 1937 Act, that offences against the Act shall be prosecuted summarily, thus bringing into effect the Summary Jurisdiction Act, 1848, s. 11 ; but that it is realised that there may be circumstances where it is necessary to hold an inquest which may make it very difficult

to deal with the matter until the inquest has been concluded. That may even take beyond the 6 months. Therefore, a special provision is inserted saying that, where an inquest is necessary, summary proceedings against the persons liable to be proceeded against may be commenced at any time within 3 months after the conclusion of the inquest. Quite apart from authority, I have no doubt about the matter, and that that is the true interpretation of that section.

This case, however, is, in my opinion, concluded by authority. The case which we have been referred to is *Felton v. Heal* (2), but before dealing with the report it is desirable to look at the Coal Mines Act, 1914, s. 2, under which that case arose. It is almost identical with the terms of the Factories Act, 1937, s. 140 (4)—indeed, the latter seems to have been taken from the Coal Mines Act, 1914. Sect. 2 of the 1914 Act provides :

Where . . . in consequence of, any accident in a mine, [those words, of course, are different] . . . a coroner's inquest is held, and it appears . . . from the proceedings at the inquest, that any of the provisions of the Coal Mines Act, 1911, or the orders or regulations made thereunder, were not being complied with at the time of the accident, summary proceedings against any person liable to be proceeded against in respect of such non-compliance may be commenced at any time within 3 months after . . . the conclusion of the inquest.

It has been admitted by counsel for the respondents that, *mutatis mutandis*, those words are exactly similar. Upon the language of that section *Felton v. Heal* (2) arose, in the course of which these observations are to be found in the judgment of EARL OF READING, L.C.J. ([1920] 3 K.B. 1, at p. 8) :

The justices, in the first place, looking at the dates, and giving the construction to the Act of Parliament which they thought right, came to the conclusion, in point of fact, that these summonses were both out of time, and therefore that the appellant failed on that ground, and the first question is whether the justices were right in this view. In my opinion they were wrong. They proceeded under the impression that the Coal Mines Act, 1914, s. 2, repealed the Coal Mines Act, 1911, s. 103, which brought into operation the Summary Jurisdiction Acts and consequently limited the time within which the summonses might be issued to 6 months, as provided by the Summary Jurisdiction Act, 1848, s. 11. The justices came to the conclusion that sect. 2 of the Act of 1914 was intended to cut down and limit the operation of sect. 11 of the Act of 1848. I think that was a mistake. Sect. 2 of the Act of 1914 was passed for the purpose of extending the time for taking proceedings, inasmuch as it is well known that an inquest or report upon an accident in a coal mine may last for some considerable time, even longer than 6 months. There are inquiries of a technical and expert character to be made, and time may elapse before the experts can actually get to the place where the accident took place. But whatever may be the reason for the enactment I think that the words of sect. 2 are of an enabling and not of a restrictive character, and that it was intended that not only should the Summary Jurisdiction Act, 1848, apply, but that additional time should be given in a proper and necessary case. I think that the case of *Boydell v. Levant Mine Adventurers* (1) really covers the precise point.

So far as principle is concerned, no doubt the Lord Chief Justice was right in saying that the *Boydell* case (1) covered that case.

That is a decision which is binding upon us. I find it quite impossible to distinguish it from this case. Therefore, merely observing that my opinion would have been the same if there had been no authority, I gladly follow that case. In my opinion, this appeal ought to be allowed, and the case ought to go back to the magistrates with a direction to hear and determine the information.

CROOM-JOHNSON, J. : I agree.

Appeal allowed with costs.

Solicitors : *The Solicitor, Ministry of Labour and National Service* (for the appellant) ; *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

NOSS FARM PRODUCTS, LIMITED v. LILICO.

[KING'S BENCH DIVISION (Humphreys and Cassels, JJ.), June 7, 1945.]

Food and Drugs—Misleading label—Proceedings against manufacturer—Original sale by manufacturer of article of food complying with current regulations—Subsequent alteration in law—Sale of article by retailer—Substance and quality of article of food not complying with new regulations—“Offence . . . due to an act or default of some other person”—Manufacturers not liable—Food and Drugs Act, 1938 (c. 56), s. 83—Defence (Sale of Food) Regulations, 1943 (S.R. & O., 1943, No. 1553), arts. 1, 2.

A manufacturer of food who sells an article of food with a label attached to it and who complies, at the time of the sale, with the then existing regulations, does not infringe the Food and Drugs Act, 1938, and is, therefore, not liable to prosecution under sect. 83 (3) of that Act, if, due to a subsequent alteration of law, the sale of such article with such label attached becomes unlawful at the time when the retailer sells it. The words “due to his act or default” in sect. 83 (3) must be construed as meaning “due to his wrongful act or default” and, therefore, a manufacturer cannot be made responsible under the section for a sale, which takes place after he has parted with the article of food, on the basis that it would be wrong for him, after the alteration of the law, to sell an article which he then is not proposing to sell and does not sell.

[**EDITORIAL NOTE.** The principle that a criminal offence ought not to be created retrospectively is applied to a prosecution under the Food and Drugs Act. This rule does not apply to matters of procedure and the case cited, *Concentrated Foods, Ltd. v. Champ* (1) which turned upon the time for prosecution, can be thereby distinguished.

FOR THE FOOD AND DRUGS ACT, 1938, s. 83, see HALSBURY'S STATUTES, Vol. 31, p. 305.]

Case referred to :

* (1) *Concentrated Foods, Ltd. v. Champ*, [1944] 1 All E.R. 272; [1944] 1 K.B. 342; 113 L.J.K.B. 417; 170 L.T. 302.

APPEAL by way of case stated from the decision of the justices for the county borough of Derby. An information was laid by the respondent, Dr. Gordon Lilico, a medical officer of health, against the appellants alleging that, due to their act or default, one Cecil William Crick, a retail dealer at Derby, had given on July 6, 1944, with an article of food, namely, a cake mixture, which he sold to a sampling officer, a label calculated to mislead as to the nature, substance and quality of the mixture, in breach of the Defence (Sale of Food) Regulations, 1943, art. 1. The cake mixture was sold originally by the appellants on Oct. 23, 1943, and, at that time, the sale complied with the food regulations then in force. The justices decided that the label was calculated to mislead the purchaser, and that the appellants had committed an offence against the Defence (Sale of Food) Regulations, 1943, on the date on which Crick sold the mixture to the sampling officer. The appellants were, accordingly convicted and fined 10 guineas, and ordered to pay costs.

A. S. Diamond for the appellants.

A. Aiken Watson for the respondent.

HUMPHREYS, J. : In my opinion this is a clear case. The appellants are a limited company, and they sold on Oct. 23, 1943, an article of food with a label attached to it, and at that time they complied with the law in every respect. On July 4 that article of food having been sold by the appellant to one person, that person sold it to one Crick, who sold that same article to a sampling officer. Crick was quite plainly *prima facie* guilty of an offence, namely, of selling an article of food with a label calculated to mislead as to the nature, substance and quality of the mixture inside, contrary to the Defence (Sale of Food) Regulations, 1943, art. 1. Crick committed that offence because the law had been altered after the article of food, bearing the label, had left the hands of the appellants. When they sold it, it was a perfectly proper article to sell, complying with the law in every respect, but by reason of the alteration of the law it had become an unlawful article to sell, because the label did not now correspond with the requirements of the law as to labels.

In those circumstances the local authority had to consider whether they

would prosecute Crick or not, and they came to the conclusion that he could probably show that the label, being a contravention of the law—we may call it now the improper label—had been put on by some other person, and that the contravention of the law was due to the act or default of that other person. In the circumstances the local authority decided to take advantage of the Food and Drugs Act, 1938, s. 83, and to prosecute the people who originally put the label on. The material part of sect. 83 (3) is as follows :

Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person [that is here Crick] and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first mentioned person could establish a defence under sub-section (1) of this section, [that being that he had used all due diligence to secure that the provisions of the law were complied with, and so forth] they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first mentioned person.

It may well be that in taking the proceedings the local authority had not in mind that the original sale by the appellants had been long before this new law had come into force and was, at that time, perfectly lawful. What the local authority had to prove was, according to sect. 83 (3), this :

In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first mentioned person might have been charged.

We are asked to say here that the meaning of that provision is, that if a man sells what is perfectly legal and proper according to law, nevertheless a year afterwards—and, it may be said, the law having in the meantime been altered—he is to be brought before a police court and, being a reputable person, is to be charged with a criminal offence. To my mind that is a monstrous proposition. I cannot conceive of any Act of Parliament being passed having such an effect, and, in my view, the Food and Drugs Act, 1938, certainly does not have that effect because the act or default mentioned in sect. 83 (3) plainly has the meaning of wrongful act or default.

Counsel for the respondent has drawn our attention to a case which he suggests is in his favour, *Concentrated Foods, Ltd. v. Champ* (1). That case has, in my view, nothing whatever to do with this matter. The only matter decided in that case, which is in the least degree relevant to this case, is that it was held there that the prosecution was not out of time. There is a limit of six months beyond which a person cannot be prosecuted for an act punishable upon summary jurisdiction in certain circumstances. The prosecution was within time so far as the last seller was concerned, but it was out of time so far as the original seller was concerned. Both of them had been guilty of an offence because they both contravened the law and the same law, and the question was whether the original vendor escaped prosecution because he was able to say that he should have been prosecuted within the six months' limit. The matter turned on the Food and Drugs Act, 1938, s. 38 (3) :

In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first mentioned person might have been charged.

And so the court held that the prosecution was not out of time.

In my view it is clear law that a person who does that which is right and proper and complies with the law, is not made responsible by sect. 83 for something which takes place long after he has parted with the goods by reason of the fact that the law, having been altered, it would be wrong for him now to sell the article which in fact he is not proposing to sell and does not sell.

I think this appeal is rightly brought and should be allowed.

CASELS, J. : I agree and have nothing to add.

Appeal allowed with costs.

Solicitors : *G. A. Hathway*, agent for *Flint, Bishop & Barnett*, Derby (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *C. Ashton*, town clerk, Derby (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

JAMES PEEK v. ALBERT EDWARD TOWLE.

[KING'S BENCH DIVISION (Humphreys and Tucker, JJ.), May 10, 1945.]

Street Traffic—Reporting accidents—Accident due to presence of vehicle on road—Child injured—No request by authorised person for driver's name and address at time of accident—Obligation on driver to report to police within 24 hours—Motor Traffic Act, 1930 (c. 43), ss. 22 (1), (2).

A Where a motor vehicle on a road is involved in an accident whereby a person is injured and there is no person present who has reasonable grounds for requiring from the driver his name and address and other particulars, under the Road Traffic Act, 1930, s. 22 (1), there is an obligation on the driver, under sect. 22 (2), to report the accident to the police within 24 hours. The obligation under sect. 22 (2) arises whenever, for any reason, the driver has not given his name and address, and not merely in cases
B where he has been asked to give particulars but has failed to do so.

[EDITORIAL NOTE. This is a short point on the construction of the Road Traffic Act, 1930, s. 22, relating to the duty of a motorist to report accidents. It is held that the fact that the motorist has not been required to give his name and address after an accident does not absolve him from the duty of reporting to the police. As was pointed out in *Dawson v. Winter* (1932) 149 L.T. 18, the object of the section is to insure that by one means or another the police are informed of the happening of the
C accident.

AS TO REPORTING ACCIDENTS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 675, 676, para. 998; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 232d, 232e.]

APPEAL by way of case stated from a decision of the justices for the county borough of Derby. The facts are set out in the judgment of the court delivered by
TUCKER, J.

D *Vernon Gattie* for the appellant.-
Percy Lamb for the respondent.

TUCKER, J. [delivering the judgment of the court]; This is a case stated by justices for the county borough of Derby in which it appears that an information was laid against the respondent under the Road Traffic Act, 1930, s. 22 :

E . . . for that he being the driver of a certain motor vehicle, namely, a motor car on a certain road called City Road, and an accident occurring whereby injury was caused to a person owing to the presence of the said motor vehicle on the road and not having given his name and address to any person requiring him so to do did fail to report the accident at a police station or to a police constable as soon as was reasonably practicable and in any case within 24 hours of the occurrence thereof.

The facts set out in the case so far as material are as follows. The appellant is an inspector of police for the district and the respondent was the driver of a
F car registered No. BXA 10, which at 12.20 p.m., on Saturday, Sept. 9, 1944, was involved in an accident whereby a child was injured. The respondent was not required to and did not give his name and address to anyone having reasonable grounds to require it at the time of the accident, nor the name and address of the owner of the vehicle, nor the identification marks of the vehicle, nor was he requested for the same by any person authorised to require it. The
G respondent did not report particulars of the accident to the police until 9.30 a.m., on Wednesday, Sept. 13, 1944.

Those are the whole of the facts and, on those facts being proved, the respondent contended (i) that no evidence had been given by or on behalf of the appellant that the respondent had been required to give his name and address by any person having reasonable grounds for so requiring; (ii) that because he had not been so required the respondent was under no obligation to report
H the accident under the Road Traffic Act, 1930, s. 22 (2); (iii) that the circumstances proved by the evidence, if they disclosed any offence, should have been the subject of a charge under the Road Traffic Act, 1930, s. 40 (2), and not under the section as charged. The justices were of opinion and found that the contention of the respondent was correct in law and they accordingly dismissed the information. Then they say that if the court is of opinion that they came to an incorrect decision in point of law, the court is requested to reverse or amend their determination or remit the matter with the determination of the court thereon.

This raises a very short point. The Road Traffic Act, 1930, s. 22, is in these words :

(1) If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal, the driver of the motor vehicle shall stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner and the identification marks of the vehicle. (2) If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, he shall report the accident at a police station or to a police constable as soon as reasonably practicable, and in any case within 24 hours of the occurrence thereof.

There is no question but that the driver of this motor vehicle was not required by any person having reasonable grounds for so requiring, or at all, to give his name and address, and the argument on behalf of the respondent is that subsect. (2), which imposes the liability to report to the police, only arises in cases where the driver has been required by a person having reasonable grounds for so requiring to give his name and address, and that if he has not been so required by such a person, there is no obligation under this section to report to the police. That argument is really founded upon the words in subsect. (2), "in the case of any such accident as aforesaid" and the words which follow, "to any such person as aforesaid." It is said that those words all indicate that what is being envisaged in the first instance is the driver having been required to give these particulars by a person having reasonable grounds so to do and that it is only when he has been so required that it can be said that the words "in the case of any such accident as aforesaid" apply, and similarly, the words "to any such person" indicate someone who on reasonable grounds has required these particulars to be given.

In our view, these words are perfectly plain. The words are "in the case of any such accident as aforesaid," and that means where an accident has occurred whereby damage or injury has been caused to any person, vehicle or animal owing to the presence of a motor vehicle on a highway. That is what is meant by "in the case of any such accident," and it goes on to provide that where for any reason the driver does not give his name and address "to any such person as aforesaid," meaning the person described in subsect. (1), then there is an obligation upon him to report to the police. The best reason, or the strongest case, for not having given such particulars to any such person occurs when no such person is present at the scene of the accident, and, in our view, that is the kind of case that is envisaged, or one of the classes of cases which is envisaged, by this section. It would be a remarkable state of affairs if, when somebody has been involved in an accident in some lonely place where nobody has been present to observe it, he should be under no obligation to report the accident at a police station, and that the obligation should only arise in cases where there has been some bystander who has asked for these particulars and where there has been a failure to comply with such request.

An argument is made in support of the view taken by the justices that such an occurrence as this could, and should, have been dealt with under sect. 40. There is no need to express any view one way or the other as to whether or not sect. 40 would have been applicable to this particular case. Sect. 40 is a section dealing primarily with the requirements as to the production of a certificate of insurance or of security and with certain consequences which follow where there has been a failure to produce such a certificate and it is not necessary for the purposes of this case to express any opinion with regard to that section.

In our view, it is quite clear on the facts found by the justices that there has been a breach of sect. 22 and that the case should be remitted to the justices with the intimation that they should find the offence proved and adjudicate thereon.

Appeal allowed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Charles Ashton*, Town Clerk, Derby (for the appellant); *G. A. Hathway*, agent for *J. P. R. Pym*, Belper (for the respondent.)

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

R. v. JARMAN.

[COURT OF CRIMINAL APPEAL (Wrottesley, Stable and Lynskey, JJ.),
October 16, 19, 22, 1945.]

Criminal Law—Murder—Felony involving personal violence—Use of loaded firearm a violent measure—Violence resulting in death of victim—Inadvertent use of firearm not reducing offence to manslaughter.

A The appellant, armed with a loaded revolver, entered a garage for the purpose of committing a robbery. At the time the cashier was counting the day's takings. According to the appellant's evidence, he pointed at the cashier the revolver which he was then holding in his right hand and demanded the money. On the cashier's refusal to do so, the appellant transferred the revolver to his left hand and, while it was still being pointed at the cashier, cocked it twice, thereby introducing a live round into the breach. His finger was on the trigger which, according to his evidence, he must have pressed inadvertently. Subsequently the cashier fell shot; the appellant seized some money and ran away. The cashier died. The question arising on appeal was whether the fact that the firing of the revolver was, or might have been, inadvertent created an exception to the rule that where a person whilst committing a felony did an act which was known to be dangerous to life and likely in itself to cause death and the death of another person resulted as a consequence of that act though not intended by the person committing it, such person causing the death was guilty of murder:—

HELD: (i) a person using violent measures in the commission of a felony involving personal violence did so at his own risk and was guilty of murder if those violent measures resulted even inadvertently in the death of the victim.

Director of Public Prosecutions v. Beard (3) followed.

(ii) for this purpose, the use of a loaded firearm intended to frighten the victim into submission was a violent measure.

R. v. Hulton and Jones (4) followed.

[EDITORIAL NOTE. It is well-established that death caused in the course of the commission of a felony involving personal violence is murder, and the court here refuses to recognise an exception to the rule where one act in the chain of circumstances leading to the death is inadvertent. The House of Lords rejected such a principle in *Director of Public Prosecutions v. Beard* (3) and the alleged inadvertent extra pressure which resulted in strangling in that case was of a similar character to the pressing of the trigger here considered. Once a series of acts involving violence is commenced the performer must accept the consequences and cannot plead that at some stage they become involuntary.]

AS TO DEATH CAUSED WHILE FELONY IS COMMITTED, see HALSBURY, Hailsham Edn., Vol. 9, p. 437, para. 749; and FOR CASES, see DIGEST, Vol. 15, pp. 787-789, Nos. 8486-8515.

AS TO JUDGE'S SUMMING UP, see HALSBURY, Hailsham Edn., Vol. 9, pp. 170, 171, para. 247; and FOR CASES, see DIGEST, Vol. 14, pp. 302, 303, Nos. 3186-3194.]

Cases referred to:

(1) *R. v. Larkin*, [1943] 1 All E.R. 217; [1943] 1 K.B. 174; 112 L.J.K.B. 163; 168 L.T. 298.

(2) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; Digest Supp.; 104 L.J.K.B. 433; 153 L.T. 232.

(3) *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; 14 Digest 65, 306; sub nom. *R. v. Beard*, 89 L.J.K.B. 437; 122 L.T. 625.

(4) *R. v. Hulton and Jones*, unreported.

H APPLICATION for leave to appeal against conviction for murder and sentence of death passed by CHARLES, J., at the Central Criminal Court. The court, having treated the application as the appeal, heard counsel for the appellant and the Crown. The appeal was dismissed and the court decided to give their reasons later. The facts are fully set out in the judgment of the court delivered by WROTTESELEY, J.

F. H. Lawton for the appellant.

L. A. Byrne for the Crown.

Cur. adv. vult.

WROTTESELEY, J. [delivering the judgment of the court]: The facts in so far

as they are relevant to the subject matter of the appeal are quite simple and are not in dispute. The appellant, having purchased an automatic pistol, with the object of using it in order to commit armed robbery, inquired from a friend as to the business routine at a particular garage and finally decided to hold up the owner of it and to rob him. Accordingly, on June 28, between 5.30 and 6 p.m., he entered the garage expecting to find and hold up the proprietor. In fact, he found Mrs. Ivy May Phillips counting the day's takings. As no one but the appellant has survived who knows exactly what happened then, I will read his account of it. She saw the gun. In front of her were two piles of silver on top of some notes. The appellant said to the dead woman: "I'll have that, sister"; she said: "Don't be silly." The appellant, who up to then had the gun in his right hand pointing at her, now changed it over to his left hand and cocked it twice, thus allowing one live round to be ejected, saying: "This ain't no toy," hoping to frighten her. She said: "Don't be absurd." She was apparently a brave woman, and in addition may well have refused to believe that in 1945, at Thornton Heath she was likely to be shot by a casual visitor just because she refused to hand over her employer's money. The appellant said no more, but kept the pistol in his left hand pointed at the woman and with his finger on the trigger. When he had cocked it for the second time he had introduced a live round into the breech. Then, according to his account, he must inadvertently have pressed the trigger, for the pistol went off. The woman fell shot, and as she fell the appellant realised he had shot the woman and turned round and grabbed a pile of notes and ran out. After two operations, the woman died of the wound inflicted.

Dealing with this account of the killing of Mrs. Phillips, which the jury may or may not have believed, but which they were bound to consider as being possibly the truth, the judge told the jury in three passages what was the law and what was their duty. He said:

It has been laid down many times by myself and other judges, and as recently as three years ago [in *R. v. Larkin* (1), [1943] 1 All E.R. 217, at p. 219], that where an act upon which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person and quite inadvertently the doer of that act causes the death of another person, then he is guilty of manslaughter. Now, that is if the act is unlawful, but if, in doing that same dangerous and unlawful act, he is doing an act which amounts to a felony, he is guilty of murder and not manslaughter. Such are the general terms of the law. Let me apply them, if I may, to the circumstances of this case. This man was, by all admissions, by his own sworn testimony, engaged upon an armed robbery, and that is a felony and nothing but a felony, and in the course of that armed felony this unfortunate young woman met her death at his hands. You have been invited to say that there was a sort of break, that is to say, that when this woman refused to be cowed by the exhibition of this loaded and cocked revolver, this man was so bewildered with her bravery that he forgot and set aside the execution of the felony for which he had entered the garage, and that while momentarily, almost, he was in that condition of mind he inadvertently, he knows not how, squeezed the trigger and killed the woman, or injured her so that she died a little time afterwards. I find it very difficult in directing you that you can consider any such proposition.

In addition, CHARLES, J., said:

. . . and so it is that, upon the testimony before you in this case, it is my bounden duty (and do not think that these duties are not painful) to tell you that he went to execute an armed robbery, which is a felony, and that in the execution of that armed robbery, which he carried out to its absolute completion by taking the money which he went there to get with the assistance of the revolver, in doing that he was carrying out a dangerous or unlawful act, holding a loaded cocked revolver with his finger on the trigger in the direction of that woman while he was executing a felony and as part of it. It may well be that he did not intend or desire that revolver to go off. I have to tell you in law that does not make any difference; if you accept the circumstances under which this terrible killing took place, that is murder, plain, stark murder.

Finally, CHARLES, J., ended by saying:

You will remember the statement that the accused made, but the statement does not vary from that which he said. [i.e., at the trial]. He simply says that he passed the revolver from his right hand to his left hand; he knew it was cocked, he knew it was loaded, and he held it in his left hand pointing as he knew, and says he knew, towards the woman, and that it went off inadvertently; and if all that be true, then I am bound to direct you that that is murder and not manslaughter.

On behalf of the appellant it is said here that these passages were a misdirection and that the judge confused inadvertence as to what the result of his action might be with inadvertently doing the very act itself, but in its simplest form the careful and clear argument of counsel for the appellant amounted to this, that in order to render himself guilty of murder the appellant must have pressed the trigger voluntarily and not inadvertently, and so fired the pistol. If, therefore, the jury accepted his evidence that his will did not go with the action of his finger in pressing the trigger, he was guilty not of murder but manslaughter, and that the jury should have been so directed; and in the absence of more specific authority he based his argument upon two passages. The first passage is to be found in *Woolmington v. Director of Public Prosecutions* (2), where VISCOUNT SANKEY, L.C., said ([1935] A.C. 462, at p. 482):

When dealing with a murder case, the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused.

In that case the only issue before the House of Lords was the burden of proof. There was no question of a felony with violence; at the highest the alleged facts showed only a misdemeanour.

The second passage is from the speech of LORD BIRKENHEAD, L.C., in *Director of Public Prosecutions v. Beard* (3). This is the passage ([1920] A.C. 473, at p. 493):

The first objection failed, the court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt as to its soundness.

It was argued on behalf of the appellant that this passage must be read with the addition of the word "intentional" or "voluntary" before the words "act of violence." Accordingly, counsel for the appellant claims that if the appellant's evidence is accepted, while it is true that he was engaged in the commission of a crime involving violence, the death of the woman killed was not due to a voluntary violent act performed by the appellant, but to an inadvertent and involuntary act, and the mere fact that the general design was the completion of a crime involving violence was not sufficient to make the killing, which occurred in the course of it, murder.

On the other hand, counsel for the Crown pointed out that the direction given by the judge in this case was practically *verbatim* the law as laid down in this court in *R. v. Larkin* (1). The question, therefore, arises whether the fact that the firing of the pistol was, or might have been, inadvertent creates an exception to the general rule laid down in that case, based as it is on a long line of precedents. In *Director of Public Prosecutions v. Beard* (3) LORD BIRKENHEAD, L.C., pointed out ([1920] A.C. 479, at p. 492), that in the Court of Criminal Appeal two separate and independent points of misdirection had been raised on behalf of the prisoner. The first was that the judge should have told the jury that if they were of opinion that the violent act, which was the immediate cause of death, was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter. As LORD BIRKENHEAD, L.C., pointed out, that objection failed; and it is clear that the House of Lords approved of the decision of the Court of Criminal Appeal in rejecting that objection. As counsel for the Crown observed, if the Court of Criminal Appeal were right in that decision, they decided that which is in principle indistinguishable from that which arises in this case. In effect, the argument for the appellant here rests on the proposition that you must isolate the pressure of the appellant's finger on the trigger of the pistol from all the surrounding acts and circumstances which made it a deadly thing to do. The act in the performance of which the appellant killed the woman was robbery with arms which was compounded of many elements and circumstances. The pistol must be loaded, cocked and presented at the woman as well as fired in order that her death might result, and it was admitted that all these elements were present and that all but the last were brought about by his voluntary act. Even if the pistol had never been fired, it is clear that the appellant committed upon this woman a felony involving violence; he even completed the robbery.

The judge was no more under a duty to direct the jury that if the pressing of the trigger was inadvertent the killing was manslaughter, than was the judge in *Director of Public Prosecutions v. Beard* (3) under a duty to direct the jury that, if the pressure exerted by the appellant in that case voluntarily was only so much as was necessary to silence the child and the extra pressure which throttled her was inadvertent and accidental, then the accused there was guilty of manslaughter.

We think that the object and scope of this breach of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those violent measures result, even inadvertently, in the death of the victim. For this purpose, the use of a loaded firearm in order to frighten the person victimised into submission is a violent measure. The recent case of *R. v. Hulton and Jones* (4) decided in this court, but not reported, is clear authority for the proposition.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *The Director of Public Prosecutions* (for the Crown).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

GORDON, DADDS & CO. v. MORRIS AND OTHERS.

[CHANCERY DIVISION (Lynskey, J.), September 27, October 4, 1945.]

Emergency Legislation—Requisitioning of premises—Delegation—Power to take possession delegated to local authority—Possession taken for the purpose of providing accommodation for refugees from enemy attack—Local authority directed to retain possession for different purposes—Powers of requisitioning authority—Emergency Powers (Defence) Act, 1939 (c. 62), s. 1—Requisitioned Land and War Works Act, 1945 (c. 43), s. 28 (2)—Defence (General) Regulations, reg. 51 (1), (5).

In Jan., 1944, the plaintiffs, a firm of solicitors, purchased certain leasehold premises situated in Westminster. At that time the Westminster corporation, by their town clerk, were in possession of the premises by virtue of a requisition order, dated Sept. 30, 1940, the power to requisition the premises having been delegated to the town clerk by the Minister of Health for the purpose of providing accommodation for refugees from enemy attack. This requisition order was confirmed on Oct. 12, 1940, subject to the condition that the Minister was to retain control of the period of requisition. When hostilities with Germany ceased, it seemed unlikely that the premises would be required any longer for the purpose for which the requisition order had originally been made, but the premises were retained by the town clerk, acting under instructions of the Minister for the temporary accommodation of evacuees. Subsequently, on Aug. 13, 1945, the Minister decided to retain possession of the premises for use as a hostel for the reception and housing of wives and children of Canadian soldiers temporarily without accommodation. The town clerk was informed of that decision on Aug. 14, 1945. A request by the plaintiffs to the Minister to make arrangements for the release of the premises, dated July 26, 1945, was refused. The plaintiffs, having heard that the premises were now used for a purpose different from that for which the original order of requisition had been made, secured entry to the premises on Aug. 22, 1945, and purported to take possession of the house. On the same day, Canadian soldiers, under the instructions of the Minister, entered the premises to prepare the house for the purposes envisaged by the Minister's decision. As a result, the plaintiffs commenced proceedings against the town clerk, the Minister of Health and the Canadian military authorities. The principal contentions of the plaintiffs were (i) that where a competent authority, i.e., the Ministry of Health, delegated part of its power under the General (Defence) Regulations, 1939, reg. 51 (5), it thereby denuded itself of its right to exercise any powers in respect of any premises of which possession had been taken by its delegate under such delegated powers; (ii) that the town clerk's right to possession ceased when the premises

were no longer used for the purpose for which possession was taken, such possession thereafter becoming unlawful; and that the Ministry while relying on the town clerk's possession had not itself requisitioned the premises for other purposes and had no power to do so; (iii) that the Requisitioned Land and War Works Act, 1945, s. 28 (2) did not entitle the Minister to retain or authorise the retention of possession of the premises, because the premises were not, on Aug. 13, 1945, in his possession or in that of any person who was occupying the house, or using it, under his authority:—

A HELD: (i) the word "delegate" in the Defence (General) Regulations 1939, reg. 51 (5) was used in its ordinary meaning, and a delegation by a competent authority of its powers under reg. 51 did not divest that authority of any of its powers under the regulation. The delegated power being only a power to select premises and submit them to the Minister as suitable for the purposes named, and the Minister expressly retaining the authority to decide whether the particular premises should be requisitioned or not, such delegation did not amount to any denudation of any powers of the Minister.

B *Huth v. Clarke* (1) considered.

C (ii) where a competent authority had taken possession of land for one purpose, they were empowered, by the Defence (General) Regulations, 1939, reg. 51, to use it, or to direct its use, for another purpose and to continue in possession for that other purpose, provided that such other purpose came within one of the four purposes named in the regulation. On the facts here, the Minister was acting within his powers when he directed the town clerk to use the land for another authorised purpose, when the original purpose for which the right to take possession had been delegated was about to come to an end.

D (iii) the Minister was entitled, under the Requisitioned Land and War Works Act, 1945, s. 28 (2) to retain possession and use requisitioned premises for the purposes of a public service. Since the premises were, on the date in question, in the possession of the town clerk who was using the land under the Minister's authority, the Minister had the right to authorise the Canadian Military Authorities to enter the premises and prepare them for the purposes envisaged by the Minister's direction.

E [**EDITORIAL NOTE.** This case establishes the important principle that a Government Department requisitioning land by authority of a regulation for one purpose is entitled to use it for any other purpose coming within the ambit of the regulation. Delegation of its powers does not divest the Department of possession and consequently no fresh requisition is required on conclusion of one purpose. It was argued that possession taken under the Emergency Powers (Defence) Act, 1939, is in fact the possession of the Crown and not of the authority requisitioning, but no decision is given upon this point.

F A further interesting question arising out of this case is whether members of the Canadian forces would be within the Public Authorities Protection Act, 1893. It was suggested by counsel that sect. 1 of that Act (see, now, Limitation Act, 1939, s. 21), was sufficiently widely drawn to include them, but the matter was not argued further in view of the acceptance of liability by counsel for the Canadian military authorities.

G FOR THE DEFENCE (GENERAL) REGULATIONS, reg. 51 (1), see HALSBURY'S STATUTES, Vol. 34, p. 711.]

Cases referred to:

**(1) Huth v. Clarke* (1890), 25 Q.B.D. 391; 33 Digest 17, 68; 59 L.J.M.C. 120; 63 L.T. 348.

(2) Carlitona, Ltd. v. Works Comrs., [1943] 2 All E.R. 560.

H MOTION for an interlocutory injunction, by consent treated as the trial of the action. The plaintiffs are Gordon, Dadds & Co., a firm of solicitors, who are the owners of certain premises known as 80, Brook Street, in the city of Westminster. The first defendant is Sir Parker Morris, the Town Clerk of the city of Westminster. The second defendant is the Rt. Hon. Aneurin Bevan, Minister of Health, who is sued as such Minister. The third defendant is Major Coultry, who is sued as the nominated representative of the Canadian military authorities in this country. The plaintiffs claimed:

(i) a declaration that the requisition of the leasehold premises No. 80, Brook Street in the county of London belonging to the plaintiffs by the defendant Parker Morris pursuant to a notice dated Sept. 30, 1940, made under the powers delegated to him

by the Minister of Health for the purpose of the said premises being used as a rest centre for persons rendered homeless by enemy action terminated on the said premises ceasing to be used for such purposes; (ii) a declaration that the powers of the Minister of Health as a competent authority under the Defence (General) Regulations, 1939, reg. 51, having been delegated to the defendant Parker Morris, the defendant Aneurin Bevan as Minister of Health was not on Aug. 13, 1945, and is not entitled to retain the said premises under the said requisition as claimed by him in a letter of that date to the plaintiff; (iii) a declaration that the entry by soldiers of the Canadian Armed Forces on the said premises on or about Aug. 21, 1945, and their continued occupation of part thereof under the orders of the defendant Major Coultry constituted and constitutes a trespass; (iv) an injunction to restrain the defendants, their servants and agents and all persons acting under the authority or by the directions of the defendants, or any of them, from trespassing upon the said premises or upon any part thereof or from otherwise interfering with the plaintiff's possession and enjoyment of the said premises.

Further ancillary reliefs were claimed in the indorsement of the writ. The facts and arguments are fully set out in the judgment.

Sir David Maxwell Fyfe, K.C., and Hector Hillaby for the plaintiffs.

Valentine Holmes, K.C., and E. Milner Holland for the first defendant, the town clerk of the city of Westminster.

The Attorney-General (Rt. Hon. Sir Hartley Shawcross, K.C.), and Hon. H. L. Parker for the second defendant, the Minister of Health.

W. Arthion Davies for the third defendant, Major Coultry, the nominated representative of the Canadian Military Authorities.

LYNSKEY, J. : The action first came before me as vacation judge on motion for an interlocutory injunction in the terms claimed in the writ. The defendants asked for and obtained an adjournment to file evidence and did file evidence. At the adjourned hearing I was pressed by counsel for all parties to treat the motion for an interlocutory injunction as the trial of the action and, after considerable hesitation and with reluctance, I consented so to do.

Before I deal with the contentions put forward by the plaintiffs, I will set out the facts as I find them. On July 3, 1940, by a circular described as circular 2081, the then Minister of Health, acting under his powers as a competent authority under reg. 51 of the Defence (General) Regulations, delegated to Sir Parker Morris, under para. 5 of that regulation, his powers to take possession of and use land under paras. 1 to 3 of the same regulation, subject to certain conditions and for certain purposes which are set out in the circular. As a dispute arose as to the construction of that circular, I will deal with the purposes authorised thereby later in this judgment.

In purported exercise of the powers delegated to him, Sir Parker Morris took possession of the premises, 80, Brook Street, on Sept. 30, 1940. On Oct. 5, 1940, Sir Parker Morris wrote to the then owners, the New Alliance Club, inclosing a formal notice that he had taken possession in exercise of the powers delegated to him by the Minister of Health under and by virtue of reg. 51. The formal notice inclosed did not state the purpose for which possession was taken, but the covering letter described the purpose as "for the purpose of providing accommodation for British refugees from enemy attack."

On Sept. 30, 1940, Sir Parker Morris notified the senior regional officer of the London region for the Minister of Health, in a letter which reads :

I, Parker Morris, the town clerk of the city of Westminster, in the exercise of the powers delegated to me under the terms of Ministry of Health circular No. 2081, by the Minister of Health, and by virtue of reg. 51 of the Defence (General) Regulations, 1939, on Sept. 30, 1940, took possession of the house at No. 80, Brook Street, W.1, owned by New Alliance Club but unoccupied at the present time, for the purpose of providing accommodation for refugees from enemy attack or the imminence of enemy attack. I certify that the house does not fall within any of the categories excluded by the Minister in the inclosure to circular 1949, and I am satisfied that all reasonable precautions, including reference to the central register of accommodation earmarked for Government purposes and covering instructions relating thereto, have been taken to ensure that the house taken is not required or earmarked by any Government Department for another purpose.

On Oct. 12 confirmation was given by the deputy senior regional officer of the Minister of Health, and that is given in these terms :

The Minister of Health hereby confirms the taking possession of the premises named above. The period of occupation must not extend beyond six months from the date

of taking possession unless the consent of the Minister is obtained.

Then there is a note :

The Minister of Health may at any time direct that the possession of the premises named in this application shall cease.

A It is quite clear from Sir Parker Morris's letter and the confirmation that both the Ministry and Sir Parker Morris interpreted circular No. 2081 as authorising the latter to take possession of the premises, No. 80, Brook Street, for the purpose of providing accommodation for refugees from enemy attack or the imminence of enemy attack. It further seems clear that although the Ministry had delegated to Sir Parker Morris authority to take possession of the premises, the Ministry purported to retain control of the period of requisition. From time to time thereafter the Ministry extended Sir Parker Morris's authority on behalf of the Westminster City Council to retain possession of the premises, B 80, Brook Street, and finally, by letter dated Nov. 7, 1944, extended the period of occupation indefinitely but reminded Sir Parker Morris that the premises should not be retained for any period longer than was necessary.

C When possession was first taken or shortly afterwards, in Oct., 1940, the Westminster City Council equipped the premises with about fifty camp beds, some fifteen bunks and bedding, towels and other furniture, so as to fit the premises to be used as a hostel or clearing house for persons rendered homeless by enemy action. The premises were used, or continued to be available for such use, until at least the determination of hostilities with Germany.

On June 15, 1945, the Requisitioned Land and War Works Act, 1945, was enacted and came into force on that day. Sect. 28 (2) of that Act empowers a Minister to retain or authorise the retention of land and premises in certain circumstances, with which I will deal later.

D About the time of the termination of hostilities with Germany, it seemed unlikely that the premises, 80, Brook Street, would be required much longer for the accommodation of persons rendered homeless by enemy action. The senior regional officer of the Ministry of Health, however, intimated to Sir Parker Morris that the premises, 80, Brook Street, and certain similar houses should still be retained for the temporary accommodation of returning evacuees and their parents and escorts, and 80, Brook Street was retained for E this purpose.

In July, 1945, there were between 30,000 and 40,000 wives of members of the Canadian Forces with a large number of children awaiting transport to Canada. It became necessary to provide accommodation in London for the purpose of F arranging parties up to 1,000 persons pending their transportation to the port of embarkation and for housing wives and children of Canadian soldiers temporarily without accommodation. Up to this time the Canadian authorities had been allowed the use of certain schools belonging to the London County G Council, but, owing to increased educational demands, this facility could no longer be afforded. After discussion between representatives of the Ministry of Health and the Canadian authorities the senior regional officer of the Ministry of Health on behalf of the Ministry of Health, decided that it was necessary and expedient in the interests of public safety, or for maintaining supplies and services essential to the life of the community, that possession of 80, Brook Street should be retained to be used as a hostel for the reception of wives and children of Canadian soldiers on their way to Canada, and for housing wives and children of Canadian soldiers temporarily without accommodation. Possession of the premises, 80, Brook Street, was retained for these purposes. Sir Parker Morris was informed of this decision on Aug. 14, 1945.

H I will now deal with the position of the plaintiffs. They are a firm of solicitors with a large practice. For many years they carried on their practice at Nos. 11 and 12 St. James's Place, in the city of Westminster. In Nov., 1940, No. 11, St. James's Place suffered extensive damage from a direct hit by a delayed action bomb, which, although it did not explode, caused serious structural damage to those premises. In May, 1941, No. 12 St. James's Place was totally destroyed by enemy action. The plaintiffs obtained accommodation in a building in Buckinghamshire, upon a tenancy which expires six months after the end of the war. In Jan., 1944, the plaintiffs purchased the premises, No. 80, Brook Street, for use for the purposes of their practice as soon as they could

obtain possession. The plaintiffs are at present carrying on their practice at 11, St. James's Place and in the building in Buckinghamshire under extremely difficult and unpleasant conditions and, I have no doubt, sorely need the premises, 80, Brook Street. They suggest they only purchased the premises, 80, Brook Street, on the assurance of the Westminster City Council that the latter would discontinue the use of the premises immediately after the risk of air raids on London ceased. It was not, however, suggested in argument before me that there was or could be anything in the nature of any legal rights or obligations resulting from such assurance.

On July 26, 1945, the plaintiffs wrote to the senior regional officer of the Ministry of Health and, after informing him of their difficult position, requested him to make arrangements for the release of the premises, 80, Brook Street, for their immediate use. On Aug. 13, Mr. Anderson, on behalf of the Ministry, replied to the plaintiffs in these terms:

I am directed by the Minister of Health to refer to your letter of the 26th ultimo, and to say that it is still necessary to retain the property, 80, Brook Street, under requisition. It is regretted, therefore, that it is not possible to accede to your request for the release of the premises for your immediate use or, at present, to say when such release will be practicable.

At this time it had been decided by those acting on behalf of the Minister to retain possession of the premises for use as a hostel for the wives and children of Canadian soldiers.

On Aug. 22, 1945, Mr. F. W. Rateliff, a partner in the plaintiff firm, with two of his partners secured entry to the premises, 80, Brook Street, by means of a key in their possession and purported to retake possession of the premises. Mr. Rateliff left his representatives there with instructions to stay in the house and to hold possession on behalf of the plaintiffs.

On Aug. 22, 1945, the beds, bunks, towels and furniture belonging to the Westminster City Council were still on the premises, 80, Brook Street, and the premises had at that time not been vacated either by Sir Parker Morris or the city of Westminster. Later in the day, on Aug. 22, 1945, a non-commissioned officer and a number of Canadian soldiers entered the premises, 80, Brook Street, to take possession of them under purported authority of the Minister of Health, to prepare the premises for use by wives and children of Canadian soldiers and to make a number of structural alterations to render the premises fit for such occupation. As a result of this, the plaintiffs after certain correspondence issued the proceedings in this action.

On behalf of the plaintiffs it was contended that Sir Parker Morris, when he took possession of the premises, 80, Brook Street, on Sept. 30, 1940, for the purpose of providing temporary accommodation for persons rendered homeless by enemy action, had received no authority from the Minister of Health so to do, and that his entry into possession was, therefore, wrongful and unjustified. I doubt if this contention was open to the plaintiffs, unless they amended their claim; but, as it was argued before me, I propose to deal with it.

The authority given to Sir Parker Morris, if given at all, was given by circular 2081, dated July 3, 1940, under the provisions of reg. 51 (5), of the Defence (General) Regulations. Para. 9 of the circular reads:

The Minister accordingly, in exercise of his power under para. 5 of Defence (General) Regulations, reg. 51, hereby extends the powers already delegated to you to cover the taking possession of buildings for some purpose directly connected with the accommodation of refugees from enemy attack or the imminence of enemy attack.

If this paragraph stood alone, it is quite clear it delegated to Sir Parker Morris the power to take possession of 80, Brook Street for the purpose for which he did.

It was argued, however, for the plaintiffs that the word "accordingly" must be read solely in conjunction with para. 8 of the circular, which deals with supplementing available billeting accommodation by the use of empty houses, and that the power of taking possession given by para. 9 must be construed as restricted to that purpose. In my view this argument completely ignores para. 5 of the circular, which deals with the establishment of clearing stations for the purpose of the disposal of refugees into billets and other accommodation, and para. 6 of the circular, which deals with the re-possession of premises used as clearing stations for foreign refugees and in terms refers to

para. 9. It also ignores para. 10, which gives similar powers in respect of unoccupied furnished houses.

In my view, the word "accordingly" is used in para. 9 in reference to paras. 5 and 6, in addition to para. 8 of the circular, and probably also in reference to other paragraphs contained in that circular. My view, therefore, is that para. 9 must be construed in its ordinary meaning, without restriction, and that Sir Parker Morris was clearly authorised by para. 9 of the circular to act as delegate of the Minister of Health to take possession of the premises, 80, Brook Street, for the purposes which he did under the Defence (General) Regulations, reg. 51.

There were alternative arguments put forward on behalf of the plaintiffs and these were, in my view, the arguments upon which the plaintiffs really relied. It was contended by counsel for the plaintiffs, first, that where a competent authority (in this case the Ministry of Health) delegates part of its powers under reg. 51 (5), it thereby divests or denudes itself of its right to exercise those powers or any powers in respect of any premises of which possession has been taken by its delegate under such delegated powers; secondly, that the only person ever in possession of the premises was Sir Parker Morris as delegate and possession was never in the Ministry or in the Crown; thirdly, that Sir Parker Morris's right to possession ceased when the premises were no longer used for the purpose for which Sir Parker Morris took possession and his possession thereafter became wrongful; fourthly, the Ministry were relying upon Sir Parker Morris's original possession, which he had taken for a purpose which had ceased to exist, and they had not themselves taken possession of or requisitioned the premises for other purposes and, indeed, had no power so to do; fifthly, the Requisitioned Land and War Works Act, 1945, s. 28 (2) did not entitle the Minister to retain or authorise the retention of possession of the premises, because the premises were not on Aug. 13, 1945, in his possession or in that of any person who was occupying it or using it under his authority. The Attorney-General and counsel for the first defendant contended that each of these submissions was based upon a fallacy.

The first point which I have to consider is whether a competent authority, when it delegates some of its powers under reg. 51, divests itself of those powers. The effect of delegation was considered in *Huth v. Clarke* (1). I need not deal with the facts of that case, but in his judgment LORD COLERIDGE, C.J., said (25 Q.B.D. 391, at p. 394):

But delegation does not imply a denudation of power and authority; the 6th schedule of the Act [that is the Act with which he was dealing] provides that the delegation may be revoked or altered and the powers resumed by the executive committee. The word "delegation" implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given.

In the same case WILLS, J., said (25 Q.B.D. 391, at p. 395):

Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.

Counsel for the plaintiffs sought to distinguish this case by suggesting that the word "delegate" as used in reg. 51 (5), was not used in its ordinary sense, but had a special meaning. There is nothing in the context of the regulation which enables me to accept this view. I am of opinion that the word "delegate" in reg. 51 (5), is used in its ordinary meaning, and a delegation by a competent authority of its powers under reg. 51 does not divest that authority of any of its powers under that regulation.

When one considers what powers were delegated by para. 9 of circular 2081, it is found that they are extremely limited. Although para. 9 of the circular extends the powers to cover the taking possession of buildings for some purpose directly connected with the accommodation of refugees from enemy attack or the imminence of enemy attack, the exercise of that power was subject to the conditions laid down in the inclosure to circular 1949, with a certain exception. Those conditions required Sir Parker Morris to obtain the consent of the regional commissioner of the Ministry before possession of premises was taken. The period of occupation was not to continue beyond the period

fixed by the regional commissioner, and the requisition of any premises was subject to the right of the Ministry to direct at any time the premises to be handed over to the person otherwise entitled to possession. In effect, the delegated power only amounted to a power to select premises and submit them to the Ministry as suitable premises for the purposes named, the Ministry expressly retaining the authority to decide whether the particular premises should be requisitioned or not. In my view, a delegation made in these terms and subject to these conditions did not amount to any denudation of any powers in the Ministry of Health. A

The second point taken was that the premises, 80, Brook Street, were in the possession of Sir Parker Morris or his city council and were never in the possession of the Ministry or the Crown. It was argued by the Attorney-General that the Emergency Powers (Defence) Act, 1939, which gives the power to make regulations by Order in Council, by sect. 1 (2) (b) (i), only authorises the taking possession or control of property on behalf of His Majesty and that, therefore, reg. 51 of the Defence (General) Regulations made thereunder only authorised a competent authority or its delegate to take possession of any land on behalf of His Majesty and, once possession is taken under the regulation, the possession is that of His Majesty and not that of the competent authority or its delegate. This argument, it seems to me, ignores sect. 1 (1) of the Emergency Powers (Defence) Act, 1939, and also the opening words of subsect. (2) of that section of that Act, which provides : B C

Without prejudice to the generality of the powers conferred by the preceding subsection . . .

In view of sect. 1 (1) of that Act regulations may be made to take possession of land or premises for any of the purposes named in that first subsection, and reg. 51 follows the words of that subsection and authorises a competent authority to take possession of land and premises and makes no reference to the taking of possession of land and premises on behalf of the Crown. I do not think it necessary for the determination of this case to come to a final conclusion on this question, and I would prefer to reserve my decision upon it until it becomes necessary to decide that point. D

For the purpose of my judgment in this case I will assume, without deciding, that Sir Parker Morris was in possession of 80, Brook Street whilst the premises remained in use as, or available for use, as accommodation for refugees from enemy attack and thereafter, until Aug. 14, 1945. Such possession was, however, subject to this condition : that it could only continue so long as the Ministry permitted it and the Ministry could at any time direct that the premises should be handed over to persons "otherwise entitled to possession." E

The third argument put forward by the plaintiffs was that the right of Sir Parker Morris to possession ceased when the premises ceased to be used for the purposes for which he took possession and his retention of possession thereafter was wrongful. The fourth argument was that the Ministry were relying upon Sir Parker Morris's original possession which had been taken for a purpose which had ceased to exist, and had not themselves taken possession of, or requisitioned the premises for other purposes and, indeed, had no power so to do. These two arguments may be considered together. Before they will help the plaintiffs, they must establish the facts upon which they are based. F G

On the evidence before me I am satisfied that the premises were available for use as accommodation for refugees from enemy attack at least up to the date of the cessation of hostilities with Germany. At or before this time the Ministry, by their Senior Regional Officer, had intimated that possession of the premises, 80, Brook Street, should be retained for the temporary accommodation of returning evacuated mothers and children. In view of my decision that the original delegation by the Ministry to Sir Parker Morris did not divest it or denude it of any of its powers under reg. 51, I am satisfied that the Ministry were entitled to give this instruction. H

It is said on behalf of the plaintiffs that, before this could be done, possession should have been given up by Sir Parker Morris to the plaintiffs and possession then taken again as on a fresh requisition for the new purpose. I do not so read the regulation. In my view para. 1 of reg. 51 deals with the taking of possession of premises for particular purposes. Para. 2 of the regulation deals with the

use of premises after they have been taken and does not restrict that use to the purpose for which they were originally taken. The relevant paragraph, para. 2 of reg. 51, empowers the competent authority to use land, notwithstanding any restriction imposed on the use thereof (whether by Act of Parliament or otherwise):

... for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.

A In my view, where the competent authority has taken possession of land for one purpose, they are empowered by the regulation to use it or direct its use for another purpose, provided that that other purpose comes within the ambit of one of the four purposes named in the regulation, and to continue in possession for that other purpose.

B In this case, having delegated to Sir Parker Morris the right to take possession for one purpose, when that purpose was about to end, the Ministry delegated to him its power to use the land for another authorised purpose. On the evidence in this case I am satisfied that on Aug. 13, 1945, the premises were in possession of Sir Parker Morris, on the assumption that I have already made, with the authority of the Minister for the purpose of accommodating returning evacuees, their parents and escorts. It becomes unnecessary, therefore, for me to decide what the legal position would have been if the premises ceased C to be used for a purpose authorised by the regulation.

That brings me to the Requisitioned Land and War Works Act, 1945, s. 28 (2), which provides:

D Any Minister may retain or authorise the retention of possession of any land which (whether by virtue of an exercise of emergency powers or otherwise) is in his possession or in that of any person who is occupying or using it under his authority, notwithstanding the determination of any other right thereto, and, where possession of any land is retained under this subsection, any Minister may use it or authorise its use for the purposes of the public service or in any manner in which it was being used immediately before possession was so retained.

E On my findings of the facts, on Aug. 13, 1945, the premises, 80, Brook Street, were in the possession of Sir Parker Morris, who was using the premises under the authority of the Ministry of Health by virtue of the exercise of emergency powers. On that date the Minister by his representative, the Senior Regional Officer, decided to retain or to authorise the retention of the premises, and so notified the plaintiffs by his letter of Aug. 13, 1945.

F Having decided to retain the land, the Minister authorised the use of the premises by the Canadian military authorities as a hostel for the reception of wives and children of Canadian soldiers on their way to Canada and for housing wives and children of Canadian soldiers temporarily without accommodation. It was not contended before me that such use was not a use for the purposes of the public service; indeed, counsel for the plaintiffs conceded, that in view of the evidence and the decision in *Carltona, Ltd. v. Works Commissioners* (2), it was not open to him so to contend.

G The result is that, in my view, the Minister of Health was acting within his powers in retaining possession of the premises, 80, Brook Street, and in authorising the Canadian military authorities to enter the premises and prepare and fit them for use for the accommodation of the wives and children of Canadian soldiers. Sir Parker Morris was, in my view, at all times acting within the powers delegated to him. The Canadian authorities were equally acting under the authority granted to them by the Minister of Health.

In the result this action fails.

Judgment for the defendants with costs.

H Solicitors: *Gordon, Dadds & Co.* (for the plaintiffs); *Allen & Son* (for the first defendant); *The Solicitor to the Ministry of Health* (for the second defendant); *L. Bingham & Co.* (for the third defendants).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

624 [Nov. 24, 1945] ALL ENGLAND LAW REPORTS ANNOTATED [Vol. 2
ELDERTON v. UNITED KINGDOM TOTALISATOR CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., du Pareq and Morton, L.JJ.),
October 22, 23, 24, 1945.]

Gaming and Wagering—Football pools advertised in newspaper—Pools conducted on credit system—Whether a prize competition “for forecasts of the result . . . of a future event”—Pari-mutuel or betting operations—Betting and Lotteries Act, 1934 (c. 58), s. 26.

Statutes—Construction—Criminal and penal statutes—Interpretation—“Wide and comprehensive language”—Ordinary rules of construction applicable—Contemporaneous circumstances—Judicial notice.

The appellant company advertised in a newspaper a “coupon” with particulars of different football pools at varying stakes. Those taking part in the pools were called “investors” and had to predict the results of any one or more of a series of football matches to be played on the following Saturday. The coupon, duly filled in, was sent to the appellant company, but the sums staked on the forecast were not sent until the following week. From the total of the stakes thus contributed, the appellant company deducted a percentage for commission and expenses, and the balance was divided between those “investors” whose forecasts were correct or most nearly correct. It was contended on behalf of the appellant company that (i) the language of the Betting and Lotteries Act, 1934, s. 26, which was penal in character, was ambiguous and, according to the rules of construction, the section did not cover the scheme promoted by the appellant company; (ii) a football pool was a form of pool betting which was governed by Part I of the 1934 Act; sect. 26, which was in Part II of that Act, dealt with prize competitions other than pool betting operations and, therefore, the words “pool betting” and “competition” were mutually exclusive; (iii) the proviso to sect. 26 of the 1934 Act could not afford any assistance in the construction of the subsection:—

HELD: (i) the ordinary rules of construction, applicable to a section creating a criminal offence, could not be used to restrict the scope of the section, where the legislature had used wide and comprehensive language which had no technical meaning and which covered the particular operation in question.

(ii) “pari-mutuel” and “pool betting” were terms used to cover a method of procuring betting, or enabling betting to be carried out, in such a way that the mathematically correct odds were given. Football pools, whether or not they amounted to pool betting operations, would still appear to be competitions in which prizes were offered “for forecast of the result . . . of a future event” and were, therefore, illegal if conducted by advertisement in a newspaper.

(iii) the proviso to sect. 26 of the 1934 Act could not be ignored because it had a bearing on the scope of the section. It excluded from the prohibition against the conduct of competitions pari-mutuel or pool betting operations carried on by a person whose only trade was that of a bookmaker.

Per LORD GREENE, M.R., and MORTON, L.J.: The court may take judicial notice of the fact that competitions of various kinds in which prizes were offered were advertised or carried on through newspapers, in or prior to 1934, and that football pools were then in existence and well known.

[EDITORIAL NOTE.] In accordance with the views of UTHWATT, J., in the court below, and the Divisional Court in *Bretherton v. United Kingdom Totalisator Co.* (2) it is now held by the Court of Appeal that football pools are competitions for prizes and as such unlawful when conducted in a newspaper. Whether or not “competition” connotes a conflict of interests between the contestants, there is such a conflict here, and the reward offered by the promoters can properly be described as a prize. It should be observed that the decision does not depend upon whether football pools are pool betting, for the court holds that competitions for prizes and pool betting are not necessarily mutually exclusive. This view is confirmed by a consideration of the proviso to the Betting and Lotteries Act, 1934, s. 26, which appears to indicate that the legislature thought there might be pool betting operations which could be described as competitions for prizes.

FOR THE BETTING AND LOTTERIES ACT, 1934, s. 26, see HALSBURY'S STATUTES, Vol. 27, p. 292.

AS TO CONSTRUCTION OF CRIMINAL AND PENAL STATUTES, see HALSBURY'S, Halsham Edn., Vol. 31, pp. 536, 537, paras. 703, 704; and FOR CASES, see DIGEST, Vol. 42, pp. 726-730, Nos. 1456-1527.]

Cases referred to :

- A * (1) *Elderton v. United Kingdom Totalisator Co., Ltd.*, [1935] Ch. 373; Digest Supp.; 104 L.J.Ch. 105; 152 L.T. 549.
- * (2) *Bretherton v. United Kingdom Totalisator Co., Ltd.*, [1945] 2 All E.R. 202; 173 L.T. 126.
- * (3) *A.-G. v. Luncheon and Sports Club, Ltd.*, [1929] A.C. 400; Digest Supp.; 98 L.J.K.B. 359; 141 L.T. 153.

APPEAL by the defendant company from a decision of UTHWATT, J., dated July 10, 1945. The facts and arguments are fully set out in the judgments of LORD GREENE, M.R., and MORTON, L.J.

B *Gilbert H. Beyfus, K.C.*, and *I. J. Lindner* for the appellants.

Valentine Holmes, K.C., and *S. Pascoe Hayward* for the respondents.

Cur. adv. vult.

C LORD GREENE, M.R. : Counsel for the appellants, quite properly, argued that the section the construction of which is in controversy in this case creates a criminal offence, and he pointed out that, where a criminal offence is created, it should be created in clear language. The present language, he said, was at the best so ambiguous that we ought to construe it in such a way as to restrict the ambit of the offence which the section creates. The rule with regard to the construction of sections which create a criminal offence is not to be used to restrict the scope of the section where wide and comprehensive language is used, not in terms of art, but in terms of ordinary English which are sufficiently broad in their meaning to cover the particular operation in question. In my opinion, that is the case in this instance. The legislature has used wide and comprehensive language, which has no technical meaning and must be construed according to the ordinary rules. The section in question is the Betting and Lotteries Act, 1934, s. 26, which provides :

E It shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the sale of any article to the public (a) any competition in which prizes are offered for forecasts of the result either of a future event, or of a past event the result of which is not yet ascertained or not yet generally known . . .

F It is said, and has been held by UTHWATT, J., that the football pools which are here in question fall within that language and constitute a competition in which prizes are offered for forecasts of the result of a future event. Nothing turns on the question whether they are forecasts of the result of a future event, for they are obviously that; but it is said on behalf of the appellants that the pools do not amount to a competition and that no prizes are offered within the meaning of the section. I should add that para. (b) of sect. 26 (1), which makes unlawful the conducting in any of the specified manners of a competition "success in which does not depend to a substantial degree upon the exercise of skill," is not in issue in these proceedings. The respondents have never asserted that success in these transactions does not depend to a substantial degree upon the exercise of skill. We have nothing to do with that, because obviously such a question could only be decided on evidence and no evidence was called with regard to it. I merely mention that to make it clear that nothing that we say on this appeal has any bearing on any question that might hereafter be raised under para. (b).

G Counsel for the appellants has put his argument in a way which, I think, may, without unfairness, be summarised as follows. He says: The transaction into which persons enter who engage in a football pool as investors—that appears to be the expression used—is an operation of pool betting. The statute, he says, deals with pool betting in Part I and regulates it in the manner there provided; when you come to Part II, in which sect. 26 appears, it is dealing with something which is quite different from pool betting; that the phrase "competition in which prizes are offered" cannot include pool betting and, as a football pool is a form of pool betting, it, therefore, cannot be a competition in which prizes are offered. Putting it even more shortly, the phrase "pool betting" and the word "competition" are mutually exclusive; a thing which is one cannot be

the other and there is no possibility of overlapping; that is to say, you cannot have a case which falls within both descriptions. That is the scheme of his argument.

At the outset there lies the question whether or not the form of operation called a football pool is pool betting within the meaning of this statute. I should have thought that that is a very doubtful question. Counsel for the appellants suggested that in 1934, when this Act was passed, the legislature, in using the phrase "pool betting," must have had in mind football pools, which then existed and were widespread; and he suggested that, in using the phrase "pool betting," the legislature was deliberately selecting language which referred to football pools. On looking at the SHORTER OXFORD DICTIONARY, I find under the word "pool" the phrase "pool betting," and that is defined as meaning "the collective stakes in an instance of *pari-mutuel*" and the year of that particular use is 1881. It is to be observed also that the phrase in the Act, "pool betting," is used always in collocation with the phrase "*pari-mutuel*"; it is used as an alternative English translation of that French expression and is not, in my view, used to cover something of a different or more extensive character than is described by the words "*pari-mutuel*." "*Pari-mutuel*" itself is used in the Racecourse Betting Act, 1928, and, again, in the Betting and Lotteries Act, 1934, in connection with the word "totalisator," which is used as an alternative of "*pari-mutuel*." In that particular context it is used to describe, not a system, but a machine or an instrument.

Those considerations—there are many more—make it seem to me to be doubtful whether "pool betting," which, as I have said, is used as an equivalent of "*pari-mutuel*," is a proper description of the very remarkable type of transaction which is found in a football pool. The football pool—this particular pool, and I suppose that it is typical of many—has been very closely analysed before us and I do not think that it is a misuse of language to say that it is a very peculiar and special type of operation. It seems to me to bear very little resemblance to the ordinary totalisator, the operation of which, of course, is perfectly well known and which is a method of procuring betting or enabling betting to be carried out in such a way that the mathematically correct odds are always given.

The type of transaction that we have here is very different from that. Counsel for the respondents pointed out the peculiarities in the rules: the power of the promoters to apportion expenses and to apportion expenses of one week's pools among the pools of several weeks; the apportionment of one week's pools *inter se*; the curious results of the provision under which the money allocation is to be adjusted so as to ensure that a person in a lower category does not get more for his investment than a person in a higher category; the fact that the promoters are to pay whether the other entrants provide the money or not; and the fact that you do not know whether you have won or whether you have not until you find out whether other people have made a more successful forecast than yourself, provided, of course, that you have not got your forecast 100 per cent. right. If you are anything less than 100 per cent. right, the only way in which you can ascertain whether you are a winner or not a winner is to wait until you are told whether somebody else has done better than you. All those matters seem to me to place these things in a very special category; and I am certainly not prepared to accept the argument that this can properly be described as pool betting, in the context in which that phrase is used in this legislation.

Let me assume, however, that counsel for the appellants is right and this is properly described as pool betting. The next stage in his argument is that, if it is pool betting, it cannot be a competition in which prizes are offered. In my opinion, that proposition does not bear inspection. In the present case there is, I think, a competitive element in a strict and narrow sense of that phrase. Counsel for the appellants said that the word "competition" in this context necessarily involves the idea of several persons pitting their skill against one another. I do not think that it is to be limited in that way, because I apprehend that, if a newspaper, for instance, were to offer a prize for any successful forecast of a given future event, that would be a competition and the persons who go in for it would be properly described as competitors. If that were not so, it seems to me that the obvious scope and intention of the section

could be perfectly easily defeated.

But, even if a competition is to be construed as involving that necessary element of competition of the entrants *inter se*, that element is quite clearly present in this case. Everybody who enters wishes, of course, to achieve 100 per cent. accuracy in his forecast ; but it does not follow that anyone will achieve 100 per cent. accuracy and, in so far as the financial reward to the investor depends on the superiority or the greater accuracy of his forecast over other forecasts, the competitive element necessarily exists. If, for instance, the result of the matches is to produce a possible total of twenty-six points and nobody gets twenty-six points, each man is competing against all the others to get the nearest to twenty-six points and, of course, the fewer entrants there are who achieve that degree of accuracy the greater is the dividend to those who do achieve it. It seems to me that, even in the narrow sense that counsel for the appellants wishes to impress upon the word "competition," the competitive element exists. That is merely one way of putting it. There are other ways that have been mentioned in argument, but I do not think it necessary to go through them.

Then it is said : Where are the prizes and who offers them ? The answer to that, I should have thought, was reasonably clear. That these rewards are prizes, within any ordinary meaning of the word in this context, appears to me to be quite clear. Counsel for the appellants said that the money which a successful entrant receives is not a prize, but it is merely the payment of a betting debt. In my opinion, even assuming that the transaction is properly regarded as a betting transaction, the money that he receives and the money that is offered to him is properly described as a prize. Then counsel for the appellants says : Who offers it ? It does not seem to me to matter very much whether you treat the prize as offered by all the competitors or whether you treat the prize as offered by the promoters. The promoters are going to pay, whether the competitors pay their entrance fees or not and, even if that is regarded as a guarantee, it seems to me that the offer of that guarantee is the offer of a prize within the meaning of the subsection. That, I think, really is all that I need say on the arguments that have been put before us. There is, however, one matter to which I should refer and that is the effect of the proviso to sect. 26, which I have not read. The proviso says :

Provided that nothing in this subsection with respect to the conducting of competitions in connection with a trade or business shall apply in relation to pari-mutuel or pool betting operations carried on by a person whose only trade or business is that of a bookmaker as defined in Part I of this Act.

The promoters of this pool are admittedly bookmakers within the definition ; so that that can be put out of the way.

Counsel for the appellants says that we ought not to look at that proviso, because the body of the section is so clear that the proviso cannot afford any assistance in its construction. Alternatively, he says that, if it is to be looked at, it points in the direction which he favours and shows, not that the word "competition" may include something which can be described as a pool betting operation, but that it quite clearly excludes pool betting operations. The use which can properly be made of a proviso is, of course, well understood. It is merely an example of the ordinary rule as to construction of documents : that you must look at the whole document and give such weight to each part of it as each part requires. It is nothing more than that.

In the present case I do not think it right to ignore the proviso, because it has, in my view, a bearing on the scope of the section. The true construction of the proviso appears to me to be that it excludes from the prohibition against the conduct of competitions in connection with a trade or business pari-mutuel or pool betting operations carried on by a bookmaker whose only trade is that of a bookmaker. Whether that is to be relied upon as showing that the legislature regarded pool betting operations as something which would clearly and necessarily be included in the meaning of the word "competition" or whether it was thought that the word "competition" was wide enough to include some things which might be described as pool betting operations, I do not know and it is not material ; the materiality of it, to my mind, is that the legislature has regarded the phrases "competition in which prizes are offered" and "pool betting operations" as not necessarily being mutually exclusive, as counsel for the appellants

argued that they were. What he said that the proviso means, if I understood him correctly, was this: that it enabled a bookmaker who was carrying on pool betting operations to carry on in addition the business of prize competitions. That is not what the language says. It does not say: Nothing in this subsection with respect to the conducting of competitions shall apply in relation to competitions conducted in combination with pari-mutuel or pool betting operations. It does not say that; and that is what it would have to say in order to give the meaning that counsel for the appellants wishes us to put upon it. It says:

... nothing in this subsection with respect to the conducting of competitions ... shall apply in relation to ... pool betting operations ...

which is a different thing altogether; and, in my opinion, it must be construed in the sense which I have indicated.

There is one more matter to which I should refer before I turn shortly to the state of the authorities; and that relates to the admissibility of certain evidence which counsel for the appellants wishes to tender. It consisted of two or more bound volumes of a periodical called *THE WINNER*, which contains and did contain in those days, as it contains now or contained, at any rate, until the judgment in this case, the advertisements of certain football pools. We were told that in those proposed exhibits anterior to the 1934 Act the same paper advertised for the same persons competitions in which prizes were clearly offered—things which really were prize competitions within the narrow sense in which counsel for the appellants interprets that phrase. Then he said: That is admissible evidence to show that the legislature, when it was using the phrases “pool betting” and “prize competitions,” must have had in mind the fact that football pools and things which were admittedly prize competitions were being carried on by the same persons and advertised in the same newspaper. In my opinion, that evidence is not of the slightest value in the task of construction which we have to carry out, but is quite clearly inadmissible. Who knows whether the legislature ever employed its leisure or, indeed, its working hours in perusal of what I imagine may be described as a rather obscure sporting periodical and used language adapted to the state of affairs which it found in the pages of that periodical? We have no right to make any such assumption.

It is not difficult for the court to assume and I apprehend that the court can take notice of the fact that things which were unquestionably competitions in the narrow sense used by counsel for the appellants, not confined to football but extending to all manner of things, were common before 1934 and were commonly advertised or carried on through newspapers. We also know that in 1934 (and this is notorious) football pools were in existence, were well known and were popular. Those matters we are entitled to take into account; but it does not seem to me that we are entitled to take into account the practice of particular promoters in advertising in a particular newspaper two forms of operation, one of which was unquestionably a competition and one of which was unquestionably a football pool. Not only would the evidence, to my mind, be perfectly useless, but it is quite clearly inadmissible.

With regard to the authorities, reliance was, of course, placed on the original decision of *EVE, J.*, in *Elderton v. United Kingdom Totalisator Co., Ltd.* (1), from which the Divisional Court in *Bretherton v. United Kingdom Totalisator Co., Ltd.* (2), and *UTHWATT, J.*, in the case before us, differed. I do not wish to go into the reasoning of *EVE, J.*, at any length; but my respectful criticism of his decision is that he attributes to the judgment of the House of Lords in *A.-G. v. Luncheon and Sports Club, Ltd.* (3), much too wide an effect. That judgment dealt with the relationship created by a transaction carried on between members of a club, subject to certain definite and quite clear rules, and all that the case decided was that, having regard to the circumstances of that case and in particular the language of the rules, the transaction was a betting transaction as between the members of the club who took part in the totalisator operations. *EVE, J.*, treated it as a general authority, which led necessarily to the conclusion that the football pool was a transaction of betting between the various entrants, and he regarded it as a pool betting transaction. That seems to me to be, with great respect, an unjustifiable use of the House of Lords case and not in accordance with the *ratio decidendi* in that case.

Then he asks : If it is a competition, who are the competitors, what is the competition and where are the prizes ? I do not think that I need deal with that, because it will appear from what I have already said that in my opinion there is a competition and there is a prize. The Divisional Court and UTHWATT, J., both took the view which I am taking. I have no comments to make on the judgment of either of those courts, except that I agree with them, subject to one small comment on the language of UTHWATT, J. He did not, in my opinion, give to the proviso to sect. 26 that weight which I think it ought to bear and I cannot agree with his method of treating it. But it is right that I should say this. In the result he came to the conclusion that the substantive part of the section was to be construed in the way which he thought was the right one without reference to the proviso. I entirely agree with him. Nothing that I have said with regard to the proviso must be read as indicating that in my opinion it is necessary to have the assistance of the proviso before the body of the section can be construed in the way in which I think that it ought to be construed. I regard the proviso as being a confirmation of the construction which I find in the body of the section and it does not raise in my mind any such doubts as might very well have been raised if the proviso had meant what counsel for the appellants said that it means. It must not be taken, therefore, that I have to fall back on the proviso in order to extract the stated meaning from the language of the section, but merely that I think that UTHWATT, J., did not quite regard in the correct manner the use which ought to be made of a proviso such as this in this context.

In the result the appeal fails and must be dismissed with costs.

DU PARCQ, L.J. : I agree and, but for the fact that a different view was taken by EVE, J., in *Elderton v. United Kingdom Totalisator Co., Ltd.* (1), I am bound to say that I should have thought this a very plain case indeed. One does not expect when an Act of Parliament has declared a certain thing to be illegal to find people who are doing that thing and describing it in their own words using language to describe it which will plainly bring it within the Act of Parliament. It would have been a little surprising if the appellants in this case had described this as a competition and said that they were offering prizes ; but the question is, what description they gave to it or what other description others might give to it or what it would be called by those who took part in it, but whether the wide, general words used by the legislature—words, I should imagine, purposely wide and general—are such as will clearly cover it. I think that they are.

The appellants come into possession of considerable sums of money, which they describe as stakes. They do not necessarily come into possession of all the stakes which should eventually be deposited with them, because there may be some defaulters ; but they have, at any rate, an expectation that all the stakes will be paid. Then they say, not, indeed, that they will divide the whole of that money or the whole of that money, less some fixed percentage, in various proportions among the people who are successful, but that they will deduct from it, in addition to a fixed percentage, such sum by way of expenses as the independent accountants who supervise the matter shall consider to be right ; and, as was pointed out, those expenses need not necessarily be the expenses of the particular contest, but may be other expenses of other weeks. The result is that with part of the money received or which it is hoped will be received the unsuccessful contestants are being rewarded, and the offer is made in plain terms that they will be so rewarded ; and it appears to me to be a perfectly proper and legitimate use of language to say that those making the offer are offering prizes to successful competitors.

I agree entirely with what LORD GREENE, M.R., has said as to the word "competition." It is not necessary to decide whether, in order that you may have a competition, there must be a necessary conflict of interests between the participants in it. I agree with the view, which was, I think, indicated by LORD GREENE, M.R., that you may have a competition, properly so-called, where there is no necessary conflict of interests, as, for instance, if the promoters say : We will give a prize, a fixed and an unvarying prize, to everybody who is completely successful. It is not necessary to decide the point today. I think that in such a case there is a competition properly so-called, but in the present

case, as LORD GREENE, M.R., has pointed out, there is quite a distinct conflict of interests, because the fewer the competitors who are successful the more will be obtained by those who are successful and it is to every participant's interest, not only that he should succeed, but that others should fail. It seems to me to be plain that there was here a competition and that prizes were offered; and those are the principal matters which have been discussed.

I wish to add also that I agree that it would have been wrong to admit the evidence which was tendered, and it is an important matter of principle, in my opinion, that such evidence should not be admitted. No case was cited to us and I believe that none could be cited in which, where the court has been dealing with a modern statute, evidence has been called in order to show what facts might be supposed to have been known to the legislature when the Act was passed. It is perfectly true that in dealing with ancient statutes the court will inform itself as to such facts, usually, I think, by reference to recognised historical works or ancient documents. No such considerations apply here and there is no room for research as to the surrounding circumstances when perfectly plain language is used. Perhaps it is difficult to say of any language that it is perfectly plain, because, as experience shows, it is almost always possible to argue that there is some ambiguity in it; but in this instance we are dealing, even in the case of the French expression "*pari-mutuel*," with words and phrases which have found their way into English dictionaries, so that they may be supposed to be part of the English language as it exists today, and it has always been regarded as right that the court should, if it is necessary, inform its mind by having recourse to standard dictionaries. It matters not that this may—I say "may"—be properly described as pool betting or *pari-mutuel*. It is perfectly possible for a thing to be properly so described and also to be a competition for prizes. I agree with LORD GREENE, M.R., as to what is indicated by the proviso: that the legislature thought that there might be cases in which *pari-mutuel* or pool betting operations were such that they could properly be described as competitions for prizes.

For these reasons, I entirely agree that the decision of UTHWATT, J., which agreed with that of the Divisional Court, was right and that this appeal should be dismissed.

MORTON, L.J.: I am of the same opinion, but, as there has been a conflict of judicial authority on this matter, I should like to express my reasons in my own words, as briefly as I may.

The only question which this court has to decide is whether the five football pools advertised by the defendant company in THE WINNER for Feb. 26, 1944, are competitions in which prizes are offered for forecasts of the result of a future event, within the Betting and Lotteries Act, 1934, s. 26. If they are competitions of such a kind, it is not disputed that they are conducted in or through a newspaper.

It would, I think, be sufficient for the appellant's purpose if we held that any one of those pools is such a competition; but, in my judgment, they all equally come within the terms of the section.

I shall take the Points Pool as an example. Is the Points Pool a competition? In my view, it clearly is. Even if the entrants had only aimed at producing a wholly correct forecast, I think that the Points Pool would have been a competition; but, in addition, as LORD GREENE, M.R., has pointed out, each entrant is endeavouring to secure a higher number of points than the other entrants in that particular pool, and I think that he is competing against them in any ordinary sense of that word. It would be quite useless for the entrant to send in a wholly correct forecast if all the other competitors also sent in wholly correct forecasts.

The next point is: Are prizes offered in that competition? Counsel for the appellants has contended that the sums to be won are not prizes or, if they are prizes, they are not "offered" by anyone. For my part, I cannot see why the sums received by the winners are not aptly described as prizes. Each sum so received is the reward gained by a competitor in a competition for being more successful than his rival in that competition and such a reward surely comes within any ordinary definition of a prize. Further, in my view they are offered by the promoters of the pools. It is only necessary to look at the advertisement

in THE WINNER to see that the competitors are told that success in any particular pool will be rewarded by a certain proportion of the entrance fees, less expenses and a percentage to be retained by the promoters. It seems to me that this intimation is aptly described as an offer of prizes, and none the less so because the prizes offered are not to come out of the promoters' money but out of moneys to be paid by the unsuccessful competitors. Nor does it matter, to my mind, whether or not on the true construction of the rules the promoters guarantee to the winners the full amount which they have won, notwithstanding that the losers may fail to pay up in full what they have promised to pay.

It is perhaps a little dangerous to try to foretell the reactions of the man in the street (to use a common phrase) in a case of this kind, but I cannot help imagining what would happen if an entrant for one of these pools were asked, after he had sent in his entry: "Have you entered for a competition in which prizes are offered for forecasts of the result of football matches?" He might think that a slightly pompous question, but I do not think he would doubt that it contained a perfectly accurate description of that which he had just done. For these reasons, I am of opinion that the Points Pool comes within the section, and it is unlawful to conduct it in or through a newspaper.

I need not examine the other pools in detail, although they all differ in certain respects from one another. Counsel for the appellants did not attempt to argue that, if any one of the pools came within the section, any other of them could be outside the section. It is not for this court to consider whether football pools are or are not a benefit to the community, or to seek for a logical reason why no one may conduct them through a newspaper while anyone may conduct them through the post.

The result is that this appeal must fail; but I shall deal shortly with another part of the argument of counsel for the appellants. He says that football pools are a form of pool betting and that pool betting is dealt with in Part I of the Act and does not come within sect. 26. For my part, I am by no means satisfied that football pools come within the term "pool betting" as that term is used in this particular statute. I do not propose to go through Part I of the statute; but there are indications that it is dealing primarily, if not wholly, with the common form of pool betting, in which bets are laid by a number of persons, on the result of a particular horse race or dog race. As junior counsel for the respondents pointed out, there are certain features of these football pools which do not appear in ordinary pool betting. To take an example, suppose that A and B each enter for the Points Pool and the results are six draws and six wins by home teams, so that the maximum number of points to be scored by any competitor would be twenty-four. It is quite possible, for reasons which I need not elaborate, for A to get fewer correct results than B and yet to get the same number of marks or even more marks. Again, it is quite possible that A and B, entering for any of the other pools, might elect to forecast the results of two entirely different sets of matches. A might choose, for instance, the first eight matches in Pool No. 1 and B might choose the next eight.

These matters seem to me to render these pools rather unlike what is ordinarily known as pool betting. However, I do not express any opinion on the point whether these football pools are "pool betting" in the sense in which that phrase is used in the Act. I am prepared to assume that they are. Even so, the essence of the argument of counsel for the appellants is that "pool betting" and "competition in which prizes are offered" are mutually exclusive. I see no reason why this should be so, and the proviso to sect. 26 indicates that this argument is ill-founded. It is true that the proviso is not directed to a competition conducted through any newspaper; but if Parliament had not thought that some at least of the operations referred to as pool betting were also competitions within sect. 26, there would be no need for the proviso. If I may paraphrase the proviso, I hope accurately, it says: If a man's only trade or business is that of a bookmaker as defined in Part I of this Act, he may carry on pari-mutuel or pool betting operations, notwithstanding anything in this subsection. That seems to me to indicate quite clearly that pari-mutuel or pool betting operations may be within the wording of sect. 26 (1).

As to the admissibility of the evidence tendered by counsel for the appellants, to which the other members of the court have referred, that matter was not

fully argued by counsel for the appellants, as the court was willing to take judicial notice of the fact that there were competitions of various kinds well known before the 1934 Act was passed, some of which would come within the definition of counsel for the appellants of a competition in which prizes are offered, and some of which would not. Under those circumstances I personally have formed no conclusion upon the point whether the evidence tendered was or was not admissible.

I agree that this appeal must be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the appellants); *Ashby, Rogers & Fournier* (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. WILLIAM RITSON MORRY.

[COURT OF CRIMINAL APPEAL (Hilbery, Wrottesley and Stable, JJ.), October 29, 1945.]

Criminal Law—Committal—Accused making speech after caution as advocate on his own behalf—Statement by magistrates not containing in full arguments advanced by accused—Certificate of magistrates recording statement final—Accuracy of statement not to be inquired into by trial judge—Criminal Justice Act, 1925 (c. 86), s. 12.

Criminal Law—Bill of indictment—Preferment—Indictment containing counts upon which accused not committed—Counts "founded on facts or evidence disclosed in . . . examination" before magistrates—Power of trial judge to decide whether counts properly included—Previous consent of court for inclusion of counts not necessary—Validity of indictment where counts so added to be raised on motion to quash—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 2.

The accused, a solicitor, was tried on an indictment containing four counts, charging him with fraudulent conversion. On committal by the magistrates the accused, when asked whether he wished to say anything in answer to the charge made a lengthy speech as an advocate on his own behalf. At his trial he moved to quash the indictment alleging that the committal was bad because the magistrates had failed to comply with the Criminal Justice Act, 1925, s. 12, in that his statement, taken down before the magistrates and certified in accordance with the requirements of the section, did not contain all that he had stated. The trial judge overruled the submission, holding that the certificate of the examining magistrates was final, and that the question whether or not it recorded the statement of the accused fully could not be inquired into by the trial judge. On the arraignment of the accused, who was appearing in person, the trial judge raised the question whether the first two counts of the indictment could be included in the indictment having regard to the facts (i) that the magistrates had refused to commit the accused for trial on these two charges, and (ii) that no application had been made to the trial judge for his consent to the inclusion of counts 1 and 2. The trial judge took the view that, having regard to the proviso to sect. 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, counts 1 and 2 were properly included. The accused was thereupon tried on all four counts in the indictment, found guilty, and convicted. By leave of the trial judge the accused appealed against conviction, his principal grounds of appeal being the matters raised before the trial judge:—

Held: (i) the procedure of calling upon the accused to make a statement if he chose, at that stage in the proceedings where the magistrates were considering whether a case was made out for committal or not, was not intended to apply to a person making a speech as an advocate on his own behalf. The statement sent forward by the magistrates need not, therefore, contain all the arguments so advanced by the accused, and, the magistrates having finally certified that it recorded the statement of the accused fully, it could not be inquired into by the trial judge.

(ii) the trial judge had the power to decide whether particular counts charging certain offences were properly included in an indictment as "charges founded on facts or evidence disclosed in any examinations or depositions . . . being counts which may lawfully be joined in the same indictment."

(iii) on a true interpretation of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2) there was no necessity to obtain the previous consent of the court to include in the indictment counts sought to be added. The question whether an indictment was good or bad in law, in so far as counts had been added on which the accused was not committed, was a matter of law for decision of the trial judge on motion made to quash the indictment in so far as such counts had been added.

[EDITORIAL NOTE.] The proviso to the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), provides that an indictment may include counts founded on facts or evidence disclosed in examination before the justices, but the Act gives no indication as to who is to decide whether such counts are in fact so founded. It cannot have been the intention to give this power to the prosecution, and it is, therefore, held that it is a matter for the trial judge on a motion to quash the indictment. There is no machinery for obtaining the opinion of the court before the counts are added to the indictment.

AS TO CAUTION TO, AND STATEMENT OF, THE ACCUSED, see HALSBURY, Hailsham Edn., Vol. 9, p. 109, para. 140; and FOR CASES, see DIGEST, Vol. 14, pp. 282-284, Nos. 2948-2961.

AS TO ADDING COUNTS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 128-130, para. 166; and FOR CASES, see DIGEST, Vol. 14, pp. 211, 212, Nos. 1932-1945.

FOR THE ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT, 1933, s. 2 (2), see HALSBURY'S STATUTES, Vol. 26, p. 81.]

Cases referred to :

(1) *R. v. Gee*, *R. v. Bibby*, *R. v. Dunscombe*, [1936] 2 All E.R. 89; [1936] 2 K.B. 442; Digest Supp.; 105 L.J.K.B. 739; 155 L.T. 31; 30 Cox, C.C. 432; 25 Cr. App. Rep. 198.

(2) *R. v. Phillips*, *R. v. Quayle*, [1938] 3 All E.R. 674; [1939] 1 K.B. 63; Digest Supp.; 108 L.J.K.B. 7; 159 L.T. 479; 31 Cox, C.C. 146; 26 Cr. App. Rep. 200.

APPEAL by William Ritson Morry against conviction for fraudulent conversion passed on him by LYNSEY, J., at the Birmingham Summer Assizes, on July 25, 26, 1945. The facts and arguments are fully set out in the judgment of the court delivered by HILBERY, J.

The appellant appeared in person.

P. E. Sandlands, K.C., and *A. P. Marshall* for the Crown.

HILBERY, J. [delivering the judgment of the court]: At the summer assizes at Birmingham, on July 25, 26, 1945, the appellant was tried on an indictment containing four counts charging him with fraudulent conversion of four sums of money totalling £3,136. He was convicted on all counts, and sentenced to eighteen months imprisonment. He now appeals by leave of the judge who tried him against his conviction.

The trial judge gave leave to appeal in the following circumstances. At his trial the accused moved to quash the indictment alleging that the committal was bad because the magistrates had not complied with the requirements of the Criminal Justice Act, 1925, s. 12. His contention was that the justices had sent forward with the depositions, and certified as his statement made to them, a statement which did not contain all he had said by way of statement to those examining magistrates. The trial judge overruled the submission, holding that the certificate of the committing justices to the statement of the accused sent forward by them to the court of trial was final, and that the question whether it recorded the statement of the accused fully or accurately would not be inquired into by the trial judge.

The accused repeats this contention of his in the notice of appeal as his first ground of appeal, and he has argued it before us. On the arraignment of the accused, who was appearing in person, the trial judge himself raised the question whether the first two counts of the indictment could be included in the indictment having regard to the fact that the justices had refused to commit the accused for trial on these two charges. After argument the trial judge decided that they were properly included, but gave a certificate of leave to appeal

solely because of this question. The accused was thereupon tried upon all four counts in the indictment and was found guilty on all four counts.

As to his second ground of appeal, the accused now appeals against his conviction on counts 1 and 2, contending that the trial judge's decision on this question was wrong in law. It is convenient to deal with these two grounds of appeal before proceeding to the three other grounds of appeal which appear in the notice of appeal. In our view the trial judge's decision against the accused's first contention that the committal was irregular and the whole indictment should be quashed, was right. Sect. 12 of the Criminal Justice Act, 1925, is a section which enacts a code of procedure. It lays down the procedure to be followed by examining magistrates where a person is charged before them with an indictable offence, and that procedure must be followed. It was conceded that the magistrates had taken all the procedural steps required of them by the section, and it was only contended that what had been taken down before them and certified in accordance with the requirements of the section did not in fact contain all that the accused had actually stated. That objection does not go to establish a failure on the part of the magistrates to comply with the procedural requirements of the section, as was the case in *R. v. Gee and others* (1) and in *R. v. Phillips, R. v. Quayle* (2). It goes to establish that the matter which they have certified to the trial court as a correct account of what has been stated, is not, in truth, a correct account. The duty to see that what is sent forward correctly represents what has been stated by the accused, or given in evidence as set out in the depositions, is a duty laid upon the examining magistrates. As the trial judge held, their certificate is final as to the statement made by the accused to them. It must be remembered that the accused is in no way handicapped at his trial by this because he can make any statement he wishes to the court and jury at his trial. He is not confined to what the magistrates have certified that he stated before them. In this case the appellant, we now know, by looking at the original statement certified by the magistrates and sent forward by them, actually signed each sheet of the material which the magistrates sent forward as representing his statement, thereby approving it, and the magistrates finally certified that that was his statement. The appellant was a practising solicitor, well acquainted with criminal work, and he signed each sheet. I mention that to show that a more unmeritorious objection than that which he finally made before the trial judge could scarcely be conceived in those circumstances.

But the matter in this particular case does not rest there. The appellant was addressed by the magistrates in accordance with the procedure laid down by the section, and asked :

Do you wish to say anything in answer to the charge ? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial.

The appellant knew the purpose of that question and to what extent opportunity should be taken for making a statement and he knew the sort of statement which, it was contemplated, a man should make at that stage, but he took that opportunity to make a speech, lasting some three hours, as an advocate on his own behalf. He now complains that because every word of that was not taken down and certified, the committal was irregular and the whole indictment should have been quashed. In our view that procedure of calling upon the accused to make a statement if he chooses at that stage in the proceedings where the magistrates are considering whether a case is made out for committal or not, was never intended to apply to a man making an oration as an advocate on his own behalf. That is not the time at which all the arguments should be put, nor is it intended that the statement sent forward shall be one containing all the arguments advanced as an advocate. It was only because those arguments advanced as an advocate by the appellant in the present case were not included in the statement that, as I understand it, he objects to the statement, sent forward by the magistrates and certified by them, as insufficient and not complying with the section. The first ground of this appeal, therefore, fails.

The second ground of appeal, upon which the trial judge gave his certificate, raises a question on the construction of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2). Sect. 2 (2) of the Act is in these terms,

in so far as it is material to this case :

Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence ; or (b) the bill is preferred by the direction or with the consent of a judge of the High Court . . . provided that [I have omitted words which are quite irrelevant to this matter] (1) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment.

The examining magistrates in this case had refused to commit on the charges which were the subject of counts 1 and 2 of this indictment. Having regard to the evidence in this case, we share the trial judge's inability to understand what reason the examining magistrates had for so refusing. The result, however, was that so far as these first two counts in the indictment were concerned, the indictment could not be said to have been preferred under, and in accordance with, the requirements of sect. 2 (2) (a) or (b), which I have just read. No application had been made to the judge for his consent to the inclusion of counts 1 and 2 or for his direction that they should be included, nor had the accused been committed on those counts. Unless, therefore, counts 1 and 2 could properly be preferred by virtue of the words in sect. (1) of the proviso in sect. 2, as far as counts 1 and 2 were concerned the indictment was bad and should have been quashed.

The difficulty which the wording of the proviso creates is that while it provides that an indictment may include, either in substitution for, or in addition to, counts charging the offence for which the accused is committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment, it does not state who is to decide whether the counts which are added are founded on facts or evidence disclosed in the examination or depositions taken before a justice in the presence of the accused. As the trial judge pointed out, this Act under consideration was the Act which abolished grand juries, and the framers must have had in mind the Vexatious Indictments Act, 1859, and the amending Act known as the Criminal Law Amendment Act, 1867, and the practice which had obtained under those Acts. Omitting irrelevant words, the opening part of the Vexatious Indictments Act read thus :

No bill of indictment for any of the offences following [and then certain offences are set out] shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the Superior Courts of Law at Westminster . . .

And then certain other officers of State are named who may grant the consent.

That Act gave rise to certain inconveniences, and in consequence the Criminal Law Amendment Act, 1867, was passed. Sect. 1 of that Act provides in these terms :

The said provisions of the said first section of the said Act [that is the Vexatious Indictment Act] shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law . . .

Under that Act it was not necessary to obtain the opinion of the court before including in the indictment the counts said to be founded on evidence disclosed in the depositions. Although there had been no previous committal on the

particular charges the subject of these counts, they were included in the indictment, but might be, and often were, objected to on a motion made to the trial judge to quash the indictment in so far as it contained those added counts. It was then for the trial judge to consider whether in his opinion they were founded on evidence disclosed in the depositions.

In the section of the Act which we are considering after the word "founded," the words of the older Act "in the opinion of the court in or before which the same bill of indictment be preferred" are not to be found, but the section cannot have intended to put it in the power of the prosecution to decide finally whether the indictment against the accused should include charges upon which the examining magistrates, the statutory court designated by law to inquire whether those charges are *prima facie* made out, have refused to commit. That construction would enable the prosecution to overrule the decision of the magistrates. The governing words at the beginning of sect. 2 precludes such a view.

Where then rests the power to decide whether particular counts charging certain offences are properly included in an indictment as :

. . . charges founded on facts or evidence disclosed in any examination or depositions . . . being counts which may lawfully be joined in the same indictment ?

The answer, in our view, is plainly with the court before which the bill of indictment is preferred, in other words, the trial judge. The question in its nature is one of legal objection to the indictment. It is appropriate matter for a motion to quash the indictment. The omission of the words "in the opinion of the court in or before which the same bill of indictment be preferred," coupled with the whole structure of the section and subsection in question, leaves no room for supposing that the opinion of the court must be obtained in favour of the inclusion of counts which it is sought to add before adding them, nor, be it noted, are there any rules providing machinery for such a course, while there are rules for obtaining the leave of the court to prefer an indictment where that leave is made a preliminary condition to such an indictment being preferred. The construction which we and the trial judge in this case put upon the section leaves the question whether an indictment is good or bad in law, in so far as counts have been added upon which the accused was not committed, a matter of law for decision by the trial judge on motion made to quash the indictment in so far as such counts have been added. As it happened in this case so it always will be that where an accused is not represented, if there is any doubt as to the inclusion of counts upon which there has been no committal, the trial judge will raise, consider and decide the question. The second ground of appeal, therefore, also fails.

The appeal is dismissed. It was on certificate that this appeal was lodged. It has gone beyond the bounds of the certificate, but it was on certificate, and, therefore, in accordance with the practice of this court, the sentence will run from the date of conviction. It dates from the first day of the assizes.

Appeal dismissed.

Solicitors : *Director of Public Prosecutions* (for the Crown).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

Re AN APPLICATION BY H. E. N. ENOCH.

[CHANCERY DIVISION (Cohen, J.), October 12, 15, 16, 17, 18, 1945.]

Trade Marks—Registration—Application to register “Vivicillin”—Three trade marks consisting of “Cyllin” with or without additions already registered—Comparison of marks—No probability of confusion—Trade Marks Act, 1938 (c. 22), ss. 9 (1) (c), 12 (1), 17 (2), 18 (1).

The appellant made an application to register a mark consisting of the word “Vivicillin” standing alone. Three trade marks had been registered previously by another company, all consisting of the word “Cyllin,” with or without additions, in respect of some of the class of goods included in the present application. The application was refused on the ground that the mark standing alone so nearly resembled the three trade marks already registered as to be likely to deceive or cause confusion. On appeal:—

HELD: the words “Vivicillin” and “Cyllin,” when compared not only as written but also as spoken, did not justify the view that there was such similarity between them as to be likely to deceive or cause confusion.

[EDITORIAL NOTE. The problem of phonetics involved here is similar to that in the *Aristoc* case (2), but, while COHEN, J., agrees with the common English practice of slurring a word beginning with “a” referred to by LORD MAUGHAM, he holds that no such slurring is likely in the case of “vivi” as a first syllable.

The Trade Marks Act, 1938, introduced a provision by which an application can be advertised before acceptance where it is expedient by reason of special circumstances. The commodity here in issue, “vivicillin,” is in the same class as “penicillin.” The latter is not the subject of a registered trade mark, but in view of its existence, well known to the public, COHEN, J., holds that this is a proper case for advertisement, although there may be no risk of confusion between them.

As to DECEPTIVE TRADE MARKS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 563-573, paras. 872-874; and FOR CASES, see DIGEST, Vol. 43, pp. 160-174, Nos. 178-279.]

Cases referred to:

- (1) *Re London Lubricants* (1920), *Ltd.’s Application* (1925), 42 R.P.C. 264; 43 Digest 174, 277.
- (2) *Aristoc, Ltd. v. Rysta, Ltd. and Another*, [1945] 1 All E.R. 34; [1945] A.C. 68; 114 L.J.Ch. 52; 172 L.T. 69.
- (3) *Eno v. Dunn* (1890), 15 App.Cas. 252; 43 Digest 160, 180; 63 L.T. 6.

APPEAL from a decision of the registrar, acting on behalf of the Comptroller-General of Trade Marks, refusing an application for the registration of a trade mark consisting of the word “Vivicillin” standing alone. The facts are set out in the judgment.

G. H. Lloyd-Jacob, K.C., for the appellant.

H. O. Danckwerts for the respondent.

COHEN, J.: This is an appeal from a decision of the registrar acting for the Comptroller-General of Trade Marks, refusing an application for the registration of a trade mark consisting of the word “Vivicillin” standing alone. It is common ground between the parties that for the purposes of this appeal I am to act on the basis that the word “Vivicillin” contains at least the essential particulars required by the Trade Marks Act, 1938, s. 9 (1) (c), that it is an invented word.

The application having been lodged, it became the duty of the registrar under sects. 17 and 18 of the 1938 Act to do one of three things. Under sect. 17 (2) he:

... may refuse the application, or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think right.

Under sect. 18 (1) it is provided:

When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions or limitations, the registrar shall, as soon as may be after acceptance, cause the application as accepted to be advertised in the prescribed manner, and the advertisement shall set forth all conditions and limitations subject to which the application has been accepted; Provided that the registrar may cause an application to be advertised before acceptance if it made under sect. 9 (1) (c) of this Act or in any other case where it appears to him that it is expedient by reason of any exceptional circumstances so to do, and where an application has been so advertised the registrar may, if he thinks fit, advertise it again when it has been accepted but shall not be bound so to do.

In considering how to act, the registrar has to take into account two sections in particular. First of all there is sect. 11, which provides :

It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.

It is to be observed under that section the use of the mark concerned has to be taken into account, but it was not under that section that the registrar acted in this case. The registrar acted under sect. 12 (1), which is in these terms :

Subject to the provisions of subsect. (2) of this section, no trade mark shall be registered in respect of any goods or description of goods that is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, [and then come the words which are really material] or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion.

The registrar has decided in this case that the trade mark did so nearly resemble such a trade mark as to be likely to deceive or cause confusion, and he has come to the conclusion that the trade mark "Vivicillin" standing alone so nearly resembled three trade marks registered, I think, by Jeyes' Sanitary Compounds Co., Ltd., all consisting of the word "Cyllin" with or without certain additions, as to be likely to cause confusion between "Vivicillin" on the one side and the "Cyllin" group of marks on the other.

The registrar states that at the hearing he decided that the objection on the ground of the "Cyllin" marks would be met if the applicant applied for the consent of the registered proprietors of those marks to the registration of the marks specified in this application. In taking that course the registrar was applying a practice which had received the blessing of LORD HERSCHELL's committee so long ago as 1887. Counsel for the appellant suggested that this procedure was neither necessary nor desirable in view of the wider powers of advertising before acceptance conferred by the 1938 Act.

Counsel for the respondent did not deal with that point, and I do not think it right for me to express an opinion on it, as I really have not had sufficient argument or sufficient information to enable me to form a conclusion. At any rate, the applicant was unwilling to apply for the consent of the registered proprietors of the "Cyllin" marks, and the application was accordingly refused. I do not think I need draw any inference adverse to the applicant by reason of the fact that he refused to apply for consent. The practice must necessarily lead to bargaining, and there is, it seems to me, a risk that while the owner of the trade mark may be satisfied, the public may continue to be confused because the consent of the registered proprietors cannot prevent confusion arising.

In his decision the acting registrar read the provisions of sect. 12 (1) and referred to the particulars of the three marks owned by Jeyes' Sanitary Compounds Co., Ltd., and I do not think I need go into that in detail. He said, and it was common ground before me, that the goods specified in the present application were clearly the same goods or goods of the same description as some, if not all, of the goods included in the cited registrations, so that the only question he had to consider was whether the mark "Vivicillin" so nearly resembled the cited marks as to be likely to deceive or cause confusion within the meaning of sect. 12. He then proceeded to give his reasons in the following passage in his judgment :

I am satisfied that, when judged by the eye alone, the two words, "Cyllin" and "Vivicillin," are easily distinguishable and that there is no serious danger of one being confused with the other, even in badly written orders, but the distinction is not so evident when the words are judged by the ear. Phonetically, the applicant's mark incorporates the whole of the word "Cyllin," which is common to all the cited marks. It is true that this element forms the latter part of the applicant's word and that it follows a fairly forceful and distinctive prefix, namely, "Vivi." It is also true that, generally, the first part of a word is the most important for trade mark purposes. Nevertheless the fact remains that when the applicant's word is pronounced, the whole of the conflicting word "Cyllin" will be heard, and as the accent will normally fall upon the syllable "cill," it will, I think, be the latter part of the word which tends to remain in the memory. It is well established that in this connection I must have regard to the many persons who possess but an imperfect recollection of a word which they have heard for the first time and who may, at a later date, encounter the other word. Even if the distinction between the two words be clearly appreciated there

will, I think, be many persons who will detect the similarity between them and who will think that "Viviciilin" goods have some connection with the proprietors of the "Cyllin" marks already on the register. In view of these considerations, I am not satisfied that there is no real danger of the applicant's mark being confused with the prior registered marks . . .

He then referred to the practice of LORD HERSCHELL's committee.

A It was common ground between the parties that the onus of proving that there is no real danger of confusion rests with the applicant, and I think it was also common ground that in dealing with this case, the case under sect. 12, I must not have regard to user; I must consider only the marks side by side, not only when written, but also side by side when spoken, and I must consider whether there is risk of confusion either in sight or in sound.

B Counsel for the appellant in asking me to reverse the decision of the registrar called my attention to the decision of the Court of Appeal in *Re London Lubricants* (1920), *Ltd.'s Application* (1). The marks in question in the case were, on behalf of the applicants, "Tripcastroid," and on behalf of the opponents, "Castrol." SARGANT, J., said (42 R.P.C. 264, at p. 279):

C Therefore, it seems to me one must decide this question of the probability of deception purely on a consideration of the relative nature of the two words themselves, consisting of, first, the opponent's trade mark, and, secondly, the trade mark which the applicants seek to register. That being so, and concentrating on the construction of those two words, I must say that, to my mind, the two words "Tripcastroid" and "Castrol" are so different as to preclude any probability of confusion or deception. The only similarity in the word "Tripcastroid" to "Castrol" is in the letters composing the centre of the new word. The termination of the new word is different. Though I agree that, if it were the only difference, having regard to the way in which the English language is often slurred at the termination of words, that might not alone be sufficient distinction. But the tendency of persons using the English language to slur the termination of words also has the effect necessarily that the beginning of words is D accentuated in comparison, and, in my judgment, the first syllable of a word is, as a rule, far the most important for the purpose of distinction. Here the syllable that begins the word sought to be registered is a completely new and different syllable, and, beyond that, is one that is of considerable importance, because it has a special connotation in conjunction with the applicants' goods, as signifying that the goods in question are their first-quality goods. In my judgment, having regard to the complete amalgamation in the word "Tripcastroid" of the syllable "Trip" with the rest of the word, I see no reason whatever for thinking that the syllable "Trip" would E in ordinary use be dropped.

F Applying that to this case, counsel for the appellant said that the syllable "Vivi" is at least as distinctive as "Trip" in "Tripcastroid"; it is most unlikely that "Vivi" would be slurred, and that that case clearly in substance covers the case I have to decide. There was, of course, the element in that case that there was a difference in the termination as well as the beginning, but he says that not much weight should be given to that because of the fact that the end of a word is where the risk of slurring occurs.

G Counsel for the respondent, on the other hand, says the true principles are laid down by VISCOUNT MAUGHAM in *Aristoc, Ltd. v. Rysta, Ltd.* (2). The main point which was in issue in that case has nothing to do with the matter which is before me, but there are observations by VISCOUNT MAUGHAM which are undoubtedly of assistance to me in this case. The marks in that case were, on the one hand, "Aristoc" and, on the other hand, "Rysta." I will read the relevant passage ([1945] 1 All E.R. 34, at pp. 38, 39):

H LUXMOORE, L.J., however, preferred to dispose of the appeal on the simple ground that the word "Rysta" was likely to cause confusion, having regard to the existence of the appellants' trade mark "Aristoc." His grounds for differing from his colleagues and the assistant comptroller seem to me to be clear and cogent, and I agree with his view as to how the word "Rysta" on the evidence must be taken to be pronounced, and, as to how a considerable number of persons pronounce the word "Aristoc," namely, with the emphasis on the middle syllable. He also stated what is not in dispute, that it is well settled that the onus of proving that there is no reasonable probability of deception is cast on an applicant for registration of a mark: *Eno v. Dunn* (3). There follows a passage ([1943] 1 All E.R. 400, at p. 407) which I completely accept as a fair statement of the duty cast upon the court in such a case. "The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of the Trade Marks Act, 1938, s. 12, must nearly always depend on first impression, for obviously a person who is familiar with

both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants." And then he adds, a little later, "The tendency to slur a word beginning with 'a' is, generally speaking, very common, and the similarity between 'Rysta' and 'Ristoc' would, I think, be fairly obvious. It would not be surprising to learn that a person asking for 'Aristoc' stockings from a shop assistant who only knew of 'Rysta' stockings had been supplied with the latter and *vice versa*."

I respectfully accept the principles there laid down, and I go further and say I should have arrived at the same conclusion, and, indeed, counsel for the appellant did not seek to suggest that that was in any way inconsistent with the decision upon which he relies. But I confess that while it is common to slur a word beginning with "a"—and, indeed, I think some poets put an apostrophe at the beginning instead of the letter "a"—I cannot conceive that anybody would slur "Vivi". Therefore, had the matter come before me in the first instance I should have said that there was nothing in sight or in sound to justify me in holding as a matter of first impression—I say that because this has to be considered entirely as an independent view—that "Vivicillin" so nearly resembles "Cyllin" as to be likely to deceive or cause confusion.

I approach this matter, of course, with some hesitation because I am hearing an appeal from somebody who is dealing with these matters with great frequency and is a man of great experience in cases of this kind, but I cannot help feeling that the real reason why, as I think, he has gone astray is to be found in that passage at the end of the paragraph in which he gives the reason for his decision when he says:

Even if the distinction between the two words be clearly appreciated there will, I think, be many persons who will detect the similarity between them and who will think that "Vivicillin" goods have some connection with the proprietors of the "Cyllin" marks already on the register.

Counsel for the respondent agreed that that passage in the judgment could not be supported; that it was a matter which would have been relevant under sect. 11 and may well become relevant again if this application is opposed after it is advertised.

For the reasons I have stated I think that the appeal must be allowed. The question then arises as to what is the exact form of the order which I ought to make. Counsel for the appellant has pointed out to me that under sect. 52 I have the same discretionary powers of allowing this appeal as are conferred on the registrar. I can, therefore, either direct that it be accepted and then advertised, or I can direct that it shall be advertised under the proviso to sect. 18 (1).

In order to arrive at a decision as to which of these courses I ought to adopt, I do not think I ought to leave out of account the fact that there is a well known substance "Penicillin" which has not been the subject of a registered trade mark because SIR ALEXANDER FLEMING has not sought in any way to obtain any personal benefit therefrom. Counsel for the appellant very frankly told me that "Vivicillin" was in the same class of commodity as "Penicillin." There may be no risk of confusion as regards "Penicillin," and I do not want to suggest that there is in any way, but I do not think in those circumstances I ought to give that *prima facie* blessing to "Vivicillin" which might be thought to arise if I ordered acceptance immediately.

I think the right course is to allow the appeal and direct that the application be advertised under the proviso to sect. 18 (1). It seems to me essentially a case where it is expedient, by reason of exceptional circumstances, namely, the existence of "Penicillin," to take that course.

Appeal allowed. Order accordingly.

Solicitors: Kenneth Brown, Baker, Baker (for the appellant); Solicitor to the Board of Trade (for the respondent).

[Reported by A. E. BLACK, Esq., Barrister-at-Law.]

COOPER v. NATIONAL PROVINCIAL BANK, LTD.

[KING'S BENCH DIVISION (Lawrence, L.J., sitting as an additional judge),
July 19, 20, 23, 24, 1945.]

Bankers—Guarantee—Surety for married woman's banking account—Husband undischarged bankrupt—Husband authorised by wife to draw on her account—Non-disclosure of information by bank—No obligation on part of bank to disclose.

A The plaintiff was a customer of the defendant bank. He gave two guarantees in respect of the banking account of Mrs. R., who was also a customer of the defendant bank. Mrs. R.'s husband was an undischarged bankrupt and, on his wife's written authority, had drawn on her account. The plaintiff brought an action against the defendant bank claiming to set aside and have declared void the guarantees on the ground that the defendant bank had failed to disclose (i) that Mrs. R.'s husband was an undischarged bankrupt; (ii) that the husband had authority to draw on his wife's account; (iii) that the account had been operated in an improper and irregular way because certain cheques had been drawn and then orders had been given not to pay. The defendant bank contended that there was no obligation in law upon them to disclose any of the three matters and counterclaimed for the amount of the guarantees with interest:—

C HELD: since the contract between the defendant bank and the customer did not contain any stipulations which were unusual or which might not reasonably have been anticipated by the surety, the defendant bank was under no duty to disclose any of the matters complained of.

Hamilton v. Watson (2) applied.

D [EDITORIAL NOTE. A guarantor to a bank is not entitled to disclosure, without inquiry, of all the circumstances of the dealings between the principal debtor and the bank. As pointed out by LORD CAMPBELL in the well known passage in his judgment in *Hamilton v. Watson* ((1845) 12 Cl. & Fin. 109, at p. 119) such matters as how the account has been kept, and whether the debtor was in the habit of overdrawing, are very material for the guarantor to know, but information on these matters need not be disclosed voluntarily, for the contract is not *uberrimae fidei* in the sense of a contract of insurance (see *Wythes v. Labouchere* (1859) 3 De G. & J. 593).

E AS TO GUARANTEES TO BANKS, see HALSBURY, Hailsham Edn., Vol. 1, p. 864, para. 1401; and FOR CASES, see DIGEST, Vol. 3, pp. 295, 296, Nos. 931-936; Vol. 26, p. 215, Nos. 1696-1701.]

Cases referred to:

* (1) *London General Omnibus Co., Ltd. v. Holloway*, [1912] 2 K.B. 72; 3 Digest 295, 931; 81 L.J.K.B. 603; 106 L.T. 502.

* (2) *Hamilton v. Watson* (1845), 12 Cl. & Fin. 109; 26 Digest 215, 1696.

F ACTION by the plaintiff, a surety, against the defendants, the National Provincial Bank, Ltd., claiming to set aside and have declared void two guarantees, dated Sept. 25, and Sept. 28, 1942, which he had given in respect of a married woman, Mrs. Rolfs. The plaintiff contended that the defendants did not disclose (i) that Mrs. Rolfs' husband was an undischarged bankrupt; (ii) that the husband had power to draw on his wife's account; (iii) that the account had been operated in an improper and irregular way, in that certain cheques had been drawn and then orders not to pay had been given to the bank. The defendants, who did not allege that they had disclosed any of these three matters, contended that there was no obligation in law on their part to do so, and counterclaimed for £1,386 2s. 7d., being the amount, with interest, due on the two guarantees.

F. A. Sellers, K.C., and *Vernon Gattie* for the plaintiff.

R. F. Roxburgh, K.C., and *P. B. Morle* for the defendants.

Cur. adv. vult.

H LAWRENCE, L.J.: The circumstances of the case are rather unusual. It appears that Rolfs, the husband of Mrs. Rolfs who had an account with the defendant bank, was made bankrupt in 1935 and was an undischarged bankrupt at the time of these guarantees. Mrs. Rolfs, who was living with her husband apparently and had separate property of her own, had an account at the Piccadilly Branch of the defendant bank. In 1941 that account of hers was transferred from the Piccadilly Branch to the Lancaster Gate Branch of the defendant bank. The plaintiff was a customer of the bank at their Southall Branch. In 1942, in addition to Mrs. Rolfs' private account which she was then keeping with the

defendant bank at their Lancaster Gate Branch, she opened an account in the name of "Vale Farms Co.: June Phyllis Maud Rolfs trading as above," and she did that, apparently, in pursuance of a plan which she and her husband had been contemplating, for it appears from the notes of the interviews with the bank that in the autumn of 1941 the bank were informed that Mrs. Rolfs was contemplating the purchase of a farm in Pusey Vale, in Wiltshire, which was to cost, freehold, £50,000, and the stock was to be £20,000; altogether it was to be a very big transaction and it could only be financed by an advance by the bank. It was then represented to the bank, apparently by Rolfs, that Mrs. Rolfs' trustees would advance £20,000 in cash. Negotiations with reference to that went on during the autumn of 1941, and nothing seems to have come of that, but Mrs. Rolfs opened this account with the bank in the name of the Vale Farms Co. at the end of May, 1942. In or about June, 1942, when that account was opened, the plaintiff was in touch with Rolfs, and at that time the farming project had changed. The idea of purchasing this farm in Pusey Vale had been given up and the idea was, or was said to be, that of purchasing a farm near Hungerford, called Goodings Farm, and at the end of June, Rolfs had interested the plaintiff to such an extent in the project that he obtained from the plaintiff a loan of £500, which was paid into this account. The terms upon which he obtained that loan were that he was to receive 5 per cent. on that £500, and in addition he was to receive :

25 per cent. of the capital appreciation between the sum of £27,500, the agreed price for the purchase of Goodings Farm, near Hungerford, and the sum of £40,000, the agreed price at which the said property will be sold to the limited company now in course of formation, after deduction of the usual preliminary expenses which may be necessary but it is agreed that such preliminary expenses shall not exceed the sum of £2,500. When the plaintiff made that loan to Rolfs, he was given an undertaking in the terms which I have quoted, so that he stood to get, if this limited company were induced to purchase for £40,000 the property which they were buying for £27,500, at least £2,500.

In July, 1942, the plaintiff was induced to lend a further £350, and he then got from Rolfs an undertaking that he should obtain £1,000 out of the profit of £10,000 which would arise and become payable to Rolfs upon the completion of the transfer by his wife and himself of the Goodings Estate, making £850 that the plaintiff had advanced to Rolfs on this venture. About that time, namely on July 23, Mrs. Rolfs gave her husband a written authority to draw upon her account, the Vale Farms account, and gave him other powers of managing her business. On Aug. 17 the plaintiff lent a further sum of £60 and apparently was told that that was for wages used on the farm. From July 23, Rolfs appears to have operated upon the account, and one of the points which is alleged by the plaintiff as a thing which ought to have been disclosed, was the fact that a number of cheques, about 12 in all, before the signing of these guarantees of Sept. 25 and 28, had not been paid because of orders from Mrs. Rolfs not to pay them. I say "from Mrs. Rolfs" because nearly all of those 12 or so cheques were dealt with in that way before Rolfs had any authority to draw from the account, and I presume (although the point was not specifically dealt with) that the orders not to pay had been received from Mrs. Rolfs. The position therefore, was that by Aug. 1942, the plaintiff had lent Rolfs for the purposes of this venture the sum of £910, and stood to get out of it, in addition to the interest on that money, £3,500.

In or about Sept., 1942, Mrs. Rolfs' "Vale Farms Account" was not, I think, actually overdrawn, but very nearly overdrawn. Mr. and Mrs. Rolfs wanted to acquire machinery, tractors and other machinery, for the purposes of work on the farm, and they (or he, perhaps I should say) induced the plaintiff to offer to guarantee the Vale Farms account. At first the suggestion was that it was to be a guarantee for £300, and then it was to be a guarantee for £400; in any event the plaintiff telephoned to the Southall Branch of the bank to tell the manager (who kept the plaintiff's own account at the Southall Branch) that he was proposing to guarantee the account of a customer of the bank for £400. The manager of the Southall Branch of the bank heard also on the telephone from the manager of the Lancaster Gate Branch about this guarantee, and he prepared a guarantee that the plaintiff should guarantee the Vale Farms account in the sum of £400, and, accordingly, acting upon that telephone conversation with the plaintiff, the account was allowed to be overdrawn up to £482. At the same

time the bank attempted to obtain a charge upon the machinery to which I have referred, but they found that the machinery had been bought already and that it had been delivered and, therefore, they could not get a charge upon it in the hands of the makers.

A At this time Rolfs was negotiating with the bank for a considerable loan to acquire this farm near Hungerford. The bank were in correspondence with Mrs. Rolfs' solicitors and they received from those solicitors copies of two valuations of the farms in question—there was more than one farm. After receiving the letter of Mrs. Rolfs' solicitors of Sept. 12, 1942, the manager of the Lancaster Gate Branch wrote back requiring further particulars, which he obtained, in the letter of Sept. 15. About the same time the suggestion was made that an insurance policy should be taken out upon the life of Rolfs and should be deposited as collateral security, because although I think the sums involved in the purchase of this farm near Hungerford were not so large as the sums involved in the proposed purchase of the Pusey Vale Farm, they were considerable and the bank naturally required a security.

B In those circumstances, the offer of a guarantee having been made by the plaintiff, who himself was a customer of the Southall Branch, he had an interview on Sept. 24, 1942, with the manager of the Lancaster Gate Branch, Rolfs being present. At that interview, according to the manager of the Lancaster Gate Branch, the plaintiff was inquiring about the farm venture and asking C if the bank knew anything about it. The manager said that an advance of some £22,000 was going to be submitted to his directors, and that he could not answer for their decision but that there was a reasonable chance that it might be granted, whereupon the plaintiff asked Rolfs if he could have any confirmation as to the nature of the venture, and Rolfs said that certainly he would get his solicitors to write it. The plaintiff had come up there, according to the D manager of the Lancaster Gate Branch, to discuss the question of the guarantee, and the manager knew that it had not then been signed; the plaintiff said he wanted to know more about the business before he signed the guarantee, and the manager understood that if he got that satisfaction from Mr. and Mrs. Rolfs' solicitors he would sign the guarantee.

E In that account of that interview the manager of the Lancaster Gate Branch is confirmed by another witness, and also by the letter in which the solicitor to Mr. and Mrs. Rolfs writes saying that he has seen his client Rolfs :

... who instructs me to inform you that the purchase of the Goodings Estate should be able to be completed within the next few days from funds, I understand, being placed at Mr. Rolfs' disposal for this purpose.

Then :

F P.S.—Since writing the above, completion has been fixed for Wednesday next. The plaintiff in his evidence admitted that he had consulted his own solicitors, who had seen the solicitor to Mr. and Mrs. Rolfs with reference to this matter.

G On Sept. 25, 1942, the plaintiff presented himself at the Southall Branch of the National Provincial Bank and saw the manager, whose evidence I have no hesitation in accepting in preference to that of the plaintiff. The manager said that the plaintiff had telephoned in the first instance that he would be giving a guarantee of a customer of the Lancaster Gate Branch, and that some fortnight later he had a message from the manager of the Lancaster Gate Branch that the plaintiff would call to sign the guarantee of £400, guaranteeing Mrs. Rolfs' account, that is, the Vale Farms account. At this interview the plaintiff H called with Rolfs, who was a stranger to the manager. Both of them came in, and the plaintiff said that he was going to make the guarantee not for £400 but for £650. Thereupon the manager had the old guarantee for £400 destroyed and a fresh one prepared, and he told the plaintiff that it was the usual form of guarantee; he read out the name of the guarantor and the account guaranteed; no question was asked and the plaintiff signed it. The names of the parties are underlined in red, and were underlined in red at the time. He is certain that those were the facts, and that he read it out, because he had nothing in writing from the manager of the Lancaster Gate Branch but the telephone message, and, therefore, he wanted to be accurate and correct, and accordingly he read out that guarantee.

The plaintiff has sworn that he signed the guarantee without noticing that it was not a guarantee of Mr. Rolfs' account. That is to my mind incredible.

The amount was changed from £400 to £650, and it is impossible to look at that document, if you look at the "Six hundred and fifty pounds," without seeing that the account to be guaranteed was the account of "June Phyllis Maud Rolfs—wife of Lionel Malcolm Rolfs, trading as Vale Farms company," and it is made even more impossible by the fact that the sum is underlined in red.

On Sept. 28, 1942, the plaintiff called at the Lancaster Gate Branch and said to the manager that he wanted to sign another guarantee for £500. The manager had been told by Rolfs that the plaintiff was coming, and he had told Rolfs that they must have collateral security and he spoke to the plaintiff about collateral security. The plaintiff produced the Land Registry Certificate of title, and offered it as collateral security. The manager accepted it and gave instructions for the guarantee and the deposit to be made out on the same day. I do not know that anything very much turns upon it, but the plaintiff denied that it was made out on the same day. In the document of charge there was a schedule of the deeds deposited, and according to the manager, whose evidence I accept, that was made out at the same time that that schedule was filled in and then signed by the plaintiff. But I do not think anything very much turns upon that.

Those are the two guarantees which are sued upon by the bank and which the plaintiff desires to have set aside. Subsequently Rolfs was prosecuted for obtaining credit whilst being an undischarged bankrupt and not disclosing the fact, and he was convicted partly on the evidence of the plaintiff. It is now contended that the bank was bound to disclose to the plaintiff the fact, which the bank knew, that Rolfs was an undischarged bankrupt and that he had authority to draw upon the Vale Farms account, and that the Vale Farms account had been operated in the way in which I have indicated, namely, by a certain number of cheques, before these guarantees, being drawn and then orders given not to pay.

Of the authorities which have been cited to me, the most in point was *London General Omnibus Co., Ltd. v. Holloway* (1) because there the authorities were fully reviewed, although that was a case of a fidelity guarantee, which differs, of course, from a bank guarantee. In that case FARWELL, L.J., refers to what LORD CAMPBELL said in *Hamilton v. Watson* (2), which is cited with approval in all the cases upon bank guarantees. LORD CAMPBELL said (12 Cl. & Fin. 109, at p. 119):

Your Lordships must particularly notice what the nature of the contract is. It is suretyship upon a cash account. Now the question is what, upon entering into such a contract, ought to be disclosed? And I will venture to say, if your Lordships were to adopt the principles laid down and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account; because no bankers would rest satisfied that they had a security for the advance they made, if as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept; whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; for all these things are extremely material for the surety to know. But, unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure: and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect: and, if so, the surety is to see whether that is disclosed to him. But, if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires.

That passage has frequently been cited, and never criticized, so far as I am aware. Applying it to this case, it seems to me that the submissions which have been made to me on behalf of the plaintiff are diametrically opposed to what is there said: for instance the words, "if such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept; whether the debtor was in the habit of overdrawing"—as a matter of fact, in this case the plaintiff admitted that the

manager of the bank told him that the account had been overdrawn some hundred pounds for some time. But the other criticisms which are made of non-disclosure are directed to the way in which the account was operated—"whether he was punctual in his dealings": that is very much the same thing as drawing cheques and not being ready to pay them and giving orders that they should not be paid—"whether he performed his promises in an honourable manner." Those matters which LORD CAMPBELL mentions there seem to me directly to cover the points of non-disclosure which have been raised in this case with reference to the cheques for which orders were given not to pay.

When LORD CAMPBELL deals more generally with the matter he puts it that, if there is a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect, then the surety ought to be told. But in this case it does not appear to me that there was any contract between the debtor (namely, Mrs. Rolfs of Vale Farms company) and the creditor which made the position between them such as the surety would not naturally expect. There is, in my opinion, nothing unusual in a wife giving to her husband authority to draw upon her account; moreover, it was not a matter of contract between the bank and her, it was a unilateral authority by her given to her husband, and the fact that he was an undischarged bankrupt does not, in my opinion, make it so unusual that it ought to be communicated. If it could be said that the account which was being guaranteed was not really the account of the wife at all, but was the account of the husband in reality, and the bank then took a surety for the wife's account knowing that the account was really not the wife's at all but was really the husband's who was an undischarged bankrupt, it might be, possibly, that that would be a matter which they ought to disclose; but the bank neither knew that nor had any reason to think it. The account was operated by the husband, and the idea of the farming venture was that the husband should manage it, but all the facts which have been proved in evidence before me tend to show that it was the wife's and that the funds which were being used were the funds of the wife in so far as they were not the funds of the bank.

Therefore I hold that there was no duty to disclose; in my opinion there was nothing in the contract between the bank and the customer which was unusual or might not reasonably have been anticipated by the surety. The customer's account was overdrawn; a number of cheques had been drawn upon the account and orders given by the drawer not to pay; the customer had authorised her husband who was an undischarged bankrupt to draw upon the account; but, in my opinion, there was no duty on the bank to disclose any of those facts. As I have said, they did disclose the fact of the overdrawing. The orders not to pay were merely the method of operation of the account by the debtor, and the authorisation by the wife to her husband to draw on that account is, in my opinion, not unusual, even if he is an undischarged bankrupt. It was not the husband's credit which was being guaranteed, it was the wife's, and the facts known to the bank did not show that the account was really the husband's, nor do the facts proved in this case.

Junior counsel for the plaintiff drew my attention to the fact that the undertakings given in the early stages to the plaintiff for his loans were given in the name of the husband, and that cheques were drawn by the husband; but one of the undertakings indicated that the estate was to be vested in the wife and the husband, and those undertakings and cheques were all some time antecedent to the guarantees, and by the time that the guarantees came to be given it must, in my opinion, have been obvious to the plaintiff that he was not being asked to guarantee the account of the husband, which never existed, but was being asked to guarantee the account of the wife trading as the Vale Farms company.

For all these reasons I hold that there was no duty upon the defendant bank to disclose any of the facts which it is alleged they were under a duty to disclose and did not disclose. The action must, therefore, be dismissed with costs, and there will be judgment on the counterclaim for the defendant bank for the sum of £1386 5s. 11d., with costs.

Judgment for the defendants on the counterclaim, with costs.

Solicitors: *Gulliver & Burrow* (for the plaintiff); *Wild, Sapte & Co.* (for the defendants).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

BLOOMFIELD v. SERENYI.

[COURT OF APPEAL (Scott and MacKinnon, L.JJ., and Uthwatt, J.), October 18, 19, 1945.]

Practice—Service out of jurisdiction—Action not properly brought against defendant within jurisdiction—Duty of applicant to make full disclosure to court of all the facts within his knowledge—Court to consider all relevant matters without necessity of deciding disputed matters—R.S.C., Ord. 11, r. 1 (g).

In 1941, the plaintiff issued a writ against the defendant S., a managing director of a Swiss firm which carried on business in Zurich. At the time of the service of the writ the defendant S. was within the jurisdiction. The action arose out of an agreement, alleged to be partly oral and partly in writing, by which the plaintiff was to receive commission on the sale of certain letters patent registered in the name of the defendant S., and was brought for the purpose of claiming (i) a sum for commission; (ii) remuneration for services rendered by the plaintiff in respect of the patent; and (iii) damages for fraudulent misrepresentation. In Nov., 1943, the plaintiff, by his solicitor, applied to the master for leave to join the Swiss firm as second defendants in the action, and for an order for service out of the jurisdiction. On Nov. 5, 1943, an affidavit was sworn by a clerk of the plaintiff's solicitor stating that the first defendant and the proposed defendants were joint contractors with the plaintiff and that both the plaintiff's first claims were based upon that proposition. A few days prior to the filing of the affidavit, the original statement of claim had been amended so as to make the Swiss company co-defendants in the action. Although the affidavit was the only document before the master, he gave leave under R.S.C., Ord. 11, r. 1 (g) for notice of the writ to be served on the Swiss company as being a necessary or proper party to the action properly brought against the first defendant duly served within the jurisdiction. Service was effected, but, owing to the war, the Swiss company failed to enter appearance, and judgment in default of appearance was signed against the company. Subsequently the company made application to set aside the order for service out of the jurisdiction and the judgment signed against them. The judge, on considering all the relevant documents before him, found that the facts disclosed no joint contract between the plaintiff and the two defendants, and that there had not been full disclosure to the master of all the facts within the knowledge of the applicant. Accordingly, judgment was given for the defendants. The plaintiff appealed:

HELD: (i) in order to enable the court to decide an application under R.S.C., Ord. 11, r. 1 (g), it was necessary for the party making the application to supply all the material facts within his knowledge. The court would then, without trying to determine the merits of the action, consider all the relevant documents, even though that might involve some investigation, and make an order accordingly.

(ii) on the claim here for commission and for remuneration, the investigation of the facts disclosed that the only real defendants were the Swiss company and that S. had only been made a defendant to give a foundation for the application of R.S.C., Ord. 11, r. 1 (g).

Per SCOTT, L.J.: it is the duty of a solicitor, as an officer of the court, when asked to obtain leave under R.S.C., Ord. 11, to examine with care the material put before him for the purpose of so acting and to ascertain definitely the real case made by his client before he made, or allowed to be made by his clerk, an affidavit upon which the court must necessarily rely.

[EDITORIAL NOTE.] On an application for leave to serve notice out of the jurisdiction it is essential that the party making it should observe *uberrima fides*, and make a full disclosure of all facts necessary for the court to arrive at a decision whether a proper case for the exercise of the discretion exists. It is held here that the writ and the statement of claim should be produced and that it is the duty of the solicitor who is asked to obtain leave, as an officer of the court, to satisfy himself that he knows the real case upon which the affidavit is founded. In this connection, however, it may be remarked that in *Kinahan v. Kinahan* (1890) 45 Ch.D. 78, at p. 83, KEKEWICH, J., observed "In my experience, it very seldom happens that the affidavit in support of

the *ex parte* application under that order, notwithstanding that it is generally made by the plaintiff's solicitor, strictly or satisfactorily complies with the exigencies of the order."

On the facts here there was no proper case for the application of R.S.C., Ord. 11, r. 1 (g), and there is, therefore, no room for the application of the principle laid down in *Ellinger v. Guinness, Mahon & Co.* ([1939] 4 All E.R. 16), that non-disclosure of a material fact on the application is not a sufficient ground for setting aside the application unless there has been an attempt to deceive the court.

A AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-36, paras. 44-52; and FOR CASES, see DIGEST, Practice, pp. 368-372, Nos. 787-822.

See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 96-99.]

APPEAL by the plaintiff from a decision of WROTTESELEY, J., dated July 30, 1945, allowing an appeal of the co-defendants, a Swiss company, from an order of MASTER BAKER, dated Nov. 5, 1943. On Mar. 28, 1941, a writ was issued by the plaintiff against the defendant Serenyi alone. The writ was endorsed with the following claims: (i) for commission; (ii) for remuneration for certain services; (iii) for damages for fraudulent misrepresentation. The defendant Serenyi was the managing director of the co-defendants, Fadutub A.-G., a Swiss company carrying on business in Zurich, and the writ was served on him while within the jurisdiction. On Nov. 5, 1943, an affidavit was sworn by a clerk of the plaintiff's solicitors, with a view to joining the Swiss company as co-defendants in the action and to obtaining leave for service out of jurisdiction. This affidavit stated, *inter alia*, that the sum claimed for commission was due to the plaintiff in respect of the sale by the defendants jointly of a patent, owned by the defendants or one of them, to a British company, and that the defendants were jointly indebted to the plaintiff in respect of the commission and remuneration. On the strength of this affidavit, which was the only document before the master when the application was made, leave to serve notice out of jurisdiction under R.S.C., Ord. 11, r. 1 (g) was given. Owing to the war, the defendant company made an application to intervene in the proceedings only after judgment had been signed against them in default of appearance. Subsequently the defendant company sought to set aside the order for service out of jurisdiction and the judgment signed against them. The facts are sufficiently set out in the judgment of SCOTT, L.J.

E *Serjeant A. M. Sullivan, K.C.*; and *M. O'Connell Stranders* for the appellant (plaintiff).

Valentine Holmes, K.C., and *Hon. T. G. Roche* for the respondents (defendants).

SCOTT, L.J.: This is an appeal from a decision of WROTTESELEY, J., in an application to set aside the service of a writ as to which leave to serve notice out of the jurisdiction had been given under R.S.C., Ord. 11, r. 1 (g). The action was brought in 1941 by the appellant Bloomfield against the respondent Serenyi alone. In that action there were three claims: (i) for commission; (ii) for remuneration for certain services; (iii) for damages for fraudulent misrepresentation.

Serenyi was in fact a director of a Swiss company called Fadutub A.-G., carrying on business in Zurich. The matters in question concerned letters patent which were registered in the name of Serenyi. The commission was alleged to be due to the plaintiff [appellant] from him and the company jointly and it was on that allegation that leave to serve notice of the writ, making the company a co-defendant, had been given. On the original application an affidavit had been sworn on Nov. 5, 1943, by a clerk of the plaintiff's solicitors, and that affidavit and nothing else, not even the original writ, was before the master when asked to make the order for service out of the jurisdiction, although that writ had been issued on Mar. 28, 1941. A statement of claim had also been served as long previously as May 8, 1941.

H It is very important to appreciate that there was literally nothing before the master except this affidavit. The first paragraph stated that the action was brought for the purpose of claiming from the defendants (a) a sum of £4,600 commission due to the plaintiff in respect of the sale by the defendants jointly of the defendant Serenyi's patent, owned by the defendants or one of them, to a British company called "Transparent Containers, Ltd."; (b) remuneration on a *quantum meruit* basis in respect of services rendered by the plaintiff

to the defendants or one of them in connection with the patent; (c) damages for fraudulent misrepresentation as to the exclusive right to the said patent. Para. 2 stated that Serenyi was within the jurisdiction but that the defendant company, the Swiss company, carried on business in Zurich. Para. 3 said:

The plaintiff had a good cause of action against both the defendants in respect of the matters aforesaid. The said defendants are jointly indebted to the plaintiff in respect of the commission and remuneration . . . The first named defendant was at the material times the registered owner of the said patent . . . When the said patent was sold to British Transparent Containers, Ltd., the sale was effected by a deed . . . wherein both the defendants were the joint vendors.

On that affidavit the master gave leave. Service was effected, and it was some time, because of war conditions, before an application was made by the defendant company to intervene in the proceedings. By that time judgment had been signed against them in default of appearance, and, therefore, they applied also to set aside the judgment. It came before WROTTESELEY, J., and I have a note taken by junior counsel, who was present, of what the judge said:

I have come to the conclusion that, having regard to what I must deal with, there has never been any answer on affidavit by the plaintiff [that is, by the plaintiff personally] . . . He has sworn nothing which would justify the service being allowed to stand. The contract was partly in writing. He [plaintiff] is still unable to produce the letters. I do not think there has been full disclosure in view of the letter of the plaintiff as to what he intended to do. It is clear that he knew where his rights lay. The affidavit of the solicitor was far from being a real disclosure. In my discretion, this is not a proper case to compel these people to come over and fight this action here.

That judgment is, of course, very short and gives very little information about the facts, but it is clear from it that the judge exercised his discretion and came to the conclusion that there had not been full disclosure at the time that leave to serve out of the jurisdiction had been asked for. If there is one principle that is clear about the order for service out of the jurisdiction it is that the party applying for leave to serve must make full disclosure to the court in order to enable the court really to judge whether the facts are such as to bring the case within the rules permitting such service. It was said here that the defendant company came within R.S.C., Ord. 11, r. 1 (g), which says:

Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The affidavit clearly made such a case because it said that the existing defendant and the proposed defendant were joint contractors with the plaintiff and that both his first claims were based upon that position. Inferentially, it would probably follow that the third claim, for fraudulent misrepresentation, had a similar origin—joint action by the two of them. When the Swiss company applied to set aside the service and judgment, the judge, quite properly, went into the material produced before him. The facts disclosed no joint contract at all. There was possibly a suggestion of some oral arrangement but there was no such contract by the plaintiff with the two defendants as entitled the solicitor to describe it as a joint contract between them of the one part and the plaintiff of the other.

In my view, that is enough to dispose of the appeal, but, in view of the intensive investigation that has been made before us (which I understand was also made before the judge) I feel bound to say that the plaintiff's solicitors' clerk in the original affidavit upon which leave was asked did not put before the court anything like full disclosure. I cannot help thinking that the deponent must have been erroneously instructed, perhaps quite innocently, by the plaintiff as to what the position was. But I want to say definitely that it is the duty of a solicitor, asked to obtain leave under R.S.C., Ord. 11, to examine with care the material put before him for the purpose of so acting and to make sure that he does know the real case that his client has before he makes, or allows a clerk to make, an affidavit upon which the court must necessarily rely. The solicitor should remember also that he is an officer of the court.

In my view, the position here was one in which no such application ought to have been made. The facts were such that the solicitor ought to have felt at once very great doubt as to whether the action had been, in the words of para. (g), "properly brought" against Serenyi so as to justify the assumption of para. (g) that the plaintiff had been justified in starting the action against

the defendant already on the record. I cannot help feeling that the matter was treated in the solicitors' office and by the master far too much as a matter of course and as one in which it was only necessary to put a bare statement before the court for the plaintiff to be entitled as of right to have leave to serve out of the jurisdiction. I think that is the kinder way to look at the affidavit. As it is, I feel, that the statement of joint indebtedness on the joint contract there made was made with a levity that was wrong. The appeal must be dismissed with costs.

A

MACKINNON, L.J.: I agree. It has been rightly said in some of these cases that on such an application as this the court cannot try the merits of the action. That is quite true, but I think that means trying and determining disputed facts. Where on such an application the court considers the admittedly relevant documents without the necessity of deciding disputed matters, I do not think that is trying the merits of the action within the meaning of the warning not to do so. The complication of the business in this case has involved us in a somewhat lengthy investigation which gives the appearance of something like trying the merits of the action, in deciding whether it is a proper case for the application of R.S.C., Ord. 11, r. 1 (g). But in essence I do not think it is so. The ascertainment of the facts involves some investigation but I do not think it involves the resolution of disputed facts. In truth I think that after the investigation we have made it is apparent that on the claim here for commission and for remuneration the only real defendants are the foreign company and that Serenyi was only made a defendant to give a foundation for the application of this rule. There is, it is true, another claim, for so-called damages for fraud; but I think that counsel for the respondents was right in saying that that claim for damages was manifestly without any legal foundation. In so far as there can be any damages for such fraud it would be another ground for claiming the commission that has been lost, or the remuneration; it comes to the same thing.

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The only other thing I should like to say is that I am astonished to hear that an application of this sort can be made to a master, entertained by the master and granted by the master without his ever having brought before him the writ the notice of which it is sought to serve out of the jurisdiction. I should have thought it was elementary that on such an application the writ should accompany the affidavit in support of the application. I agree that the appeal should be dismissed.

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UTHWATT, J.: I agree. It appears to me quite clear that many facts within the knowledge of the applicants obviously bore on the question whether leave to serve out of the jurisdiction ought to be granted. No attempt was made to bring any of those facts to the notice of the master. He was not even furnished with the writ; nor was he given the amended statement of claim which had been delivered as amended two days before. For my part, had the matter been delivered as amended two days before. For my part, had the matter come before me with only the writ, the statement of claim and the affidavit, I should have been perfectly satisfied that this was not a case in which leave to serve out of the jurisdiction ought to be given. It is quite clear that this is a matter with which this country has no concern whatever.

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Appeal dismissed with costs.

Solicitors: *Spiro & Co.* (for the appellant); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

BARRATT v. GOUGH-THOMAS.

[COURT OF APPEAL (Lord Greene, M.R., du Parc and Morton, L.JJ.),
October 19, 1945.]

Solicitor—Lien—Mortgage—Solicitor acting for mortgagor and mortgagee—Title deeds in custody and control of solicitor—Mortgagor owing to solicitor costs of transaction—Death of mortgagee—Solicitor one of the executors—Redemption action—Claim for lien raised by solicitor—Jus tertii—Order asked for premature.

In 1919 the respondent purchased certain freehold farm property which he mortgaged on the same day to one Reece. The appellant, a solicitor, acted in the transaction for both the respondent and the mortgagee. In Feb., 1941, Reece died and, on Feb. 10, 1942, his will was proved by the appellant and others, executors thereby appointed. The appellant, on completion of the mortgage, had received, in his professional capacity the title deeds of the property and had held them on behalf of the mortgagee ever since. The respondent wanted to redeem the mortgage but the appellant took the view that he was entitled as against the respondent to refuse to hand back the title deeds without having his claim for costs and certain other disputed items in connection with the mortgage transaction paid. The respondent then commenced a redemption action by originating summons against the appellant and his co-executors, and it was, at the same time, considered convenient to have the question decided whether the appellant's claim to a lien was valid. No separate ordinary summons was taken out for this particular issue, but an order was made on the originating summons declaring that: (i) the executors were to deliver up to the respondent the mortgage and title deeds in their custody or in the custody of any one of them; (ii) upon redemption the appellant was not entitled against the respondent to any lien on the deeds. The appellant by his notice of appeal asked for a declaration that he was entitled to a lien upon the title deeds and that on redemption of the mortgage he would be entitled to retain those deeds until his costs had been paid:—

HELD: (i) the appellant's claim to a lien on the title deeds was a *jus tertii* and as such did not concern the redemption proceedings. In order to raise this issue in redemption proceedings the proper procedure would have been by a separate ordinary summons.

(ii) the order asked for would purport to declare rights to be effective on some future occasion in circumstances which might never materialise. Therefore, the application, in the form and at the time it was brought in the court below, ought never to have been entertained.

Decision of VAISEY, J. ([1945] 2 All E.R. 414) reversed on other grounds.

[EDITORIAL NOTE. The order of VAISEY, J., is here discharged on the ground that it is premature, and also that the solicitor, in setting up a claim to a lien, is acting in a manner prejudicial to the estate of which he is co-executor. The correct time for settling the right to lien is when the time comes for delivery of the title deeds, by which date the solicitor may have handed them to his co-executors under order of court. The making of the order asked for would prejudice the matter, which might well never arise. In any case, the proper procedure was by an ordinary summons and not on the originating summons for redemption, in order to allow for the severance necessary in view of the conflict of interest between dual capacities in which the solicitor was acting.]

AS TO SOLICITOR'S RETAINING LIEN, see HALSBURY, Hailsham Edn., Vol. 31, pp. 238-244, paras. 265-267; and FOR CASES, see DIGEST, Vol. 42, pp. 267-269, Nos. 3016-3027.]

APPEAL by the defendant from an order of VAISEY, J., dated July 10, 1945, reported ([1945] 2 All E.R. 414). The facts are fully set out in the judgment of LORD GREENE, M.R.

R. F. Roxburgh, K.C., and D. H. Cohen for the appellant.

J. Neville Gray, K.C., and C. Montgomery White for the respondent.

LORD GREENE, M.R.: The controversy which has given rise to the present appeal was brought before the court in a curious and, indeed, in my opinion, irregular manner. The appellant is a solicitor who acted for both purchaser and mortgagee on the occasion of a purchase followed immediately by a mortgage

to the mortgagee who provided the purchase money or a great part of it. The title deeds, including the conveyance to the purchaser, remained in the possession of the solicitor and, I apprehend, it would not be disputed that when he originally received them from the vendor, which he did at some moment of time anterior to the mortgage, he received them as solicitor to the purchaser and at that moment held them on the purchaser's behalf. The question on whose behalf he held them when the mortgage was concluded is a matter which it is desired to put in controversy. As the argument has, for reasons which will appear later, come to a premature end, I do not propose to express an opinion either way upon the point. But the suggestion is that he held them from that moment in some way, which at present at any rate I have not been able to understand, on behalf both of the mortgagor, that is to say the purchaser, and the mortgagee. It is said, on the other hand, that directly the mortgage transaction was completed the solicitor from that moment held the deeds on behalf of the mortgagee alone. What is perfectly clear is that the solicitor could not have refused to hand over the deeds to the mortgagee if the mortgagee had demanded them. His claim to a lien, be it good or be it bad, as against the mortgagor could in no way affect his obligation as solicitor to the mortgagee to hand over to the mortgagee the deeds to which the mortgagee was quite clearly entitled, for the very simple reason that neither the mortgagor nor the solicitor could prejudice the rights of the mortgagee to have the deeds by setting up this alleged lien on the part of the solicitor.

It so happened that the mortgagee died and he appointed as his executor the solicitor and three ladies. The mortgagor was minded to redeem. One further thing is perfectly clear, that if the deeds had been in the possession of the mortgagee and not in the physical possession of the solicitor there is no question but that the mortgagor would have been entitled to redeem and, as a necessary consequence on redemption, get back his deeds. But the solicitor considered himself to be in a position of some advantage and he took the view that he was entitled as against the mortgagor, who was the original purchaser, to refuse to hand back the deeds without having his claim for his costs and a number of disputed items paid. The costs in respect of which he was claiming included the costs of the original transaction which his client, the original purchaser and the subsequent mortgagor, was bound to pay. There are a number of other disputed items. He took up the attitude that he was not going to hand over these deeds which were physically in his possession, presumably locked up in his safe. The result of that was that the attempt at redemption was completely hung up. The mortgagor was anxious to pay his money and get his deeds back. The executors of the mortgagee, one would presume, wanted to get their money and to be quit of the transaction, but this claim by the solicitor impeded the whole matter. Quite clearly the position he was taking up was a position which might be, and, indeed, I should have thought quite clearly was going to be prejudicial to the estate of which he was a co-executor, because it was holding up the repayment of moneys owing to the estate pending the settlement of a dispute with which the estate had no concern whatsoever. His interest, therefore, appears to me quite clearly to conflict with the interest of the estate. That is an important point to remember having regard to the way in which I consider this appeal ought to be dealt with by this court.

That being the position and this deadlock having been produced by the claim of the solicitor to retain the deeds, the mortgagor issued the originating summons. It is on the face of it an ordinary originating summons for redemption. It was then considered, apparently, that the convenient course would be to get decided in those proceedings the question whether the solicitor's claim to a lien was or was not a valid claim. It was suggested by counsel, we are told, that that could be done by taking out an ordinary summons in the originating summons asking for the determination of that question. Perhaps it would have been unusual even to do it in that way because this is really a *jus tertii* which is being set up which does not concern the redemption proceedings as such. But one thing I am quite clear about is that, if this issue was going to be raised and could properly be raised in redemption proceedings, the proper way to raise it, if it was desired to raise it at this stage, was by a separate ordinary summons. That was not done. We are told that the master thought that it was unnecessary

and that the matter could be brought before the court on the substantive originating summons itself.

Matters of substance are very often wrapped up in matters of procedure and it not infrequently happens that the substance of the matter can be tested by considering what the appropriate procedure is. That, I think, is clear in this case because, if an ordinary summons had been taken out raising this question, it would have been taken out either by the plaintiff to the summons, that is to say the mortgagor, or by the solicitor himself, Mr. Gough-Thomas. If he had raised the point and taken out the summons, he would have had to make his co-executors respondents and there would have been immediately a severance, which is exactly the thing which ought to have taken place for the reason I have pointed out, namely, that there is a conflict of interest between Mr. Gough-Thomas claiming in his own capacity as solicitor and the interests of the estate of which he is co-executor. But by doing it in this way, the necessity of such a severance was concealed. I use that phrase not as meaning that there was any intentional concealment, but that was the effect of it.

What happened was this. The matter was argued before VAISEY, J., on the originating summons and he held that the defendants were bound to deliver up to the plaintiff "the said mortgage and all other deeds or writings in their custody or power or in the custody or power of any of them relating to the said property comprised in the said mortgage." He also declared that "upon redemption as aforesaid the defendant William Gough-Thomas is not entitled against the plaintiff to any lien on the said documents or writings or any of them." I may point out that the declaration there is a declaration as to the duty of the defendants. The defendants are all four executors including the solicitor. The order, therefore, is made against those four. The order as it stands, though naturally prejudicial to and defeating the defendant solicitor's claim, is one which if it were the correct order, does no harm. The question we are asked to decide is whether it is correct or not.

Counsel for the appellant asks by his notice of appeal for a declaration that the solicitor is entitled to a lien upon the deeds and documents of title relating to the freehold property and that on redemption of the mortgage he will be entitled to retain the deeds and documents until the costs are paid. Let me just consider the order which is asked for. First of all, the notice of appeal is not served on the three ladies. That, of course, could be corrected by adjourning this appeal and ordering it to be served upon them. But the order asked for is something which, if it were obtained, would be prejudicial to the estate because it would enable the solicitor to hold up the whole of the redemption proceedings until his claim for a lien for an unascertained amount is finally ascertained and settled. In those circumstances, it appears to me that the solicitor is putting himself in an impossible position because at one and the same time he is acting as solicitor for these three ladies, his co-executors, and is setting up, without their having had any independent advice, a claim which is prejudicial to their rights as executors and prejudicial to the estate of which he himself is an executor. If ever there was a case in which the parties ought to sever, I should have thought it was this case.

The importance of it may be shown in another way. I have already said that I can see no answer to the argument that if the solicitor had not been an executor of the mortgagee the executors could have insisted on having the deeds handed over to them, in which case the redemption would have gone forward in the ordinary way and would have taken place without any necessity for a summons at all. If that had been the position at this moment the whole difficulty could have been resolved by the executors of the mortgagee insisting on the deeds being handed over to them. I cannot see what possible answer the solicitor would have had. But, of course, that is not the position. He happens to be one of the executors. That being so, suppose his three co-executors say to him "We do not want to be troubled with a redemption action, we want our money. The executors as such are entitled to the possession of these deeds. Will you please hand them over to the mortgagor" and he says he will not. It might very well be, though I do not express an opinion upon it, that the three ladies, if properly and independently advised, could then apply in the administration of the estate for an order on him either to concur with them in handing over these deeds or to hand over the deeds to them so that they could hand

them to the mortgagor themselves. They have had no opportunity of taking that step and the order which is being asked for by the notice of appeal is one which would entirely prejudice them if they were advised that that was the proper step as executors to take, because if this order is obtained in these proceedings it will declare that he is entitled to a lien and would make it apparently impossible for them to do what I cannot help thinking they could otherwise have done by appropriate proceedings, namely, insure that the deeds were taken from his physical custody and handed over to the mortgagor.

A I am not, of course, expressing any opinion as to what could or could not be done or what order ought or ought not to be made. I have merely called attention to these matters because they bring out clearly, it seems to me, the correctness of the impression which I received immediately this case was opened, and which on consideration is confirmed, that this particular application is misconceived and premature. The order asked for is purporting to declare rights which are to be effective on some future occasion in circumstances which may never materialise. It may never be the case that the appellant will have an opportunity of asserting this lien at the moment when the time for asserting it arises because by that time he may have been subject to an order of the court to hand over the deeds to his co-executors or to concur with them in handing the deeds over. The making of an order at this time entirely prejudices that matter and, as I say, orders may be made in the meanwhile which will make it quite impossible for the order now asked for to be a correct one. In these circumstances, although I appreciate the desire of both parties to have a question which has been raised between them decided, and although I appreciate and indeed sympathise with the view that appears to have been taken that the matter could be settled in this way and expense could thereby be avoided, I have come to the conclusion that, as not infrequently happens, what appeared to be a satisfactory short cut has really turned out to be the longest way round. I do not think that the court should deal with the question at this stage and I think VAISEY, J., ought to have refused to entertain it.

C It was suggested to us that we should continue to hear the appeal and that if we decided that the appellant was wrong and we confirmed the order of VAISEY, J., no harm would be done. That would involve this curious position, that we should be hearing the appeal on the footing that if we dismissed it we should be treating the matter as having been properly entertained by the court, whereas if we thought the judgment was wrong we should discharge the judge's order on the ground that he ought never to have entertained the application at all. That is, of course, quite an impossible position for this court to be put into.

E In the result I am of opinion that VAISEY, J., whose attention was quite obviously not called to this aspect of the matter, ought not to have entertained this application in the form and at the time it was brought before him. The time when the question of this lien will fall to be decided will be when the moment comes for delivery of the deeds. The right to the lien will depend on the position as it exists at that moment which may not be the same as the position which exists now. Therefore the application was in my opinion premature, the judge ought not to have entertained it, and his order must be discharged. This appeal must be formally dismissed.

G DU PARCQ, L.J.: I agree. One cannot without regret take a course, the result of which must be that a good deal of time has been wasted, but I am in full agreement with LORD GREENE, M.R., that, for the reasons he has given, we can take no other course than to discharge the order of VAISEY, J., and decline to consider the question which he decided, as it seems to me it was premature. I am quite satisfied that we are not taking the course which we are taking merely for reasons of technicality but, as the judgment of LORD GREENE, M.R., shows, for weighty and substantial reasons.

H MORTON, L.J.: I also agree. I naturally feel every sympathy with VAISEY, J., in arriving at the conclusion that he could decide this matter now. It was desired to save expense and time, no doubt, but the very form of his order shows that he was deciding a future question. His declaration is that upon redemption by the plaintiff of the property comprised in the mortgage the defendants are bound to deliver up the mortgage and title deeds.

Then he goes on to declare that upon redemption as aforesaid by the plaintiff, the solicitor is not entitled as against the vendor to any lien on the deeds. There are circumstances in which future questions may be conveniently determined by this court although the circumstances are comparatively limited in number. In this case, for the reasons already explained by LORD GREENE, M.R., the decision of the question was wholly premature and the judge was indeed deciding something which might never arise and deciding it in circumstances which give rise to the greatest difficulty when one comes to consider any appeal from the decision of VAISEY, J. I entirely agree with the order proposed.

Appeal dismissed. Each party to pay their own costs. Order of VAISEY, J., discharged.

Solicitors: *Rooke & Sons, agents for W. Gough-Thomas, Ellesmere* (for the appellant); *Field, Roscoe & Co., agents for Batten & Whitsed, Peterborough* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

RIDLEY v. DE GEERTS.

[COURT OF APPEAL (Lord Greene, M.R., du Parc and Morton, L.JJ.), November 1, 1945.]

Damages—Measure of damages in a purchaser's action—Sale of land at higher price before completion of contract—Vendor's liability—Difference in price proper measure of damages.

The appellant agreed to purchase a freehold dwelling-house belonging to the respondent for £1,400. Before completion of the sale, the respondent sold the property to a third party for £1,600. The appellant then brought an action for specific performance and other relief. The court took the view that there was no contract of sale between the parties and dismissed the action. An appeal from this decision was allowed and, by consent of the parties, the Court of Appeal dealt with the measure of damages to be awarded to the appellant. It was contended for the respondent that, although the amount of damages would be the difference between the two prices, *i.e.*, £200, there should be deducted from it the costs, including stamp duty, which the appellant would have incurred if the contract of sale had been completed:—

HELD: the purpose for which the house was required, whether for occupation or for sale later, did not affect the question of damages which must be fixed in relation to the pecuniary loss suffered by the appellant who was, therefore, entitled to damages without deduction of any costs.

[EDITORIAL NOTE. It is held that where general damages for loss of bargain are awarded to the purchaser of property, according to the principles in *Re Daniel* ([1917] 2 Ch. 405), the vendor is not in the circumstances of this case, entitled to deduct from the damages the costs which the purchaser would have been put to if the contract had gone through. The market was active and the purchaser could have sub-sold immediately, nor was it material that she was in fact buying for her own occupation.

AS TO DAMAGES UNDER AN UNCOMPLETED CONTRACT, see HALSBURY, Hailsham Edn., Vol. 29, pp. 390-394; and FOR CASES, see DIGEST, Vol. 40, pp. 262-268, Nos. 2273-2350.]

APPEAL by the plaintiff from a decision of ROMER, J., dated June 22, 1945. The plaintiff, in a purchaser's action claimed specific performance and other relief with regard to a contract for the sale of a dwelling-house. ROMER, J., dismissed the action on the ground that there was no contract between the parties. The Court of Appeal indicated that the appeal would be allowed and the parties consented that damages should be assessed by the Court of Appeal.

Gilbert H. Beyfus, K.C., and C. J. Salkeld Green for the appellant.

D. L. Jenkins, K.C., and G. A. Rink for the respondent.

LORD GREENE, M.R.: There is no question of specific performance because the respondent thought it proper to back out of this transaction when she had been offered a higher price, and she has in fact completed that purchase for

£1,600, that is £200 more than the appellant was to pay. The question, then, is what is the measure of damages. *Prima facie* one would have thought on the evidence before us—and we are asked to assess the damages—the measure of damages would be the difference between the two prices, £200. But counsel for the respondent suggests that there should be deducted from that the costs which the appellant would have been put to, including stamp duty, in the event of the transaction going through. It may very well be that in some cases that
 A may be an appropriate deduction, but on the facts of this case I do not think it would be right to deduct those costs. My reason is this: at practically the very moment when this contract was made and within a very few days of its being made the respondent repudiated and broke the contract by accepting an offer of £1,600. We may take it, therefore, that when the appellant entered into the contract to buy the house she was buying a house for £1,400, the market value of which was £1,600, and she could then and there have resold the house
 B at a profit before even she had investigated the title, much less completed the contract. She could have sub-sold; at any rate, on the facts, that is the inference I would most certainly draw. The market was an active one and here was a considerable increase of price. It is no answer to say that the appellant was buying for her own occupation. The question of what she intended to do with the house cannot affect the question of damages, which must be fixed in relation to the pecuniary loss which she has suffered, having regard to the market
 C value of the subject-matter of the contract. I, therefore, do not think in this case it would be proper to make any such deduction as counsel for the respondent asks for and the proper measure of damages is, in my opinion, £200.

DU PARCQ, and MORTON, L.JJ., concurred.

Appeal allowed with costs. Award of £200 damages.

D Solicitors: *S. Myers & Son* (for the appellant); *Pettit & Westlake* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

T. H. BLACKWELL (INSPECTOR OF TAXES) v. MILLS.

E [KING'S BENCH DIVISION (Macnaghten, J.), October 29, 1945.]

Income Tax—Schedule E—Deductions from emoluments—Travelling expenses—Attendance at evening classes condition of employment—Expenses so incurred not in performance of duties of office—Income Tax Act, 1918 (c. 40), Sched. E. r. 9.

F In Sept., 1941, the respondent commenced employment as a student assistant in the research laboratories of the General Electric Co., Ltd. It was a condition of his employment that he should attend classes in preparation for the final examination for the degree of Bachelor of Science of London University. The respondent, in order to comply with this condition of his employment, enrolled as a student with the Chelsea Polytechnic where he regularly attended evening classes. He was allowed
 G without deduction of pay, to leave his work at the laboratories in time to travel to the Chelsea Polytechnic and to attend the classes there. The company paid half the tuition and examination fees for the respondent, and half the cost of his text books. The travelling expenses were wholly borne by the respondent. It was contended for the respondent that, since the subject-matter of the evening classes was not unconnected with the duties the respondent had to perform, he should be regarded as performing
 H the duties of his office when attending the Chelsea Polytechnic, the travelling costs and the half share of cost of text books being, therefore, admissible deductions from his remuneration:—

HELD: since the respondent was not performing the duties of a student assistant at the company's laboratories when attending the evening classes, the expenses incurred were not admissible deductions within the meaning of the Income Tax Act, 1918, Sched. E, r. 9.

Simpson v. Tate (1), *Nolder v. Walters* (2) and *Ricketts v. Colquhoun* (3) applied.

[EDITORIAL NOTE.] This is a border-line case on the question of deduction of travelling expenses under Sched. E, r. 9. It is not unusual for young assistants in commercial employment to be required to attend classes as a condition of the employment, and it is argued here that such attendance is so connected with the duties of the employment as to be deductible. This argument is rejected in accordance with the principles laid down in *Ricketts v. Colquhoun* (3). It is not altogether clear why fulfilment of the condition was not part of the duties of the employment, which were to be performed in part at the Polytechnic and in part in the laboratories, so that at least the respondent's share of the cost of the text books was necessitated in the performance of his duties. A

AS TO TRAVELLING EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 221, 222, para. 446; and FOR CASES, see DIGEST, Vol. 28, pp. 88-90, Nos. 519-535.]

Cases referred to:

*(1) *Simpson v. Tate*, [1925] 2 K.B. 214; 28 Digest 89, 527; 94 L.J.K.B. 817; 133 L.T. 187; 9 Tax Cas. 314.

*(2) *Nolder v. Walters* (1930), 46 T.L.R. 397; Digest Supp.; 15 Tax Cas. 380.

*(3) *Ricketts v. Colquhoun*, [1926] A.C. 1; 28 Digest 88, 519; 95 L.J.K.B. 82; 134 L.T. 106; 10 Tax Cas. B

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the division of Gore in the county of Middlesex for the opinion of the King's Bench Division of the High Court of Justice. The Commissioners allowed a claim by the respondent who was employed as a student assistant in the research laboratories of the General Electric Co., Ltd., to deduct from the remuneration he received from the company the sums of £2 19s. 9d., and £9 10s. 0d. as expenses deductible under r. 9 of the rules applicable to Sched. E as money expended "wholly, exclusively and necessarily" in the performance of his duties. The Crown appealed. The facts are sufficiently set out in the judgment. C

The Solicitor-General (Rt. Hon. Sir Frank Soskice, K.C.) and Reginald P. Hills for the appellant, the Crown. D

G. G. Honeyman for the respondent.

MACNAGHTEN, J.: The facts as stated by the Commissioners are that in Sept., 1941, the respondent commenced employment as a student assistant in the laboratories of the General Electric Company, and that it was a condition of his employment that he should attend classes in preparation for the final examination for the degree of Bachelor of Science in the University of London. He attended evening classes at the Chelsea Polytechnic in order to comply with this condition of his employment, and the company allowed him to leave his work at the laboratories in time to have a meal and get to the Polytechnic before the classes began. He was allowed time off without deduction of pay. The company paid half the tuition and examination fees for the respondent, and half the cost of his text books. The respondent had to pay the cost of travelling to and from the Polytechnic and half of the cost of his text books. Those are the expenses claimed as a deduction from his remuneration which the Commissioners have allowed. E

The deductions that can be made from remuneration received in respect of an office of profit are strictly limited by r. 9. Few people sleep at the place where the duties of their office are performed, but it is well established that you cannot claim deduction for the expenses of getting from the place where you sleep to the place where you perform the duties. The expenses permitted to be deducted must be expenses incurred in the performance of the duties of the office. F

The matter has been fully explained by the late SIR SIDNEY ROWLATT, J., most clearly in *Simpson v. Tate* (1) and *Nolder v. Walters* (2). If any further light on the subject were required, it is to be found in the decisions of the Court of Appeal and House of Lords in *Ricketts v. Colquhoun* (3). G

Following those decisions, it appears to me that this appeal must be allowed. It was a condition of the respondent's employment that he should attend the evening classes. Although counsel for the respondent contended that, since the subject-matter of the evening classes was not unconnected with the duties that the respondent had to perform, he should be regarded as performing the duties of his office when he was attending the Chelsea Polytechnic, in my opinion, any such view is inadmissible. The duties of his employment were as a student assistant in the research laboratories of the General Electric Company. H

It seems to me impossible to say that, when he was listening to the lecturer at the Chelsea Polytechnic, he was performing the duties of a student assistant at the laboratories of the company. I think it is a plain case. The appeal must be allowed.

Appeal allowed. No order as to costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant Crown) ; *Faithfull, Owen & Fraser* (for the respondent).

[*Reported by P. J. JOHNSON, Esq., Barrister-at-Law.*]

AMOS v. AMOS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P. and Hodson, J.), October 23, 1945].

Husband and Wife—Summary jurisdiction—Maintenance order—Application to discharge—Summons charging adultery limited to particular incident—Evidence of adulterous association for a period of two years—Justices adjudicating on particular charge only—Jurisdiction of Divisional Court—Power to amend summons—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

On July 6, 1945, the appellant husband applied to the justices to discharge a maintenance order, made in 1942 in favour of the respondent wife and based upon desertion, on the ground that she had since committed adultery. In his application, the husband did not make a general charge of adultery, but limited his allegation to a particular incident, namely, that the respondent wife had committed adultery, in Oct. 1944, with one L., at Babbacombe, Devon. There was evidence before the justices that the association of the respondent wife with L. had lasted for a period of two years and that the respondent wife had informed the appellant husband that she had been away with L. for a visit to Babbacombe and that she would no longer require any maintenance from the appellant. At the hearing before the justices in Aug., 1945, all arrears under the maintenance order were cancelled by consent, but the justices, limiting the scope of their inquiry to the incident at Babbacombe, decided, on the evidence of the respondent wife and L., that no adultery had then been committed and dismissed, therefore, the husband's summons. The husband appealed :—

HELD : although the appellant had confined his charge to one particular incident, the true issue to be determined by the justices was whether or not adultery had been committed by the respondent wife during the whole of her association with L. For this issue to be decided there must either be a fresh summons or an amendment of the present summons. Counsel for the respondent agreeing, the present summons was amended and the case remitted for hearing by a fresh panel of justices.

[EDITORIAL NOTE.] On an application to justices under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, to discharge an order by reason of a subsequent act of adultery, the justices are bound to consider the whole adulterous association disclosed by the evidence, notwithstanding that the applicant has limited his allegation to adultery on one specific occasion. Where they have failed to do so, the summons will be sent back to them for rehearing, and it seems that the Divisional Court have jurisdiction to make the necessary amendment. In this case, however, the amendment was made by consent, and it remains a question for determination whether the court has power to make this amendment, or whether the applicant must issue a fresh summons making a general charge of adultery.

AS TO DISCHARGE OF MAINTENANCE ORDER ON THE GROUND OF WIFE'S ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10. pp. 841, 842, para. 1343 ; and FOR CASES, see DIGEST, Supp., Husband and Wife, Nos. 6250b-6251a.]

APPEAL by the husband from an order of the justices of the Bristol petty sessional court, dated Aug. 24, 1945, dismissing an application of the husband to discharge a maintenance order on the ground of the wife's subsequent adultery. The facts and arguments are fully set out in the judgment of LORD MERRIMAN, P.

Colin Duncan for the appellant husband.

Harvey Moore for the respondent wife.

LORD MERRIMAN, P. : This is an appeal from a decision by the justices of the Bristol petty sessional court. On Aug. 24, 1945, they dismissed the complaint of the appellant husband, dated July 6, whereby he applied to discharge an order made in favour of the respondent wife on July 31, 1942, based upon desertion, on the ground that she had since committed adultery. In the complaint and the summons based upon it he did not, as it happens, follow the wording of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, literally ; he did not, except by implication, make a general charge of adultery since the making of the order, but limited his allegation simply to this, that the wife had committed adultery with Harold Ladd in Oct., 1944, at Babbacombe, in Devon. A

In those circumstances it would not be surprising if the justices thought that they were confined to the question "Aye or No, is it shown that adultery was committed at that time and place ?" or, to be more precise, as the evidence turned out, "Was adultery committed at Babbacombe between Oct. 24 and 28, 1944 ?" I am bound to say, and I want to make it clear at once, that I do not attribute any blame to the justices for the difficulties which cropped up in this case. In remitting the case for a rehearing by the justices of Bristol, as I think we ought to do, having made that plain in the first place, I wish to make it plain in the second place that the particulars of the charge must be widened, so that the real question, as I see it, is presented to the justices. I wish to say as little as possible upon the merits, but I must say just enough to give the justices the guidance to which I think they are entitled. B

This order of the respondent wife had already been running for three years at the date of the hearing, although it had not been running for three years at the date of the summons ; and, as the respondent wife herself said, it was her intention to found a petition for desertion upon it as soon as the three years had expired. It is that circumstance, amongst others, which makes it so important that any decision of this particular question should be arrived at on the fullest possible material and upon the widest possible basis. On the evidence it is clear beyond any doubt that for a period of two years the respondent and one Ladd had been associating. It is also clear beyond any controversy that on Oct. 24, 1944, they went together to Babbacombe, and there, posing as husband and wife, shared a bedroom until the 28th. They were seen coming away from Babbacombe with their suitcases on their arrival at Temple Meads Station, Bristol, and the respondent wife told the husband that she had been away for this visit, and made it the ground of an intimation to the appellant husband (I think in Nov., 1944), that she would no longer require any maintenance from him. It is common ground that at the hearing in Aug., 1945, by consent, and I emphasise the words "by consent," the arrears, which were considerable, under the order were wiped out, as the justices had power to wipe them out, while at the same time this particular summons was dismissed. In those circumstances, and that much being more or less common ground at the time when the summons was taken out, it is not surprising that the appellant husband limited his allegation to this visit to Babbacombe, but, having regard to the importance of the implications of this particular question, I desire to make it plain that on a rehearing the summons should be amended so as to raise what I think is the real issue. I ought to add this, to make it quite plain, that, as I understand the law, on the evidence given by the respondent wife and by Ladd the justices were quite entitled to hold that adultery had not, in fact, been committed on those nights, or at any rate, to hold that they were not satisfied that it had been committed. In saying that the whole question must be open to those who rehear the case I must not be taken to be casting any reflection on the justices in respect of their finding, limited, as I think it was, to the question, Aye or No, was adultery committed in that bedroom between those particular dates. The justices were entitled to believe and to accept the wife's evidence, supported by Ladd, that her physical condition was such that adultery was not possible and was not, in fact, committed during that period, but in my opinion the issue never should have been limited to that narrow point. One understands, as I have said, why it was so limited, both on the part of the appellant husband in framing his charge and on the part of the justices in dealing with it, but on the evidence before the justices and before us it is quite clear that the issue is really much wider. The issue is whether, during this association, lasting as it did for some two years, adultery had, or had C D E F G H

not, been committed as and when the opportunity to indulge in the guilty affection presented itself. In that sense the visit to Babbacombe was not a matter which stood by itself; it was merely an incident in the whole association. It is impossible to deny—and, indeed, no argument to that effect has been addressed to us, or even hinted at—that, taken at its lowest, the visit to Babbacombe is almost conclusive evidence of an adulterous inclination in this association; indeed, both parties admitted that they had gone to Babbacombe with the intention of committing adultery, with the excuse on the part of the man that he became scared, as he said, of the possibility of the respondent wife becoming pregnant, and, on the part of both, that her condition prevented the commission of adultery. It is as clear as anything can be, on their admissions, that this expedition was undertaken with the deliberate intention of committing adultery, but, assuming that it was open, as I think it was, to these justices, and is to any other court which hears the case, to accept the oath of the parties that during that time and at that place adultery was not committed, it is clear to me that the real scope of the enquiry should be much wider.

A I am only going to refer to certain pieces of evidence which were given, to illustrate what I am trying to say, and I must not be taken, any more than I must be taken to be indicating a view about the Babbacombe incident, to be giving any directions to the justices as to how they should find the facts. There was evidence, as I have said, that the respondent wife had volunteered to the husband in Nov., 1944, that she would not want from him any more money under the order after Christmas, because she had been away to Babbacombe with a man, the man had left his wife and they were getting a divorce, and she was going to live with him. Apart, therefore, from the Babbacombe incident taken by itself, there was evidence of a confession by the respondent that she was associating with a man with whom she intended to set up house as man and wife. There was evidence given by Ladd's wife, which, in part, at the time it was given, was not strictly admissible. It ought not to have been received, except in so far as it was repeated to the respondent, and her attitude on that occasion was evidence: but it became relevant later to test the credibility of Ladd. First of all she proved the fact that Ladd had left her in Nov., 1944, and she proved that he said that he had been going out with the respondent, for two years, and had been carrying on with her for six months, and also that Ladd had said that he slept with the respondent on their holidays as man and wife. As I say, that is not evidence against the respondent, though it is, of course, evidence against Ladd. On a later occasion this witness challenged the respondent and her own husband together, and the respondent was accused of being the woman who had broken up her home, to which the respondent is said to have replied, "You must be careful what you say," and then, in her presence, Mrs. Ladd repeated in substance what had been said to her—the phrase I have quoted above—"This is the woman you told me you had been going out with for two years, and had been associating with and with whom you slept," and, according to Mrs. Ladd, neither replied. The fact that the respondent, with an opportunity such as that, elected to say nothing, is, of course, some evidence against her of the guilty nature of this association taken as a whole; and then, when Ladd himself came to give evidence, the question whether he had, or had not, made the admission to his own wife in the terms which she had proved was put in issue; and it would be a matter for the tribunal who hear the case—and it was open to the justices below—to consider whether Mrs. Ladd or Ladd was telling the truth, and, if they thought that she was telling the truth and he was not, it would be open to them to discount his denial of adultery, and to say that his admissions to his wife were true.

G I have indicated these matters which occurred before the court below, without indicating in the least what conclusion should be drawn from them, to illustrate the point that the real question in this case is not confined to the point whether adultery was or was not committed at Babbacombe, but whether this was an adulterous association, of which the visit to Babbacombe was but one illustration, whether adultery was, or was not, committed there.

H That is the issue which must be determined on a rehearing, and in my opinion this appeal must be allowed and the present order discharged, in order that that issue may be determined by a fresh panel of the Bristol justices.

HODSON, J.: I think that in order to insure the determination on the

merits of the real question in controversy between the parties, it is just that the issue of the respondent's adultery should not be limited in the way in which it has been limited in the court below. That was not the fault of the justices. The appellant husband limited his charge to a particular incident, which is set out in the heading at the top of the notes :

Offence : to discharge the order on the ground of the wife's adultery with Harold Ladd in the month of October, 1944, at Babbacombe, Devon.

The justices have only adjudicated upon that charge, so that in allowing the appeal, if that is the way in which our order must be worded, we are not doing more than making an order which will enable the real question to be determined, without indicating that the justices were wrong in acting in the way in which they did on the particular charge. It is convenient that the course should be taken, if it is right to do so, and counsel for the respondent wife has not objected to the course being taken, of amending the summons so as to widen the charge and enable the real question to be determined on merits between the parties, subject to this : counsel for the respondent says that, in truth, the justices have dealt with the real question, as indicated by their reasons. Their reasons are as follows : " We do not find adultery proved to our satisfaction from the evidence given, and we dismiss the summons." I do not agree with that contention. I do not think it is clear, from the reasons given by the justices, that they have dealt with the matter in that particular way. I think it may well be that, applying their minds to the whole history of the association between these people, the respondent and Ladd, with particular reference to the incident at Babbacombe, these same justices might well have come to a different conclusion. Further, counsel for the respondent says that even if his first contention is wrong, nevertheless, if they had applied their minds to the whole history of the case, whether they did or not, they would have come to the same conclusion, having regard to the notes of the evidence which had been given, and which this court has had the opportunity of reading. Again, I for myself do not accept that contention. I do not think it does necessarily follow. Indeed, it follows from what I have said already, that if the justices had applied themselves to the whole story they might not have come to the same conclusion as the one which they came to, on the one incident at Babbacombe, and the only doubt in my mind has been whether the power of this court ought to be used in the way in which we are using it, or whether, the justices having found this particular issue in the way in which they did on the particular summons, the husband ought to be forced to issue a fresh summons upon our indicating that only a limited decision has been come to.

On consideration of the matter, and especially as counsel for the respondent has taken the line he has taken, quite rightly, I think, of accepting the jurisdiction to deal with the matter by amending the summons, subject to the objection which he has taken on the facts of this particular case, I agree that the right order is to send the case for rehearing, and for the amended summons to be drawn in the way which has been indicated.

Appeal allowed. Case remitted to trial by a fresh panel of the Bristol justices upon the summons amended as agreed.

Solicitors : Haslewood, Hare & Co., agents for E. J. Watson, Cox & Counsell, Bristol (for the appellant husband) ; Shaen, Roscoe & Co., agents for Wansbroughs, Robinson, Tayler & Taylor, Bristol (for the respondent wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

HAIGH v. DEUDRAETH RURAL DISTRICT COUNCIL.

[CHANCERY DIVISION (Vaisey, J.), October 25, 1945.]

Nuisance—Pollution of river by sewage—Local authority in control of sewer—Sewer originally constructed by rural sanitary authority—Subsequent legislation vesting rights and duties of sanitary authority in local authority—Injunction against local authority at suit of private individual—Liability of local authority.

Certain fields, forming part of freehold farm property belonging to the plaintiff, were in part intersected, and in part bounded, by a stream into which crude sewage matter had been discharged in considerable quantities, thereby infringing the plaintiff's right to have the flow of the stream in its natural state. The defendants, the local authority for the purposes of the Public Health Act, 1936, for the rural district within which the lands in question were situate, were in charge of the sewer. The sewer had been originally constructed by a rural sanitary authority, to the rights and duties of which the defendants had succeeded. The defendants admitted that, since 1937, the reconstruction of the sewer had become necessary, but no steps to improve the sewage system were taken until the outbreak of the war. In Nov., 1943, the plaintiff commenced the present action which was allowed to remain in abeyance pending attempts of the defendants to obtain the permission of the Welsh Board of Health, required under the Defence (General) Regulations, reg. 56A, to carry out a proposed scheme of reconstruction. This application, and a second modified application involving less expenditure, were rejected by the Board. It was contended on behalf of the defendants that no relief should be granted to a private litigant against a public authority where such relief would amount in substance, though not in form, to a mandatory order on that authority to construct a new sewage system:—

HELD: since the sewer had been constructed by the local sanitary authority for the time being and had been throughout vested in and under the control of that authority and its successors under the relevant legislative provisions, the defendants were under the same liability as a private person for allowing the pollution of the river by the escape of sewage. The plaintiff was, therefore, entitled to an injunction to restrain the defendants from discharging sewage matter into the river, and to damages.

Jones v. Llanrwst Urban Council (3) followed.

Glossop v. Heston & Isleworth Local Board (1) and *A.-G. v. Dorking Union* (2) distinguished.

[EDITORIAL NOTE. In general, the remedy for pollution by the escape of sewage from the sewer of a local authority, through their neglect of duty, is by *mandamus*. Here, however, VAISEY, J., grants an injunction, basing his decision on the decision of PARKER, J., in *Jones v. Llanrwst Urban Council* (3), in view of the fact that the sewer had been constructed by the local authority and vested throughout in that authority or its successors.

The nuisance had in fact commenced before the war. Its continuance was due, first, to the dilatoriness of the authority and subsequently to the refusal of the Government, acting under a Defence Regulation, to release the necessary labour and materials. It is interesting to speculate upon the position had the nuisance commenced *after* the Regulation had come into force, when the authority would have been unable to abate the nuisance owing to *force majeure*.

AS TO REMEDIES FOR POLLUTION, see HALSBURY, Hailsham Edn., Vol. 33, pp. 609-612, paras. 1072-1079; and FOR CASES, see DIGEST, Vol. 36, pp. 189-191, Nos. 317-322.]

Cases referred to:

(1) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 44 Digest 51, 365; 49 L.J.Ch. 89; 40 L.T. 736.

(2) *A.-G. v. Dorking Union* (1882), 20 Ch.D. 595; 41 Digest 42, 308; 51 L.J.Ch. 585; 46 L.T. 573.

(3) *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; 41 Digest 34, 255; 80 L.J.Ch. 145; 103 L.T. 751; *sub nom. Isgood-Jones v. Llanrwst Urban District Council*, 9 L.G.R. 222.

(4) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220; *affg. S.C. sub nom. Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; *revsg.* (1865) 3 H. & C. 774.

- (5) *A.-G. v. Corke*, [1933] Ch. 89; Digest Supp.; 148 L.T. 95; 31 L.G.R. 35; *sub nom. A.-G. and Bromley Rural Council v. Corke*, 102 L.J.Ch. 30.
- (6) *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528; 28 Digest 405, 325; 22 J.P. 561.

ACTION for an injunction and for damages. The facts and arguments are sufficiently set out in the judgment.

C. Erskine Simes, K.C., and *C. E. Scholefield* for the plaintiff.

W. Lyon Blease for the defendants.

VAISEY, J.: The plaintiff in this action is the owner of the freehold of a farm known as Penybryn Farm, at Talsarnau, in the county of Merioneth. Some of her fields are in part intersected, and in part bounded, by a stream or watercourse, and her complaint is that the defendant council is discharging or permitting to be discharged into such stream or watercourse crude sewage matter in considerable quantities, thereby infringing her right to have the flow of the water in its natural state, and creating a nuisance which ought to be restrained by injunction. The defendant council is the local authority for the purposes of the Public Health Act, 1936, for the rural district of Deudraeth, within the area of which the lands in question are situate; and the offending sewer is vested in the defendant council, having been constructed about 70 years ago by the rural sanitary authority for the Festiniog Union, to the rights and duties of which the defendant council has succeeded under the relevant legislative provisions. She also claims damages for the injury which she alleges that she has suffered and is still suffering.

The facts of the case are not really in dispute. I am satisfied by the evidence that the nuisance exists, and that it is serious. The pollution of the water is not only fully established by means of chemical analysis, but is patent to the eye and to the nose; the tenant tells me that the cattle put to graze in the fields refuse to drink the water, and I regard it as at least questionable whether they ought to be allowed to drink it if their milk can be safely marketed. Upon this point, however, there seems to be some difference of opinion among scientists which it is unnecessary for me to attempt to resolve. The rent of the farm, originally £80 a year, has been reduced, first to £70 and then to £60, on account of the trouble.

The sewer has given rise to difficulties from the outset. It has an insufficient fall, and is in other respects not in accordance with modern requirements. At first it was connected with only one dwelling-house, and for that it may have been adequate. Later, that is in about 1937, the provision of a proper water supply to the village of Talsarnau enabled many more water-closets to be placed in the houses, with the consequence that the amount of sewage matter passing into the sewer was greatly increased. It is indeed plain that the sewer is urgently in need of reconstruction, and the defendant council frankly and fairly recognises this necessity; and the only adverse criticism that can properly be made as to its attitude in the matter is that it has been somewhat dilatory, and let slip the opportunities of putting things right which lay to its hands before the outbreak of the war. The minutes of its proceedings (which are in the Welsh language but a translation has been provided for me) show that from 1937 onwards it was fully aware of the position, and knew perfectly well that it could not be left as it was.

The writ was issued on Nov. 22, 1943, but the action was allowed to remain in abeyance while attempts were made by the defendant council to adopt some remedial measures. The difficulty was then due to the provisions of the Defence (General) Regulations, reg. 56A, which (in effect) prohibited the use of the necessary labour and materials without the leave of the competent authority—in this case the Welsh Board of Health—a department, as I understand, of the Ministry of Health, exercising its functions within the Principality and having its office at Cardiff. Application to the Board was duly made by the defendant council's clerk for permission to carry out a scheme of reconstruction involving an expenditure of over £1,000, and though the pendency of this action and its probable success were pointed out by him, the application was in fact rejected. This decision was come to by the department upon a due consideration of the circumstances, and is not open to any question or any criticism.

There followed a very sensible suggestion by the plaintiff and the defendant council that the difficulty should be temporarily met by having water laid on to drinking places in the fields in question at a cost of about £200, and the Board was asked by a letter from the clerk, dated May 4, 1944, whether in the circumstances this small expenditure could be sanctioned. He wrote :

A You will observe that the council has not yet agreed to the supply of water, but inasmuch as the council is advised that the position is considered serious owing to the contamination of the watercourse contrary to the Public Health Act, the council would welcome the views and decision of your department by the 9th inst. The plaintiff proposes to proceed with the action on the 11th inst.

This was met by another refusal, and on May 18 the clerk wrote a further letter, in the following terms :

B I acknowledge receipt of your letter of the 9th inst., the contents of which have received the consideration of the committee. It is evident, however, that the difficult and serious position in which the council is placed has not been realised. As you are aware, the position is that the council has been served with a writ and threatened with an injunction to prevent discharge of sewerage matter into a watercourse. The council is legally advised that the injunction is likely to be granted. The fact that an injunction may be postponed does not, of course, relieve the council of the responsibility, and the costs of litigation to arrive even at such a judgment might involve the council in costs far exceeding the cost of the suggested remedy of supplying water to a few fields for a period. C I am instructed by the committee to inquire definitely what step should be taken in these circumstances, and a written reply is requested immediately as the situation is urgent. In further considering the matter your department will no doubt consider the probable cost of supplying water as compared with the probable cost of litigation. I may say that the committee referred to in that letter was undoubtedly a committee of the defendant council.

D The reply from the Board, dated May 23, completely ignored the very reasonable request for guidance contained in the final paragraph of the clerk's letter, and reads as follows :

E In reply to your letter of May 18, I am directed to state that the council will appreciate that the execution of the proposed works of water supply would constitute an admission of liability on their part. Apart, however, from this consideration the matter has been carefully considered but the department are not prepared in present circumstances to issue an authority under Defence Regulation 56A for the execution of works of free water supply and to authorise the release of the necessary controlled materials for this work.

F That letter was signed by one Thomas Vose, whose position was not explained to me, nor do I know by whom he was "directed" to make the statement contained in its opening paragraph, which seems to me to be extremely unfortunate in its expressions. Here was a local authority, charged with the duty of safeguarding the health of its district and anxious to satisfy the just claims of the plaintiff, seeking the advice of the Welsh Board of Health as to how it should deal with a difficult situation in which both these matters were involved, and all that it gets is a strong hint that it should do nothing lest it should be taken to admit a claim which its own counsel had, to the knowledge of the Board, advised to be well founded. It is a matter of regret to me that the clerk's anticipation was correct, in that the defendant council having been precluded from spending £200 will now have to pay a far larger sum for damages and the costs of the action. G It may well be, and indeed I have to assume, that the Board was right in prohibiting the expenditure of the £200, but the first of the two paragraphs of the letter of May 23 seems to me to be the very reverse of helpful, and calculated to induce the defendant council to neglect rather than to fulfil its duty. A warning that it should not deal with the plaintiff *pendente lite* except without prejudice to its rights might have been justified, but if that is what the writer was intending to convey, I can only say that he has expressed himself very badly indeed. H

Counsel for the defendant council admitted, I think, at the close of the evidence that his only possible defence rested on a proposition that no relief will be granted to a private litigant against a public authority in such a case as this where such relief will amount in substance, though not in form, to a mandatory order on that authority to construct a new sewage system, and in support of that proposition he called my attention to two decisions of the Court of Appeal, *viz.*, *Glossop v. Heston and Isleworth Local Board* (1) and *A.-G. v. Dorking Union* (2).

I have considered these cases and the submissions based upon them, but it seems to me that they have no application in a case such as the present where the sewer was in point of fact constructed by the local sanitary authority for the time being and has been throughout vested in and under the control of that authority and its successors as from time to time constituted. That seems to me to be the effect of the decision of PARKER, J., in *Jones v. Llanrwst Urban District Council* (3), which, in my judgment, covers the present case.

It is rather surprising that *Rylands v. Fletcher* (4) was not relied upon in the two earlier cases, for it lays down a familiar principle which has an almost universal application to cases in which anything deleterious is allowed to escape from the land of one on to the land of another: compare *A.-G. v. Corke* (5); and see *A.-G. v. Birmingham Borough Council* (6).

There must be an injunction to restrain the defendants from discharging sewage matter into the said watercourse until it has been so treated as not to affect prejudicially the purity and quality of the water therein; but I will suspend its operation for one year from to-day, with liberty to either party to apply to extend, or, as the case may be, abridge, the period of suspension according to the duration of the temporary impediments arising from the still continuing state of emergency and from the practical difficulties of shortage in men and materials. Both parties have been reasonable hitherto, and may be trusted to continue to be so.

I am asked to assess the damages down to the date of this judgment, and on this head I award the plaintiff the sum of £175. I am also asked by the parties to indicate the amount of what I may call the subsequent continuing damages. The evidence was to the effect that the bed of the stream is so impregnated with noxious matter that the injury is likely to continue for a long time after the influx of sewage has completely ceased, but I have not overlooked that consideration in arriving at the figure already mentioned, having assumed that the cost of the removal of the sludge and purification of the bed and banks of the stream will fall upon the plaintiff. Taking everything into account, I find that she is entitled to recover from the defendant council, in addition to the sum of £175, an apportionable sum at the rate of £25 per annum calculated from to-day until the nuisance complained of is fully abated. I order accordingly, and the defendant council must pay the costs of the plaintiff, to be taxed.

Injunction granted. Operation of injunction suspended for one year. Judgment with costs, for the plaintiff for £175 and in addition an apportionable sum at the rate of £25 per annum until abatement of the nuisance.

Solicitors: *Rhys Roberts & Co.*, agents for *William George & Son*, Portmadoc (for the plaintiff); *T. D. Jones & Co.*, agents for *Guthrie, Jones & Jones*, Dolgelley (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Distinguished. Re GEE. [1948] 1 All E.R. 498.

Re MACADAM, DALLOW AND MOSCROP v. CODD AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), October 16, 17, 1945.]

Trusts and Trustees—Duties of trustees—Trust estate including shares in company—Trustees appointed directors of company—Remuneration as directors—Liability of trustees to account to trust estate for remuneration.

By his will dated Sept. 2, 1921, the testator appointed his wife, his brother Robert and G.W.W., executors and trustees thereof. He directed that his residuary estate should be held on trust, during his wife's lifetime to pay the income thereof in equal shares to his wife, his daughter and his son, and after the wife's death upon trust as to both capital and income for his daughter and son, as to 9/20th parts for the daughter and as to 11/20th parts for the son, the daughter's share being settled. The testator further provided that, if he should predecease his brother Robert, the trustees should accept, in satisfaction of the amount due to him at his death under a partnership contract between him and his brother, shares in a limited company to be formed for the purpose of acquiring the partnership businesses. The testator then declared that if any of his trustees, or any of the beneficiaries under his will, should be appointed directors of the company,

he desired that his wife should be the first to be appointed and that she should receive any fees payable to her as director "for her own absolute use and benefit" notwithstanding that she was one of his executors and trustees. He desired that his son should be the next director "so to be appointed and in like manner." The testator died in 1922, and his brother Robert died in 1924, before the provisions of the will regarding the formation of the company were carried out. The company was, however, formed under an order of the court made on Aug. 5, 1926, and the draft memorandum and articles were approved by the court. The order of the court contained a provision that neither the widow nor G.W.W. while a director of the company, would, without leave of the judge, vote for, or concur in a vote for, any remuneration for the directors exceeding the total sum of £500 in any year. Under the articles, the number of directors was to be not less than five and not more than nine, and the trustees of each of the two wills (*i.e.*, the testator's and his brother, Robert's) might appoint from time to time two directors. The widow and G.W.W., the two surviving trustees of the testator's estate, were each appointed first directors of the company, G.W.W. being appointed chairman and the widow and the son being appointees of the trustees of the testator's estate. Under the articles G.W.W. was to receive a remuneration of £250 per annum as chairman, while the remuneration of the directors was to be determined by the company from time to time in general meeting. The capital of the company consisted of £46,000 divided into 26,000 ordinary shares of £1 each and 20,000 preference shares of £1. The trustees of the testator's estate received 13,000 ordinary shares and 2,000 preference shares. In 1931, D., the first plaintiff, was appointed a trustee of the testator's estate on the retirement of G.W.W. In Aug., 1941, he was appointed a director of the company, and he received in 1942, 1943, 1944, fees of £200 a year. On Jan. 26, 1944, the widow died and on Feb. 28, 1944, M., the second plaintiff, was appointed a trustee of the testator's estate. Shortly after M.'s appointment, the 11/20ths of the testator's estate to which the son was absolutely entitled on the widow's death was paid out to him, with the result that the trustees of the testator's estate then held only 9/40ths of the ordinary shares of the company. In May, 1944, M. (the second plaintiff) was appointed a director of the company. The question to be determined was whether, upon the true construction of the relevant documents and in the circumstances of the case, the trustees of the testator's estate were entitled to retain the director's fees received from the company or whether they were accountable for them to the trust estate. It was contended on behalf of the trustees that they were not accountable, because (i) since they did not hold a majority of the shares, they could not, against the wishes of their co-shareholders, fix the remuneration to be paid to the directors, and (ii) the remuneration received as directors was not profit received from the trust estate. On behalf of the daughter it was contended that the trustees were accountable since they had put themselves into a position where their interest and duty conflicted:—

HELD: (i) although the trustees were unable against the wishes of their co-shareholders to fix the remuneration payable to the directors, under the articles they had power to appoint themselves directors and thus receive the remuneration which was fixed. Having put themselves into a position where their interest and duty conflicted, they could not be allowed to make a profit thereby. They were, therefore, accountable to the estate.

Re Francis, Barrett v. Fisher (3) and *Williams v. Barton* (2) applied.

Re Dover Coalfield Extension, Ltd. (4) and *Re Lewis, Lewis v. Lewis* (6) distinguished.

(ii) the liability to account for a profit was not confined to cases where the profit was derived directly from the trust estate. In this case, however, it could not be said that the directors' remuneration was not profit received from the trust estate, because, had the remuneration been less, the profits available for distribution would have been more.

[EDITORIAL NOTE.] It is a rule of equity that a person in a fiduciary position must account for any profit which he makes by putting himself in a position where his

duty and his interest conflict. Accordingly, it is held that trustees who become directors by exercising a discretionary power under their trust are liable to account for remuneration received as such directors, whether or not such remuneration comes directly out of the trust estate. The authorities are difficult to reconcile, but the question in every case seems to be: did the trustee acquire the position in respect of which he drew the remuneration by virtue of his position as trustee?

Such profit, when accounted for, would appear to be capital and not income, according to the dictum of KEKEWICH, J., in *Re Francis* (1905) 92 L.T. 77, at p. 78).

AS TO DUTY OF TRUSTEE NOT TO OBTAIN PERSONAL ADVANTAGE FROM POSITION, see HALSBURY, Hailsham Edn., Vol. 33, pp. 220, 221, para. 402; and FOR CASES, see DIGEST, Vol. 43, pp. 863-866, Nos. 3097-3117.]

Cases referred to:

*(1) *Bray v. Ford*, [1896] A.C. 44; 43 Digest 865, 3112; 65 L.J.Q.B. 213; 73 L.T. 609.

*(2) *Williams v. Barton*, [1927] 2 Ch. 9; 43 Digest 866, 3117; 96 L.J.Ch. 355; 137 L.T. 294.

*(3) *Re Francis, Barrett v. Fisher* (1905), 92 L.T. 77; 9 Digest 464, 3013; 74 L.J.Ch. 198.

*(4) *Re Dover Coalfield Extension, Ltd.*, [1907] 2 Ch. 76; *affd.*, [1908] 1 Ch. 65; 9 Digest 464, 3014; 77 L.J.Ch. 94; 98 L.T. 31.

(5) *Re New British Iron Co., Ex p. Beckwith*, [1898] 1 Ch. 324; 9 Digest 458, 2973; 67 L.J.Ch. 164; 78 L.T. 155.

*(6) *Re Lewis, Lewis v. Lewis* (1910), 103 L.T. 495; 43 Digest 774, 2142.

ADJOURNED SUMMONS, under the Trustee Act, 1925, to determine whether the trustees of the will of W. W. Macadam were accountable to the trust estate for sums received by each of them as remuneration in respect of the office of director of the British Malt Products Co., Ltd., the shares in the company which were held by them being part of the trust estate. The summons raised the further question as to whether, if they were accountable, they might be authorised, in the circumstances of the case, to retain for their own benefit such remuneration. The report deals only with the judgment on the first question. The facts are fully set out in the judgment.

Harold Christie, K.C., and *H. O. Dankwerts* for the trustees.

J. Neville Gray, K.C., and *G. E. Timins* for the first two defendants.

Michael Albery for the third defendant.

COHEN, J.: By his will dated Sept. 2, 1921, William Wight Macadam appointed his wife, Mary Isabella Macadam, his brother, Robert Wight Macadam, and George Wink Wight to be the executors and trustees of his will. After making a specific devise and bequest, bequeathing a number of pecuniary legacies and confirming an annuity, he bequeathed to his wife an annuity of £1,000 during her life. He then gave directions as to his residuary estate, the beneficial trust being upon trust to pay the income thereof to his wife, his daughter and his son William, in equal shares as tenants in common during the life of his wife, and after her decease upon trust as to both capital and income for his daughter and his son in the following shares, namely, 9/20th parts to his daughter and 11/20th parts to his son. He then proceeded to settle his daughter's share upon trusts which started with the usual trust for issue, contained a power to her to appoint an interest to her surviving husband, and provided that in default of any issue who should take a vested interest her share should be held in trust for such person or persons as she should by will or codicil appoint and in default of such appointment in trust for her statutory next of kin as if she had died a spinster and intestate.

The testator died on May 23, 1922. Probate was granted on Nov. 7, 1922, to the executors named in the will. The property included three businesses carried on by the testator, at Dunbar, Accrington and London, in partnership with his brother, and the testator inserted special provisions in his will as to how those businesses were to be dealt with. By cl. 14 he provided that in the event (which happened) of his predeceasing his brother his trustees should be bound to accept, in satisfaction of the amount due to him at the date of his death under the partnership contract, shares in a limited company to be formed with as little delay after his death as possible for the purpose of acquiring the said business or businesses. He then directed how his shares should be bought. Then he declared that his brother and his trustees should adjust all questions between them regarding the memorandum and articles of association required in the formation of the company and in case of difference between them the

arbitrator should adjust the memorandum and articles and other matters. He gave certain directions in the event (which did not happen) of the company being formed in his lifetime. Then comes cl. 15 :

A And I declare that if it shall be agreed or determined that any one or more of my trustees or other beneficiaries under this my will shall be appointed directors of the said limited company it is my desire my said wife shall be the first to be appointed to act as director of the said limited company and that she shall be entitled to receive any fees which may be payable to her by reason of acting as such director as aforesaid for her own absolute use and benefit notwithstanding that she shall be one of my executors and trustees and it is my desire that my said son William Stevenson Macadam shall be the next director so to be appointed and in like manner.

Then came a power to postpone the sale, calling in and conversion, and (although I do not think it is material) the usual charging clause in favour of a solicitor or other professional man.

B The provisions of the will as to the formation of the business were not carried out before the brother died on Dec. 10, 1924. The company was, however, formed in pursuance of an order made by ASTBURY, J., on Aug. 5, 1926. He had before him a conditional agreement, which does not bear on the matter, an agreement for sale by the executors of both wills to the British Malt Products Co., Ltd. (which was the new company) and other documents including the draft of the memorandum and articles of association of the company. The court approved of the draft memorandum and articles and authorised the C executors to concur with the executors of Robert's will in doing all such acts and things as might be necessary for the purpose of completing the agreement for sale. The order contained this provision :

D . . . and the plaintiff Mary Isabella Macadam and the defendant George Wink Wight by their counsel respectively undertaking that so long as they or either of them shall be directors or a director of the said company they will not nor will either of them without the leave of the judge vote for or concur in a vote for any remuneration for the directors of the said company exceeding the total sum of £500 in any year in addition to the fixed remuneration of the chairman and to the remuneration payable to the plaintiff William Stevenson Macadam under his service agreement with the said company.

E The memorandum and articles of association, which were approved by the judge, contained a provision that the capital of the company should be £46,000, divided into 26,000 ordinary shares of £1 each and 20,000 preference shares of £1 each, the preference shares carrying the right to 7 per cent. cumulative preferential dividend. By art. 9 it was provided that until otherwise determined by a general meeting the number of directors should not be less than five or more than nine. The first directors were to be George Wink Wight, Edward Hall Wight, Ivor William Wight Macadam, Mary Isabella Macadam and William F Stevenson Macadam. It is, therefore, to be observed that both the surviving executors of William Wight Macadam's will were first directors. Art. 66 provided that George Wink Wight should be the chairman of the board of directors, subject to the determination of the office by death or resignation, and should hold office so long as he was trustee of both wills ; and that the trustees of the two wills should hold between them shares in the company of the nominal aggregate value of £10,000. There were provisions as to what was to happen G if and when George Wink Wight ceased to be chairman. By cl. 67 provision was made as to the appointment of the directors by the trustees of the will of the brother, Robert Wight Macadam. By art. 68 it was provided :

The trustees or trustee for the time being of the will of William Wight Macadam may from time to time, until the trusts of his will shall be determined, so long as they shall hold shares in the company as such trustees appoint two persons, who may or may not already hold shares in the company, to be directors of the company.

H It then provides for how long such director was to hold office. It goes on :

The said trustees or trustee may at any time remove any director appointed by them or him. An appointment or removal under this article must be in writing signed by all the trustees for the time being of the said will. The above named Mary Isabella Macadam and William Stevenson Macadam are the appointees of the trustees of the said will under this article and shall hold office accordingly. So long as the power to appoint under this article continues, no vacancy in the board caused by either of the said two directors or any successor in office of either of them ceasing to be a director shall be filled up except under this article.

By art. 69 it was provided that arts. 79 and 87 (which dealt with the rotation of directors and the removal of directors) should not apply to directors under the articles to which I have referred. By art. 70 it was provided :

The said George Wink Wight, whilst acting as chairman of the board, shall be paid out of the funds of the company remuneration for his services as such chairman at the rate of £250 per annum. Subject as aforesaid, the remuneration of the directors, including the said George Wink Wight in such capacity, shall be such as shall from time to time be determined by the company in general meeting.

Art. 71 provided for the directors, in addition to their remuneration, being reimbursed their reasonable travelling, hotel and other expenses incurred in the performance of their duty.

The sale agreement was duly executed. All the ordinary and 12,000 preference shares were issued, of which the trustees of William Wight Macadam's will received 13,000 ordinary and 2,000 preference shares. It is not disputed that, having regard to the terms of the articles and to the express order of ASTBURY, J., approving George Wink Wight and Mary Isabella Macadam as the first directors appointed thereunder, they were entitled to receive and retain for their own benefit what remuneration might be payable to them under the articles.

George Wink Wight, unfortunately, got himself and the trust estate into difficulty ; in 1931 he had to retire, and on Mar. 25, 1931, Dallow, one of the two plaintiffs, was appointed a trustee in his place. To clear up the difficulties caused by the conduct of George Wink Wight, in 1931, a deed of family arrangement was executed, but it is not suggested that that in any way affects the question I am now considering. Under art. 70 it appears that, notwithstanding the order of ASTBURY, J., remuneration at the rate of £200 a year was voted to the directors, at any rate for the 3 years the last of which ended in 1944, except that in the last complete year of the company there was £100 voted. Whether that £100 a year was in itself in conflict with the intention of the judge in fixing £500 as a maximum turns on the number of directors, but it does not follow that there was any breach of what was implicit in the order of ASTBURY, J., because, as will appear in a moment, a vote for more than £500 could be carried without the votes of the trustees, in certain years at any rate after the death of the widow, because after the death of the widow the trustees ceased to hold half the ordinary capital of the company.

In 1933 the daughter, having married one Barnett and had one child by him, obtained a divorce from Barnett. On Feb. 4, 1934, she married one Cobb. On Nov. 24, 1937, her daughter, Moya Daphne Joyce Barnett, died and she has had no other issue. So that, so far as one can see at present, the only persons interested in the estate are the daughter and the son. There is, of course, a possibility—although, having regard to her age, not a probability—that there may be issue of the daughter. In Aug., 1941, *i.e.*, 10 years after he was appointed trustee, Dallow was appointed a director, and he received in 1942, 1943 and 1944 fees of £200 a year, to which I have referred. On Jan. 26, 1944, the widow died, having by her will dated Mar. 1, 1943, appointed the plaintiff Dallow her sole executor and sole residuary legatee. The will contains a recital that she made this provision as the daughter and the son were adequately provided for. In Mar., 1944, Dallow obtained probate of her will. Her death, of course, left the testator's estate with only one trustee, and on Feb. 28, 1944, Leslie William Moscrop, the second plaintiff, was appointed a new trustee. Shortly after his appointment the 11/20ths of the estate, to which the son was absolutely entitled on his mother's death, was paid out to him and thereafter, of course, the trustees ceased to hold one-half of the ordinary capital ; instead of holding one-half they held 9/20ths of one-half, *i.e.*, 9/40ths. In May, 1944, Moscrop was appointed director, at some stage and in circumstances to which it was not relevant to call my attention on the question with which I am now dealing. Someone raised the question as to whether Dallow and Moscrop were entitled to retain the directors' fees that they received from the company or whether they were accountable to the trust estate for the sums received by them as remuneration in respect of the office of director. I desire to say at once that nobody suggested any impropriety on the part of Dallow or Moscrop in regard to this remuneration. The question was asked purely as one of law, whether, having regard to all the provisions of the documents to which I have referred,

on general principles of law they were accountable or not. There is raised by a subsequent question of the summons the question whether, if I find that they are technically accountable, I ought to allow them to retain any and what proportion of that remuneration.

A My attention was called to a number of cases bearing on this matter, but I think that counsel for the daughter were right in saying that they are all applications of the same general principle, though the consequence of applying that principle has resulted in some cases in the persons concerned being allowed to retain the remuneration in question and in others in their being held accountable. The principle is well stated in *Bray v. Ford* (1), in a passage from the speech of LORD HERSCHELL ([1896] A.C. 44, at p. 51), which was cited in *Williams v. Barton* (2) by RUSSELL, J. ([1927] 2 Ch. 9, at p. 11):

B It is an inflexible rule of a court of equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.

C The first of the cases to which my attention was called was *Re Francis, Barrett v. Fisher* (3). In that case the question arose as to whether trustees, who had become directors of a company called S. W. Francis & Co., Ltd., were accountable for remuneration that they had received as directors of the company. The company had been formed for the purpose of taking over the business, assets and liabilities of a revolving shutter maker which had for many years been carried on by the testator. Under the articles the testator was governing director until he resigned the office of director or died, and he had power, if he died while holding the office of governing director, to appoint any person to be governing director in his place. He did not, however, exercise that power. It was also provided [by cl. 80] that, on his ceasing to be governing director:

D . . . the company in general meeting may, but without prejudice to art. 78, appoint any persons to be directors of the company, and may fix and determine the maximum and minimum number of directors, and the amount of their remuneration and qualification, and a general meeting shall forthwith be convened for the purpose . . . The executors or administrators of a deceased holder of shares shall for the purposes of this clause be deemed to be the holders of any shares standing in the name of the deceased.

E The testator had had the whole of the preference and ordinary shares allotted to him with the exception of 7 preference shares, and these were standing in his name at the date of his death on Apr. 12, 1904; so that his executors were in complete control of the question of who should be appointed directors under cl. 80. By his will the testator had appointed executors and bequeathed his preference and ordinary shares upon the trusts in his will mentioned, which included a trust for his daughter. The headnote continues:

F At an adjourned general meeting of the company . . . it was resolved that the applicants should be appointed, in conjunction with the respondent Arthur Wells, directors of the company at a remuneration of £200 each per annum, except during the year from the date of their appointment until the company's ordinary general meeting in Jan., 1905 . . . It was admitted that the company, which had since incorporation paid annual dividends, was earning an income upon its share capital.

G The summons came on on two occasions. On the first occasion the question was dealt with as to whether the trustees were accountable. There is no detailed report of that decision, but it was held that they were accountable. The case came on again on a question, which may arise in this case also, as to whether, if they were accountable, the amounts for which they were accountable were capital or income of the testator's estate. In dealing with that point KEKEWICH, J., said (92 L.T. 77, at p. 78):

H The trustees hold a large number of shares which are part of the estate which is settled. The trustees hold these, which are their qualifying shares, and are elected directors of the company and as directors they receive a certain remuneration. They are accountable for that to the estate, there being no provision in the will which enables them to make a profit for themselves, and the court not having been asked to accede to the trustees being directors. Therefore they are accountable. But are they to account for the amount received as capital or income? It seems to me that *prima facie* it must be capital unless you can say that it is part of the rents and profits, or, we will say, income in some way.

I do not think that counsel for the plaintiffs really disputed that, if I hold this case to have been rightly decided, he is in a difficulty. He tried to dis-

tinguish the case by saying that the position was different because, in *Re Francis* (3), they held all the shares and they, therefore, controlled effectively the remuneration, whereas it is perfectly true to say that in the case before me they do not hold the majority of the shares and they cannot, against the wishes of their co-shareholders, fix the remuneration. But, if that case was rightly decided, it is very difficult to distinguish it, because here the trustees have, under the terms of the articles, power to appoint themselves directors and thereby acquire the opportunity of getting the remuneration which was fixed. A

But (said counsel for the plaintiffs) even if that case is an authority which I am bound to follow if there be no other authority, it is inconsistent with two decisions of WARRINGTON, J., the first of which, *Re Dover Coalfield Extension Ltd.* (4), was affirmed by the Court of Appeal. In that case one Cousins, who was a director of Dover Coalfield Extension, Ltd., at the request of that company became a director of Consolidated Kent Collieries Corporation, Ltd., in order that he might look after the interests of the Dover Co. In order to qualify himself for that appointment, after he had agreed to become a director of the Kent Co. certain shares in the Kent Co., the property of the Dover Co., were transferred into his name. It appears that at the board meeting (at which only he and another director, who also became director in similar circumstances, of the Kent Co. were present) a resolution was passed in which it was reported that they had both been elected directors of the Kent Co., and it was resolved that their qualification shares should be transferred to them by the Dover Co. WARRINGTON, J., held (and his decision was affirmed by the Court of Appeal) that the remuneration was received by him for work done by him as director of the Kent Co., and was not profit received by him for the use of the Dover Co.'s shares in the Kent Co., and that he was, therefore, under no liability to account for the remuneration to the liquidator of the Dover Co. In that case, *Re Francis* (3) was not cited. Perhaps it is not surprising, as the facts were readily distinguishable. In the *Dover* case (4) WARRINGTON, J., said ([1907] 2 Ch. 76, at pp. 82, 83): D

Does a director of one company who becomes a director of another company, and as such is required to hold a qualification, obtain his remuneration as a director by the use of the shares which qualify him as director? I do not think he does. I think it may be taken to be settled, at any rate so far as I am concerned, by *Ex parte Beckwith* (5), that the right to the director's remuneration does not arise from the possession of the qualification shares. A director is entitled to his remuneration by reason of the contract of service between him and the company for which he is acting as director . . . It is perfectly true that he became a director in the interests of his company, and took these shares in order to qualify him as director, but it seems to me that he obtained his remuneration, not by the use of the shares, but by acting as a director of the corporation . . . It seems to me, therefore, that if I were to direct any account at all, I must direct it on the footing that Cousins was entitled to fair remuneration for the amount of work which he did, and would be entitled to be allowed against his director's remuneration such remuneration . . . It seems to me, therefore, first, that the remuneration received is not profit which is derived by the use of qualification shares—that is to say, that, assuming it to be profit, it is not derived by the use of the shares; and, secondly, that it is not profit within the principle, because Cousins has given for it that which he and the corporation have determined to be a fair *quid pro quo*, and it would be impossible for the court to go behind that and say a fair remuneration would be some other sum. E

It seems to me that that decision does depend on the fact that, in the view of WARRINGTON, J., first, the remuneration was remuneration for the plaintiff company, and, secondly, it was a fair inference from the circumstances that the Dover Co. had agreed to his receiving it because they had agreed to his becoming an requested him to become, a director of the Kent Co. That was, I think, clearly the view of the Court of Appeal. It will be sufficient if I read the judgment of FARWELL, L.J. ([1908] 1 Ch. 65, at p. 70): F

The claim is that because these respondents hold their qualification shares as trustees for the Dover Co., of which company they happen to be also directors, they are accountable to that company for money paid for work done and services rendered by them as directors of the Kent Co. They did the work; they are entitled to the money. The answer to the suggestion that they could not have earned the money unless they had been qualified to act as directors by shares belonging to the Dover Co. is that they became directors at the request of that company. G

It seems to me that that case was very different from the present one, where the H

trustees exercised a discretion and became directors at nobody's request (so far as there is any evidence that I have seen) other than their own. I am not saying that I accept the view that they may not have been the most suitable persons, but they were the only persons concerned in making the appointment.

The next case on which counsel for the plaintiffs relied was *Re Lewis* (6). The headnote reads :

A L. was a trustee of his father's will. His father had been one of the managing directors of a partnership firm, and by the will L. was nominated to be a partner in the firm in the place of his father, but he was to hold the share in the partnership to which he thus succeeded upon the trusts of the will. L. had, prior to his father's death, acted as salesman of the firm at a salary. He continued so to act after his father's death, and after his admission as a partner, under an agreement with the other members of the firm. The agreement to employ L. was made *bona fide*, and was for the interest of the firm, and thus of the trust estate. *Held*, that L. received his salary as salesman by virtue of his agreement with the firm, and not by reason of the trusts of the will, and that, consequently, he was entitled to retain the salary in addition to certain remuneration which he obtained under the will for acting as managing partner, and that he need not account for the salary to the trust estate.

B I think the material portion of the judgment of WARRINGTON, J., is to be found where he says (103 L.T. 495, at p. 496) :

C Now, does this gentleman by receiving this salary receive it by virtue of his position as trustee of the estate of the testator ? I am of opinion that he does not. Does he receive it by virtue of his position as a partner ? In my opinion he does not. He receives it not by virtue of anything done by the testator, but by reason of the agreement which he has made with his co-partners that one of the expenses of the firm should consist in the payment of this salary, and in the payment of this salary to him.

D Then, after pointing out that there was no decided case precisely on this point, he treats the case as governed by the principle on which *Re Dover Coalfields* (4) was decided. I, respectfully, agree with the decision in *Re Lewis* (6). It seems to me that the distinction between that case and the present is that there the trustee secured the appointment as salesman not by virtue of the exercise of any discretion in him as trustee but by virtue of a bargain with his co-partners ; whereas in the present case the plaintiffs got their appointment by the exercise of all the power which is vested in them—not, it is true, by the testator's will but by the articles of the company approved by the court, but none the less

E vested in them as trustees. The last case, and perhaps the nearest to the present—although it is a much stronger case than the one I have to decide—is *Williams v. Barton* (2) decided by RUSSELL, J., from which I have already cited a short passage. In that case the headnote says :

F The defendant, one of two trustees of a will, was employed as a clerk by a firm of stockbrokers on the terms that his salary should consist of half the commission earned by the firm on business introduced by him. At the recommendation of the defendant the firm was employed to value his testator's securities. The firm's charges were paid out of the testator's estate and, in accordance with their contract with the defendant, they paid to him half the fees so earned. The defendant took no part in making the valuations or in fixing the fees to be charged. In an action by his co-trustee claiming that the defendant was bound to treat the fees so paid to him as part of the testator's estate : *Held*, that it was the defendant's duty as a trustee to give the estate the benefit of his unfettered advice in choosing stockbrokers to act for the estate, but,

G as the recipient of half the fees earned by the firm on business introduced by him, it was to his interest to choose his firm to act. The services rendered to the firm by the defendant remained unchanged but his remuneration for them was increased, and increased by virtue of his trusteeship. That increase was a profit which the defendant would not have made but for his position as trustee, and he was, therefore, bound to treat it as part of the estate of his testator.

H After citing the passage which I have already read, RUSSELL, J., said ([1927] 2 Ch. 9, at p. 11) :

The point is not an easy one and there is little, if any, authority to assist in its determination.

I think his remarks apply to this case too. Then, after referring to the circumstances of the case, he continued ([1927] 2 Ch. 9, at p. 12) :

From this it seems to me evident that the case falls within the mischief which is sought to be prevented by the rule. The case is clearly one where his duty as trustee and his interest in an increased remuneration are in direct conflict. As a trustee it is his duty to give the estate the benefit of his unfettered advice in choosing the stockbrokers

to act for the estate ; as the recipient of half the fees to be earned by George Burnand & Co. on work introduced by him his obvious interest is to choose or recommend them for the job.

It seems to me that, with a certain substitution, that last sentence applies to this case. As trustees, it is the duty of the plaintiffs to give the estate the benefit of their unfettered advice in choosing the person to act as directors of the company, as, if appointed, they will receive such remuneration as may be voted to them ; as recipients of the remuneration of directors, their obvious interest is to choose themselves for the job. RUSSELL, J., went on :

In the event that has happened they have been chosen, and chosen because the defendant was a trustee, with the result that half of what the estate pays must necessarily pass through them to the defendant as part of his remuneration for other services rendered, but as an addition to the remuneration which he would otherwise have received for those self-same services. The services rendered remain unchanged, but the remuneration for them has been increased. He has increased his remuneration by virtue of his trusteeship. In my opinion this increase of remuneration is a profit made by the defendant out of and by reason of his trusteeship, which he would not have made but for his position as trustee.

He then dealt with *Re Dover Coalfield Extension, Ltd.* (4) and said ([1927] 2 Ch. 9, at pp. 12, 13) :

... but that case seems to me very different. At the request of the Dover company Mr. Cousins had entered into a contract with the Kent company to serve them as a director, the Kent company paying him remuneration for his services. The necessary qualification shares were provided by the Dover company, and in respect of those shares he became a trustee for the Dover company. He had not, however, used his position as a trustee for the purpose of acquiring his directorship. He had, in fact, been appointed a director before he became a trustee of the shares. The profit which he gained was not procured by him by the use of his position as trustee, but was a profit earned by reason of work which he did for the Kent company and which would not have been earned by him had he not been willing to do the work for which it was the remuneration. It was not (as in the present case) a profit acquired solely by reason of his use of his position as trustee and a profit in respect of which no extra services were rendered.

That case is, as counsel for the plaintiffs rightly says, much stronger than the present one, because (i) the profit in a sense came directly out of the estate, and (ii) because it was a profit earned, in a sense, without any work by the trustee. I think that the root of the matter really is : Did the trustee acquire the position in respect of which he drew the remuneration by virtue of his position as trustee ? In the present case there can be no doubt that the only way in which Dallow and Moscrop became directors was by exercise of the powers vested in the trustees of the testator's will under art. 68 of the articles of association of the company. The principle is one which has always been regarded as of the greatest importance in these courts, and I do not think I ought to do anything to weaken it. As I have said, although the remuneration was remuneration for services as director of the company, the opportunity to get that remuneration was gained as a result of the exercise of a discretion vested in the trustees, and, as Mr. Timins said [on behalf of the daughter] the trustee had put himself in a position where his interest and duty conflicted. In those circumstances, I do not think this court can allow him to make a profit out of doing so, and I do not think the liability to account for a profit can be confined to cases where the profit is derived directly from the trust estate. I would, however, add, in conclusion, that it would be wrong to say that the trust estate had in fact paid no remuneration, because if the directors' remuneration were less the profits available for distribution would be more. I do not, however, base my decision on that ground.

I leave over the matter of the exact wording of the order I ought to make because I do not want to do anything to prejudice the question whether, in the circumstances of this case, I ought not to allow the plaintiffs to retain the whole or a part of the remuneration. If I can be satisfied (and that is the point I have not considered) that they were the best persons to be directors, I do not think it would be right for me to expect them to do extra work for nothing.

Summons to stand over for discussion on the further questions.

Solicitors : *Guillaume & Sons* (for the trustees and the third defendant) ; *Chas. T. Nicholls* (for the first two defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. JOYCE.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Lynskey, JJ.), October 30, 31, November 1, 1945].

Criminal Law—Treason—Allegiance—Alien—Holder of British passport—Passport issued on alien's declaration of being British subject by birth—Alien broadcasting propaganda for the King's enemies—Adhering to the King's enemies—Adherence without the King's realm—Whether alien owes allegiance to the Crown—Rights and obligations of the holder of a British passport—Jurisdiction of English court to try alien for treason committed abroad—Treason Act, 1351.

The appellant was convicted on an indictment charging him with high treason by adhering to the King's enemies elsewhere than in the King's realm between Sept. 18, 1939, and July 20, 1940, in that he did broadcast to the King's subjects propaganda on behalf of the said enemies, contrary to the Treason Act, 1351. He was born in the United States in 1906, the son of a naturalized American citizen and thereby became himself a natural-born American citizen. At the age of three he was brought to Ireland and stayed there until about 1921 when he came to England, where he resided until 1939. On July 4, 1933, he made application for a British passport, describing himself as a British subject by birth having been born in Galway, and was granted the passport as such British subject by birth, for a period of five years. On Sept. 24, 1938, he applied for, and was granted, a renewal of that passport for a further period of one year. On Aug. 4, 1939, he made a further application for the further renewal for one year of that passport, and the passport was again renewed to expire on July 1, 1940. On both occasions he described himself as a British subject who had not lost that national status. At some date after Aug. 24, 1939, he left England and travelled to Germany where he remained throughout the war. On his arrest in Germany in 1945, a document was found in his possession showing that he had been engaged by the German Broadcasting Corporation as from Sept. 18, 1939, as an editor, speaker and announcer of news in English. While it was admitted that the appellant, being an alien within the realm, was a person owing allegiance to the King on Aug. 24, 1939, it was contended on his behalf that (i) allegiance due from an alien, being local in character, only continued so long as he resided within the King's dominions; (ii) assuming that the appellant was proved to have been a person owing allegiance to the King at a time when he did adhere to the King's enemies elsewhere than in the King's realm, nevertheless he could not be tried for that offence by any court in England; (iii) the renewal of the appellant's passport did not afford him, nor was it capable of affording him, any protection, and the appellant had never availed himself, nor had he any intention of availing himself, of the protection to which a holder of a British passport was entitled:—

HELD: (i) the application for, the granting of, and the renewals of, the passport, showed that the appellant, as the holder of such passport, had taken all steps to insure every assistance and protection of which he might have stood in need and to safeguard his rights of re-entry into England. Since a foreigner, although not being within the British realm, might owe allegiance to the Crown, the appellant was in all the circumstances of the case a person owing such allegiance at the time when he commenced to adhere to the King's enemies elsewhere than in the King's realm by broadcasting propaganda.

(ii) under the statute of 35 Hen. 8, c. 2, the trial of the appellant was rightly held in the Central Criminal Court.

R. v. Casement (3) applied.

(iii) the British passport held by the appellant entitled him to all the rights and protection afforded by such a passport, even if the appellant had obtained it by misrepresentation and had no intention of using it.

[EDITORIAL NOTE. This decision is, by the express words of the judgment, confined to the circumstances under consideration, and no general principle should be drawn from it. BLACKSTONE admittedly limits local allegiance to the period of residence

within the realm, but residence is nowhere defined by him, and the resolution of the judges in 1707 clearly indicates that in certain circumstances protection may still continue notwithstanding the physical absence of the alien. In this case the alien was under the protection of a passport which entitled him to return at any time, and this appears to have given rise to a species of constructive residence during which he still owed allegiance.

As to ALLEGIANCE, see HALSBURY, Hailsham Edn., Vols. 6 and 9, pp. 414-418, paras. 460-466, and p. 291, para. 432; and FOR CASES, see DIGEST, Vol. 11, p. 498, Nos. 8-18.]

Cases referred to:

- * (1) *Johnstone v. Pedlar*, [1921] 2 A.C. 262; Digest Supp.; 90 L.J.P.C. 181; 125 L.T. 809.
- * (2) *R. v. Brailsford*, [1905] 2 K.B. 730; 14 Digest 117, 861; 75 L.J.K.B. 64; 93 L.T. 401.
- * (3) *R. v. Casement*, [1917] 1 K.B. 98; 14 Digest 128, 1002; 86 L.J.K.B. 467; 151 L.T. 267, 277.

APPEAL by the accused, William Joyce, who was convicted at the Central Criminal Court before TUCKER, J., on Sept. 19, 1945, on the third count of an indictment for high treason and was sentenced to death. On the first two counts in the indictment it was alleged that the accused was a British subject. As the evidence showed that the accused had never been a British subject, he was acquitted upon those counts by the trial judge with the approval of the Attorney-General, representing the Crown. The third count of the indictment upon which the conviction took place, was treated as a count charging that the accused, not being a British subject but being a person owing allegiance to the Crown, was guilty of high treason by adhering to the King's enemies elsewhere than in the King's realm, to wit in the realm of Germany, between Sept. 18, 1939; and July 2, 1940, by broadcasting to the King's subjects propaganda on behalf of the said enemies, contrary to the Treason Act, 1351. The jury found that the accused did adhere to the King's enemies elsewhere than in the King's realm, to wit, in the realm of Germany as alleged, and the trial judge held as a matter of law that at that time the accused was a person owing allegiance to His Majesty. The accused appealed against that decision in law.

G. O. Slade, K.C., Derek Curtis-Bennett, K.C., and J. C. G. Burge for the appellant.

The Attorney-General (Rt. Hon. Sir Hartley William Shawcross, K.C.), L. A. Byrne and S. G. Howard for the Crown.

Cur. adv. vult.

VISCOUNT CALDECOTE, L.C.J. [delivering the judgment of the court]: The material facts appear to be as follows. The appellant was born in the United States of America, in 1906, the son of a naturalised American citizen, and thereby became himself a natural-born American citizen. When about three years of age the appellant was brought to Ireland where he stayed until about 1921 when he came to England. He stayed in England until 1939, being then thirty-three years of age. He was, therefore, brought up, educated and settled within the King's dominions. On July 4, 1933, he made application for a British passport describing himself as a British subject by birth, having been born in Galway, the passport being asked for for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. He was granted the passport, as such British subject by birth, for a period of five years. On Sept. 24, 1938, the appellant applied for a renewal of that passport for a further period of one year, again describing himself as a British subject by birth who had not lost that national status. That application was granted. On Aug. 24, 1939, he made a further application for the further renewal for one year of that passport, again describing himself as a British subject by birth who had not lost that national status, and the passport was again renewed to expire on July 1, 1940. Upon his arrest there was found in the possession of the appellant a document showing that he had been engaged by the German Radio Company of Berlin-Charlottenburg as from Sept. 18, 1939, as an announcer of news in English. On those facts it is clear beyond dispute that the appellant, at least up to Aug. 24, 1939, owed allegiance to the Crown as an alien "resident," whatever that word may mean, in this country and under the protection of the Crown. The grounds upon which that duty is based have not always been stated by judges in the same terms, but it cannot be doubted that any court

which is called upon to decide the question whether a person, not being a British subject, is guilty of treason committed beyond the realm, is bound to have regard to the evidence as to his being resident in the King's dominions, and to the evidence as to his being at the material time under the protection of the Crown. We do not doubt that such a person may, by his acts, be shown to have withdrawn himself from that protection and to have ceased to be resident in England, with the result that the duty of allegiance is no longer owed by him. Each case must be decided upon its own facts. We are not called upon to lay down, and have no intention of laying down, the law applicable to every case of treason beyond the realm charged to have been committed by an alien. We have to look at the evidence in this case and upon that evidence to decide whether the trial judge was right or wrong in holding as a matter of law that on Sept. 18, 1939, and between that date and July 2, 1940, this appellant did owe allegiance to the King. We agree with TUCKER, J., that the proper way of approaching that question is to see whether anything had happened between Aug. 24, and Sept. 18, to divest the appellant of that duty of allegiance which he unquestionably owed at the earlier of those dates. The one and only fact relied upon by counsel for the appellant is that the appellant left England at some date after Aug. 24, and travelled to Germany. The argument was that the act of leaving England, whatever may have been the circumstances, rendered the appellant incapable of committing the offence charged since the physical presence in the King's dominions of the appellant is and was essential to the commission by him, being an alien, of the crime of high treason. If that argument is sound no alien can ever be guilty of that form of high treason which consists of adhering to the King's enemies without the realm. It is a startling proposition and one which after mature consideration this court is quite unable to accept. It appears to be based to a great extent upon the language of BLACKSTONE'S COMMENTARIES, 8th Edn., Book 1, ch. 10, p. 370 :

Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the King's dominion and protection ; and it ceases the instant such stranger transfers himself from this kingdom to another . . . As therefore the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British Empire.

That statement of the law may be accepted as perfectly correct so far as it goes and it is in accord with the writings of all the great masters of the common law, but it is not exhaustive, for it omits something which must, we think, have been known to BLACKSTONE, lecturing and writing in the middle of the 18th century. His COMMENTARIES were first published in 1765. We find nothing in that passage to indicate that in the opinion of the writer the residence so much insisted upon by him would be broken by a mere temporary absence on business or pleasure. The writer makes no attempt to define the word "residence" or explain what he means, leaving the word to be construed in its ordinary meaning. The reason for the omission may be that BLACKSTONE'S COMMENTARIES form, to use the language of the EARL OF BIRKENHEAD in his short life of BLACKSTONE in FOURTEEN ENGLISH JUDGES (p. 203), "an elementary text book for students and must be judged as such." However that may be, FOSTER in his CROWN LAW, published in 1762, in the INTRODUCTION TO THE DISCOURSE ON HIGH TREASON, observed in sect. 4, at p. 185 :

And if such alien seeking the protection of the Crown having a family and effects here should during a war with his native country go thither and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown. And though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the judges assembled at the Queen's Command Jan. 12, 1707.

In EAST'S PLEAS OF THE CROWN, published in 1803, there is a reference in similar terms to that resolution of the judges, and the author after discussing the circumstances in which the resolution came to be passed, appeared to treat it as settled law.

HAWKINS' PLEAS OF THE CROWN, first published in 1716, makes no reference to this resolution of the judges, but in later editions of the work that resolution is set out in the same terms as the other text-book writers, and we have not been referred to any work of authority or to the judgment of any court disapproving of the law as there stated. Criticisms have been made by counsel for the appellant upon the practice of the judges in holding such meetings and those criticisms may be well-founded, but the law as stated and accepted by FOSTER and others has stood unchallenged, as counsel for the appellant admits, for nearly two hundred and fifty years, and we cannot now hold that we are not bound by it.

The importance of the matter in the decision of the present case is two-fold. If the law as stated by FOSTER is correct, it is clear that counsel for the appellant has put his case much too high in claiming, as he does, that the appellant could not in law be guilty of high treason committed abroad because he was not a British subject, and, secondly, it seems to negative a further proposition based on want of jurisdiction to be referred to later. It does not purport to show that the present appellant was guilty of the crime charged since the case put does not apply here, there being no evidence that the appellant on going abroad left his wife or effects behind him. It still remains for the Crown to show that upon the proved facts of this case he did owe the duty of allegiance to His Majesty. If there was no other evidence upon the subject than the proved fact of his departure from England after Aug. 24, the Crown might be in a great difficulty, and we express no opinion as to what would have been the proper course to adopt, beyond observing that it might have been necessary to leave further matters to the jury since the jury alone can draw inferences of fact from such evidence as they accept. But in our judgment the facts relating to the application for, the granting of, and the renewals of, the passport in this case make it clear that as a matter of law the appellant was still owing allegiance to the Crown when he commenced to adhere to the King's enemies by broadcasting as alleged in the indictment and found by the jury. We cannot agree with counsel for the appellant that the case of the appellant is to be treated as precisely the same as that of a foreigner who had once in his life paid a visit to this country of a few hours' duration. BLACKSTONE seems to require "residence," FOSTER speaks of a person "settled" here. We were much pressed by counsel for the appellant with a number of cases in which there are *dicta* appearing to be in favour of the appellant's contention. The high water mark of these cases is perhaps to be found in *Johnstone v. Pedlar* (1), where LORD SUMNER said ([1921] 2 A.C. 262, at p. 292):

The matter, which he [LORD COKE] had in hand, is the contrast between *ligeantia localis*, which begins no earlier than and continues no longer than the presence of the alien *amoy* within the realm, and the lasting allegiance of the subject born.

That passage does not touch the question which we have to consider. It certainly does not define the offence of treason. The only point argued there was whether the defendant could rely on a plea that the plaintiff was an alien, and that his money had been detained by direction of the Crown as an act of state. It was held that the plea was bad.

On his arrest the appellant made a statement put in evidence at the trial which contained these passages:

We [that is his parents and himself] left America in 1909 when I was three years old. We were generally counted as British subjects during our stay in Ireland and England. I was in Ireland from 1909 till 1921 when I came to England. We were always treated as British during the period of my stay in England whether we were or not.

It was further proved that in 1922 the appellant wrote a letter asking to be admitted as a member of the Officers' Training Corps attached to the University of London, stating that he had been born in America but of British parents, that he left America when two years of age, that he had not returned since to America and did not propose to return there, that he had been informed at the Brigade headquarters in Ireland that he possessed the same rights and privileges as he would if he had been of natural British birth, and added that he could obtain testimonials as to his loyalty to the Crown. Following upon that came the application for the passport and the two renewals of the passport, the last being as stated on Aug. 24, 1939, so that on the very eve of war the appellant had taken every step in his power to safeguard his right of re-entry into England,

and meanwhile to insure his treatment in any foreign country as a British citizen. A British passport is something more than a means of identification. It is a document of high public importance, as was stated in the *Brailsford* case (2), where LORD ALVERSTONE, C.J., observed ([1905] 2 K.B. 730, at p. 745):

A It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named. Passports have been known and recognised as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against the officials of the belligerents, and in time of peace in some countries, as in Russia, they are required to be carried by all travellers.

B The form of passport issued in this case requests the foreign Government, and requires the diplomatic and consular representatives of His Majesty in foreign countries in the name of His Majesty, to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need, and the possession of such a document clearly entitles the holder to return to the country which has issued the passport. It is, therefore, plainly a protection in every sense of that word to the holder while he is absent from the King's realm. We entertain no doubt that if it is possible for a foreigner to owe the duty of allegiance to the British Crown although not at the moment within the British realm, as we think it is, the appellant at the time when he adhered to the King's enemies did owe that allegiance.

D The next point made by counsel for the appellant was one which he expressed as being a point raising the question of jurisdiction. The point as stated by the counsel was this. Assuming that the appellant was proved to have been a person owing allegiance to the King at the time when he did adhere to the King's enemies in the realm of Germany, nevertheless he cannot be tried for that offence by any court in England. We experience some difficulty in understanding precisely the grounds upon which this submission was made. It is said to be complementary to the other submission that because the appellant was an alien he could not commit the offence charged against him in the indictment, and, therefore, could not be tried for it, but upon the footing that an alien may commit, and that this appellant did commit, the crime charged in the indictment, we find it difficult to understand why he cannot be tried for that crime. It is quite true to say that the 1351 Act creating the offence does not refer in terms to the trial anywhere of a person offending against the statute and the point F was one which troubled, as the books show, the minds of lawyers in many cases and for many years. Indeed, it was for the reason that there was no clear pronouncement by Parliament as to where and by whom a person ought to be tried who offended abroad against the 1351 Act that Parliament in 1548 passed the Act of 35 Hen. 8, c. 2:

G An Act concerning the trial of treasons committed out of the King's Majesty's Dominions. For obviating doubts as to the trial of treasons and misprisions of treasons committed abroad—Forasmuch as some doubts and questions have been moved, that certain kinds of treasons . . . done perpetrated or committed out of the King's Majesty's Realm of England . . . cannot . . . by the common laws of this realm be inquired of heard and determined within this his said realm of England; for a plain remedy . . . be it enacted . . . that . . . all manner of offences being already made or declared, or hereafter to be made or declared by any the laws and statutes of this realm, to be treasons . . . and done perpetrated or committed or hereafter to be done perpetrated or committed by any person or persons out of this realm of England, H shall be henceforth inquired of heard and determined before the King's justices of his bench for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit and be kept . . . in like manner and form to all intents and purposes as if such treasons . . . had been done perpetrated and committed within the same shire where they shall be so inquired of heard and determined as is aforesaid.

The shire referred to in the section has been generally understood as Middlesex.

It appears to us that the only point of jurisdiction which can possibly arise upon the terms of this Act depends upon the assumption that the words "any

person or persons out of this realm of England" does not include an alien owing allegiance to His Majesty the King.

In *R. v. Casement* (3) the Court of Criminal Appeal dealt with the appeal of a person who had been convicted of high treason by adhering to the King's enemies without the realm, and no question was raised upon the appeal other than the question whether the matter described in the indictment was any offence against the Treason Act, 1351, and in giving the judgment of the court of five judges dismissing the appeal, DARLING, J., observed as follows ([1917] 1 K.B. 98, at p. 138):

A statute was passed which has often been cited here, a statute of 35 Hen. 8 . . . " . . . for the trial of treasons committed out of the King's dominions." There is a distinct statement that you can commit treason out of the King's dominions; it is only a question of how the person is to be tried . . . Therefore this trial was rightly had in the King's Bench, provided that what was done by the appellant amounted to treason by virtue of the statute of Edward III. If it was such a treason it was rightly tried.

We say the same thing in this case. We can find no justification for holding that because the appellant in this case is not a British subject, therefore, although he can commit the crime alleged in the indictment of being a person who has adhered to the King's enemies while owing allegiance to the King, yet no court has power to try him because he is an alien. It is right to add that counsel for the appellant agreed that if the appellant was triable in this country as the result of the statute of Hen. 8 he was properly so tried at the Central Criminal Court.

A further point taken by counsel for the appellant was that assuming the court was against him on his first two points there was no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection, or that the appellant ever availed himself or had any intention of availing himself of any such protection and if there was any such evidence the issue was one for the jury and the judge failed to direct them thereon. It is true that no direct evidence was called in respect of the effect of the passport but the document speaks for itself, and we have already dealt with its effect earlier. In our view the passport was capable of affording him protection none the less because it was obtained by a misrepresentation and it is quite immaterial whether the appellant availed himself of that protection or not, as he had sought such protection and it was available for his use.

For these reasons we find ourselves in complete agreement with the decision of the trial judge and substantially for the same reasons. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Ludlow & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by R. BOSWELL, Esq., Barrister-at-Law.*]

BRISTOW (INSPECTOR OF TAXES) v. WILLIAM DICKINSON & CO., LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), October 17, 18, 1945.]

Income Tax—Profits from trade and trade receipts—Part recovery of debts previously written off as bad—Amounts so received to be included in computation of profits—Amounts taxable in year of receipt—Income Tax Act, 1918 (c. 40), Sched. D, case I.

The respondent company was engaged in export trade and had, for many years, made deliveries of coal and coke to customers in Spain. Between Dec. 1935, and June, 1936, the Spanish customers became indebted to the respondent company in sums amounting to £10,710. These debts were included at their full value as trade receipts in the computation of the respondent company's profits for the purposes of income tax. Owing to the outbreak of the Spanish revolution the debts were considered irrecoverable and written off as bad, and, in accordance with the practice of the Board of Inland Revenue, the sums so written off were allowed as trading losses for the years ended Apr. 5, 1938, and Apr. 5, 1939. In 1940 the British Government advanced a loan to the Spanish Government to facilitate the payment of debts owing by Spanish nationals to traders

in this country, and a clearing house for Spanish debts was set up. In the respondent company's years ending Mar. 31, 1941, and Mar. 31, 1942, the respondent company recovered the sums of £5,115 9s. 6d., and £333 3s 11d. respectively through the clearing house in respect of Spanish debts due to them. On appeal, the question for the determination of the court was whether those sums ought to be treated as trading receipts in the years in which they were paid by the clearing house to the respondent company, assessments having been made upon the respondent company on the footing that the sums should be so included as trading receipts:—

HELD: in the assessments made upon the respondent company the amounts received from the clearing house must be included as trading receipts in the years in which they were received.

Absalom v. Talbot (2) applied.

[EDITORIAL NOTE. The practice of the Revenue of allowing bad debts to be deducted as trading losses in the year in which they are written off was the subject of considerable difference of opinion in the House of Lords, in *Absalom v. Talbot* (2). In expressing the majority opinion in favour of the practice, LORD PORTER pointed out that there was a corresponding obligation on the taxpayer to submit to assessment in a later year in respect of any sum recovered on account of the debt previously written off, and this view is here held applicable.

It should be pointed out that the treatment of bad debts in this case should not be confused with the treatment of debts due from enemy and enemy-occupied territories, which the Revenue have provisionally allowed as bad debts for taxation purposes, subject to retrospective adjustment of assessments when the final position is ascertained.

AS TO TRADE RECEIPTS AND EXPENSES: PERIOD OF ACCOUNT TO WHICH REFERABLE AND AS TO BAD DEBTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 118-120, 161, 162, paras. 223-225, 328; and FOR CASES, see DIGEST, Vol. 28, pp. 49, 50, Nos. 253-254.]

Cases referred to:

D * (1) *Gleaner Co., Ltd. v. Assessment Committee*, [1922] 2 A.C. 169; 28 Digest 49, n.
 * (2) *Absalom v. Talbot*, [1944] 1 All E.R. 642; [1944] A.C. 204; 113 L.J.K.B. 369; 171 L.T. 53.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the division of the city of Newcastle-upon-Tyne for the opinion of the King's Bench Division of the High Court of Justice. On an appeal by William Dickinson & Co., Ltd., against assessments to income tax for the years ended Apr. 5, 1942, and Apr. 5, 1943, made upon them in respect of their profits as coal and coke exporters under the Income Tax Act, 1918, Sched. D, case I, the Commissioners held that certain sums recovered in respect of debts estimated as bad or doubtful did not form part of the company's trading receipts, in the years in which they were so recovered, within the meaning of the rule applicable to Sched. D, case I. The Crown appealed. The facts are sufficiently set out in the judgment.

F *The Solicitor-General* (Rt. Hon. Sir Frank Soskice, K.C.) and *Reginald P. Hills* for the appellant.

F. Grant, K.C., and *J. Charlesworth* for the respondents.

Cur. adv. vult.

G **MACNAGHTEN, J.:** The respondent in this case, William Dickinson & Co., Ltd., is a company engaged in the export trade, and for many years in the course of its trading has exported coal and coke to customers in Spain. Between Dec., 1935, and June, 1936, the Spanish customers became indebted to the company in sums amounting in all to £10,710. The company year by year is assessed to income tax under Sched. D, case I, and in accordance with the usual practice, these debts were included at their full value as trade receipts in the computation of the profits of the company for the purposes of income tax.

H In the summer of 1936 the Spanish revolution broke out and one consequence of that was that these debts, which had been supposed to be quite good, became doubtful: accordingly, in their accounts for the year ending Mar. 31, 1937, the directors of the company, having regard to the financial situation in Spain, estimated these debts as bad to the extent of £4,000. In the following year, the situation having deteriorated further, the directors, considering the debts were then worthless, wrote off the balance of the debts as irrecoverable. In computing the company's liability to income tax for the years which ended Apr. 5, 1938 and Apr. 5, 1939, the sums so written off by the directors were allowed as trading losses in accordance with a long-established practice of the

Board of Inland Revenue.

In consequence of a decision of the Judicial Committee of the Privy Council in *Gleaner Co., Ltd. v. Assessment Committee* (1), doubts had arisen as to the legality of the practice of the Board of Inland Revenue, in allowing debts which had been brought in to computation as good and subsequently proved to be bad, to be treated as trading losses of the year in which it was found that they were bad. It so happened that in *Absalom v. Talbot* (2) this practice of the Board of Inland Revenue, incidentally, came into question. That case was heard in the House of Lords by VISCOUNT SIMON, L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL and LORD PORTER. The case led to a remarkable difference of judicial opinion. The House was divided by three to two in favour of the taxpayer, Absalom; and the Court of Appeal, affirming the judge of first instance, was divided two to one in favour of the Crown. In the House of Lords, on this incidental question as to the legality of the practice of the Board of Inland Revenue, there was also a division of opinion. VISCOUNT SIMON, L.C., LORD ATKIN and LORD PORTER were of opinion that the practice was in accordance with the law, and that the Board of Inland Revenue, in the circumstances, were bound to allow the debt to be entered in some subsequent year as a trading loss. LORD RUSSELL OF KILLOWEN and LORD THANKERTON were doubtful about the matter and reserved their opinion for the occasion, whenever it should occur, when they would be called upon to decide the question. In those circumstances, I apprehend that I am bound to accept the view of the majority as to the legality of the practice.

The further facts which give rise to the question in this case are that in 1940 the British Government advanced a sum of no less than £2,000,000 to the Spanish Government to facilitate the payment of debts owing by Spanish nationals to traders in this country, and a clearing house for Spanish debts was set up. In the company's years ending Mar. 31, 1941, and Mar. 31, 1942, the company recovered the sums of £5,115 9s. 6d., and £333 3s. 11d., respectively, through the clearing house in respect of the debts due from its Spanish customers.

The question which arises in this case is whether those sums ought to be treated as trading receipts in the years in which they were paid by the clearing house to the company. Assessments were made upon the respondent on the footing that they should be so included as trading receipts. Against those assessments the respondent appealed to the General Commissioners for the city of Newcastle-upon-Tyne, and the General Commissioners decided in favour of the respondent. Thereupon the Crown brought this appeal.

In *Absalom v. Talbot* (2) LORD PORTER, after expressing the opinion that the practice of the Board of Inland Revenue, to which I have referred, was in accordance with the law, added these words ([1944] 1 All E.R. 642, at p. 652):

Such a practice necessitates, I think, the corresponding obligation on the part of the taxpayer to submit in a later year to an increase in the sum at which a debt previously treated as bad or doubtful should be brought into account if in fact a payment greater than the assumed value had been obtained or seems likely to be obtained on a later occasion.

These debts of the company's Spanish customers were in the first place brought into computation as good. Subsequently, they were written off as bad. Finally, through the clearing house, the company received payments in respect of the debts. If the practice of the Board of Inland Revenue in treating a debt which was considered good and was afterwards written off as bad, is right, it seems to me, as it seemed to LORD PORTER, to follow as a necessary consequence, that the amounts so received by the trader must be included in the computation of his profits in the year in which the money is received.

In these circumstances, I answer the question submitted by this case by saying that the payments received from the clearing house ought to be included in the assessments made upon the company. Therefore the appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Hyde, Mahon & Pascall*, agents for *Wilkinson & Marshall*, Newcastle-upon-Tyne (for the respondents).

[Reported by P. J. JOHNSON, ESQ., Barrister-at-law.]

DAVIES (INSPECTOR OF TAXES) v. PREMIER INVESTMENT CO., LTD.

HEWETSON v. CARLYLE (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Macnaghten, J.), October 17, 18, 1945.]

Income Tax—"Interest of money"—Company issuing registered convertible notes repayable with premiums at specified date—Notes not carrying interest—Premiums paid on redemption of notes—Premiums not intended to be accretion of capital—*Income Tax Act, 1918 (c. 40), Sched. D, case III, r. 1.*

A A company engaged in developing gold mining properties in Australia issued, in 1936, six-year registered convertible notes, in order to create sufficient funds for carrying their development programme to the production stage. The notes were issued at par and carried no interest, but were repayable on June 30, 1942, together with a premium of 30 per cent. It was provided that after Jan. 30, 1938, the company might redeem the notes and that, in the event of a note being redeemed before June 30, 1942, in lieu of the premium of 30 per cent. the premium should be calculated at the rate of 2½ per cent. for every period of six months or 5 per cent. per annum. The taxpayers were holders of such notes which were duly redeemed on June 30, 1942, together with a premium of 30 per cent. On appeal, the question for the determination of the court was whether such premiums, paid on the redemption of the notes, were taxable income:—

B HELD: the premiums paid by the company on the redemption of the notes issued by them were, in the absence of special circumstances indicating a contrary conclusion, "interest of money" within the *Income Tax Act, 1918, Sched. D, case III, r. 1*, and, therefore, subject to income tax.

C *Lomax v. Peter Dixon & Co., Ltd. (1) followed.*

D [EDITORIAL NOTE. The court here applies the dictum of LORD GREENE, M.R., in *Lomax v. Peter Dixon & Co. (1)* to the effect that a payment to be made on repayment of a loan, although described as a premium, is to be regarded as "interest of money," in the absence of circumstances indicating a contrary conclusion. Reference may also be made to the judgment of the LORD PRESIDENT in *I.R. Comrs. v. Thomas Nelson & Sons, Ltd. (1938) 22 Tax Cas. 175*, at pp. 179, 180, where he says: "the premiums are part of the construction given by the borrowers for the use of the capital lent to them."

E AS TO INTEREST OF MONEY, see HALSBURY, Hailsham Edn., Vol. 17, pp. 178-180, paras. 372-376; and FOR CASES, see DIGEST, Vol. 28, pp. 62-64, Nos. 316-328, DIGEST Supp., *Income Tax*, p. 64, Nos. sn, sp.

Case referred to:

*(1) *Lomax v. Peter Dixon & Co., Ltd.*, [1943] 2 All E.R. 255; [1943] 1 K.B. 671; 112 L.J.K.B. 593; 169 L.T. 145; 25 Tax Cas. 353.

F (I) CASE STATED by the Commissioners for the General Purposes of the Income Tax for the City of London, pursuant to the provisions of the *Income Tax Act, 1918, s. 149*, for the opinion of the King's Bench Division of the High Court of Justice. On an appeal by the Premier Investment Co., Ltd., against an assessment made upon them under Sched. D, case III, for the year ended on Apr. 5, 1943, in the sum of £504, the following facts were found by the Commissioners:

G The . . . sum of £504 was assessed in respect of a premium . . . upon the repayment at maturity of certain notes issued by the Gold Exploration & Finance Company of Australia, Ltd. . . . The Australian company was incorporated in 1934: it was almost entirely a holding company and was engaged . . . in acquiring, exploring, prospecting, developing and financing gold mining properties in Australia . . . In June, 1936, the Australian company's cash resources . . . had been exhausted, and further finance was required . . . It was accordingly decided to raise a sum of £500,000.

H The said sum was raised by the issue of £500,000 six-year registered convertible notes . . . they were offered to the shareholders at par and the issue was underwritten by a number of companies of which [Premier Investment Co., Ltd.] was one. The notes were unsecured and bore no interest, they were repayable on June 30, 1942, together with a premium of 30 per cent. . . .

Of the total issue of £500,000 notes to the amount of £389,910 were not applied for by shareholders and were allotted to the underwriters including notes to the value of £1,680 which were allotted to [Premier Investment Co., Ltd.]. These notes were repaid on June 30, 1942, together with the premiums of 30 per cent., making a total amount of £2,184 paid to [Premier Investment Co., Ltd.]. The premium so paid . . . amounting to £504 . . . forms the subject of the present appeal.

On these facts the Commissioners held that the premiums received and assessed were capital payments. The Crown appealed.

(II) CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts, pursuant to the provisions of the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. On an appeal by A. W. Hewetson against an assessment to income tax under Sched. D for the year ended Apr. 5, 1943, in the sum of £45 received by him as a premium on the redemption of a note issued by the Gold Exploration and Finance Company of Australia, Ltd., the following facts were found by the Commissioners :

... at all material times the [taxpayer] was a shareholder of the company. The company had not prospered. It needed additional funds, but its position was such that it could not raise those funds from the general public because it could offer no security. The only source of additional funds was the general body of the existing shareholders . . . In response to a circular [issued by the company on July 1, 1936, the taxpayer] subscribed for, and was allotted, notes to the value of £150, being £10 of notes for every 50 shares held by him on June 27, 1936. His sole reason for taking up these notes was to protect his shareholding, and he regarded the transaction as a salvage operation only. [The notes did not bear interest but were finally redeemable on June 30, 1942, at £130 for every £100 face value, the company reserving the right to redeem the whole or any part of the issue after June 30, 1938, on Dec. 31, or June 30 in any year on giving three months' previous notice. The nominal value of any notes so redeemed was repayable together with a premium calculated at the rate of 2½ per cent. on their nominal value for each half-yearly period.] . . . The [taxpayer's] notes to the value of £150 were duly redeemed on June 30, 1942, together with a premium of 30 per cent., namely the said sum of £45.

On these facts the Commissioners held that the premium simply took the place of interest, as such, and the whole of it was interest. The taxpayer appealed.

The question at issue in both appeals is, therefore, the same, namely whether the premiums paid by the Gold Exploration and Finance Company, of Australia Ltd., on the redemption of certain notes issued by the company were "interest of money" within the meaning of r. 1 of the rules applicable to case III, of Sched. D, of the Income Tax Act, 1918.

The Solicitor-General (Rt. Hon. Sir Frank Soskice, K.C.) and Reginald P. Hills for the Crown as appellants in the first appeal, and respondents in the second appeal.

F. Grant, K.C., and John Clements for the respondents in the first appeal.

F. N. Bucher for the appellant in the second appeal.

MACNAGHTEN, J.: The facts which have given rise to this difference of opinion are as follows: The Gold Exploration and Finance Company of Australia, Ltd., (hereinafter called "the company") was engaged in exploring, prospecting, developing and financing gold mining properties in Australia. By the summer of 1936, while these operations were still in the exploratory and development stage, the company had come to the end of its resources. In these circumstances the company created and issued six-year registered convertible notes for £500,000 in denominations of £10, £50, £100 and £1,000 each, all ranking *pari passu*. The notes did not carry interest but were repayable on June 30, 1942, together with a premium of 30 per cent. It was provided that after Jan. 30, 1938, the company might redeem the notes and that, in the event of a note being redeemed before June 30, 1942, in lieu of the premium of 30 per cent. the premium should be calculated at the rate of 2½ per cent. for every period of six months or 5 per cent. per annum.

The law on this subject has been recently considered by the Court of Appeal in *Lomax v. Peter Dixon & Co., Ltd.* (1). The question in that case was whether a premium payable on the redemption of certain debentures was to be regarded as interest or as a capital payment. The debentures in that case carried interest during their currency. LORD GREENE, M.R., in the course of his judgment, explained the circumstances in which a payment called "a premium" in respect of money lent may be "interest of money" within Sched. D, case III. At the conclusion of his judgment, he summed up the whole matter most clearly in the following terms ([1943] 2 All E.R. 255, at p. 262):

It may be convenient to sum up my conclusions in a few propositions. (i) Where a loan is made at or above such a reasonable commercial rate of interest as is applicable to a reasonably sound security, there is no presumption that a "discount" at which the loan is made or a premium at which it is payable is in the nature of interest. (ii)

The true nature of the "discount" or the premium (as the case may be) is to be ascertained from all the circumstances of the case and apart from any matter of law which may bear upon the question (such as the interpretation of the contract) will fall to be determined as a matter of fact by the Commissioners. (iii) In deciding the true nature of the "discount" or premium, in so far as it is not conclusively determined by the contract, the following matters together with any other relevant circumstances are important to be considered, *viz.*, the term of the loan, the rate of interest expressly stipulated for, the nature of the capital risk, the extent to which, if at all, the parties expressly took or may reasonably be supposed to have taken the capital risk into account in fixing the terms of the contract.

Then come these words, which are relevant to this case ([1943] 2 All E.R. 255, at p. 263):

In this summary I have purposely confined myself to a case such as the present where a reasonable commercial rate of interest is charged. Where no interest is payable as such, different considerations will, of course, apply. In such a case, a "discount" will normally, if not always, be a discount chargeable under case III, r. 1 (b). Similarly, a "premium" will normally, if not always, be interest.

That is a clear decision of the court that in such a case as the present one, the payment to be made when the loan is repaid, described as a premium, should, unless there are some special circumstances indicating a contrary conclusion, be regarded as "interest of money."

In the present case there are no circumstances which indicate a contrary conclusion. If the premiums were intended to be an accretion of capital, one would suppose that it would remain the same whether the loan was repaid on June 30, 1942, or at an earlier date. But, so far from that being the case, it was provided that, if the loan was repaid at an earlier date, it would carry interest at the rate of 5 per cent. per annum.

In those circumstances, I am of opinion that the Special Commissioners came to the right conclusion, and that the city of London Commissioners ought to have reached the same conclusion. I, therefore, think that the first appeal must be allowed, and the second appeal must be dismissed.

First appeal allowed with costs. Second appeal dismissed. No order as to costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant in the first appeal and the respondent in the second appeal); *Barnett, Tuson, Hood & Co.* (for the respondents in the first appeal); *Hill, Dickinson & Co.* (for the appellant in the second appeal).

[Reported by P. J. JOHNSON, Esq., Barrister-at-Law.]

LOSS v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), October 26, 29, 1945].

Revenue—Excess profits tax—"Profits of profession . . . dependent wholly or mainly on . . . personal qualifications"—Leader and conductor of dance band—Finance (No. 2) Act, 1939 (c. 109), s. 12 (3).

The appellant was the leader and conductor of a dance band, the members of which had entered into service agreements with the appellant from whom they received fixed salaries. During the period from Apr. 1, 1939, to Mar. 31, 1940, the appellant had two engagements for which he was remunerated at a flat rate. Thereafter he spent most of his time touring Great Britain and received either a fixed fee or a percentage of the takings. The band performed not only at dances, but also at concerts and at variety entertainments in theatres. In the case of those theatre engagements, where a number of supporting variety artistes also performed, the appellant was required to provide the remuneration of the variety artistes out of his percentage of the takings. Upon these facts the Commissioners held that though the appellant's profits depended very largely on his professional skill as a conductor and on his qualifications as a musician, the activities in which his qualifications were exercised did not constitute the carrying on

of a profession and that the profits made were commercial profits arising from the carrying on of a business :—

HELD : there was sufficient evidence upon which the Commissioners could find that the appellant was carrying on a business of training and exploiting for profit a band with himself as a conductor. Whether or not the appellant carried on a profession was a question of fact to be decided by the Commissioners, and their finding on this point could not be disturbed by the court.

[EDITORIAL NOTE.] While in many cases, the question whether a given set of activities constitute the carrying on of a profession is a question of fact for the Commissioners, there are cases where an adverse finding would be upset as erroneous in law. The practice of the law or medicine, or of the art of painting or sculpture are examples.

This case decides that a skilled musician, whose particular art lies in conducting a skilled orchestra, which he prefers to retain and train himself in order that he may more effectively express his art, is not carrying on a profession the profits of which "are dependent wholly or mainly on his personal qualifications."

No reasoning appears in the judgment, but it would seem that the appellant's "professional skill as a conductor, and his personal qualifications as a musician," are in some way rendered immaterial by the circumstance that in order to secure some of his engagements he was required to bear the remuneration of performers other than members of his orchestra.

FOR THE FINANCE (No. 2) Act, 1939, s. 12, see HALSBURY'S STATUTES, Vol. 32, p. 1193.]

CASE STATED under the Finance (No. 2) Act, 1939, s. 21 (2) and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. On an appeal by the taxpayer against two assessments to excess profits tax in respect of his profits as a band leader for the chargeable accounting periods Apr. 1, 1939, to Mar. 30, 1940, and Apr. 1, 1940, to Mar. 31, 1941, respectively, the Commissioners held, after considering all the facts adduced before them, that, though the profits made by the appellant depended very largely on his professional skill as a musician, the activities in which the appellant exercised those qualifications did not constitute the carrying on of a profession, and the profits made were commercial profits arising from the carrying on of a business. The taxpayer appealed. The sole question upon which the opinion of the High Court was required was whether, in the circumstances of the case, the appellant carried on a profession the profits of which were dependent wholly or mainly on his personal qualifications within the meaning of the Finance (No. 2) Act, 1939, s. 12 (3). The facts are sufficiently set out in the judgment.

Cyril King, K.C., and *J. S. Scrimgeour, K.C.*, for the appellant.

The Solicitor-General (Rt. Hon. Sir Frank Soskice, K.C.) and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

MACNAGHTEN, J. : This is an appeal by a leader and conductor of a well known dance band, from a decision of the Special Commissioners confirming two assessments to the excess profits tax imposed by the Finance (No. 2) Act, 1939, s. 12, in respect of the profits he gained from the performances of his band, namely, an assessment in the sum of £493 in the chargeable accounting period for Apr. 1, 1939, to Mar. 31, 1940, and an assessment in the sum of £5,799 for the chargeable accounting period for Apr. 1, 1940, to Mar. 31, 1941.

The Finance (No. 2) Act, 1939, s. 12 (3) provides that :

... the carrying on of a profession by an individual or by individuals in partnership shall not be deemed to be the carrying on of a trade or business to which this section applies if the profits of the profession are dependent wholly or mainly on his or their personal qualifications.

The appellant's band consisted of 14 or 15 instrumentalists and a few vocalists who, as occasion might require, blended their voices with the music of the band. All the members of the band were skilled performers. They were carefully selected and trained by the appellant, who insisted on a high standard of proficiency. They entered into service agreements with the appellant and received fixed salaries from him. Except on rare occasions, the appellant always acted

as the conductor of the band. Though described as conductor-violinist, he did not in fact play any instrument himself when acting as conductor. It is stated in the case that those who engaged the band would not have done so if the appellant did not undertake to conduct it, and that he was the attraction—that is to say, he, with his band, was the attraction.

- A During the period from Apr. 1, 1939, to Mar. 31, 1940, the band gave performances at the Kit Kat Club and the Astoria. For those performances the appellant was remunerated at a flat rate. On the termination of those engagements, the appellant spent most of his time touring throughout Great Britain, from Glasgow and Edinburgh in the north to the South Coast of England. The engagements which the appellant obtained when on tour, numbered some 78 in all. In 9 cases, the appellant received a fixed fee, and in all the other cases he was remunerated by a percentage of the takings. Five of those engagements were during the first accounting period, and all the rest were in the second period.
- B The band performed not only at dances, but also at concerts and at variety entertainments in theatres. Of the total receipts during the second period amounting to £33,302, the sum received in respect of the theatre engagements was £22,515. In the case of those theatre engagements, where a number of supporting variety artistes also performed, the appellant was required to provide the remuneration of the variety artistes out of his percentage of the takings.
- C Out of £22,515 received by the appellant from theatre engagements during the second accounting period, the appellant paid £6,681 to variety artistes.

The Special Commissioners, after hearing the evidence and arguments, gave their decision in these terms :

- D The question for our decision is whether Mr. Loss carries on a profession the profits of which are dependent wholly or mainly on his personal qualifications. If he does, he is exempt from excess profits tax . . . After considering all the facts adduced before us, while we do not question that the profits made by Mr. Loss depend very largely on his professional skill as a conductor and generally on his personal qualifications as a musician, we have come to the conclusion that the activities in which he exercises those qualifications do not constitute the carrying on of a profession, and that the profits made are commercial profits arising from the carrying on of a business. Mr. Loss selects skilled musicians for his band, trains them and through his theatrical agent obtains engagements for his band with himself as the conductor at theatres, dances, concerts and the B.B.C. Up to Mar., 1940, he was on fixed contracts, first
- E with the Kit Kat, and then with the Astoria. We hold that Mr. Loss is carrying on a business which can be described as the business of training and exploiting for profit a band with himself as the conductor.

- F Counsel for the appellant, urged that the facts as stated in the case did not warrant this conclusion. The question which was before the Commissioners, whether the appellant was carrying on a profession, the profits whereof were dependent wholly or mainly on his personal qualifications, is a question of fact to be decided by the Commissioners. Even if I differed from their conclusion (which I do not), I should be bound to endorse their decision. Personally, I do not see how, on the facts of this case, it could be held that the profits made by the appellant were profits arising from the exercise of a profession. In my opinion, therefore, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

- G Solicitors: *Fletcher & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by P. J. JOHNSON, ESQ., Barrister-at-Law.]

Re GRIMWOOD, TREWHELLA v. GRIMWOOD.

[CHANCERY DIVISION (Uthwatt, J.), October 12, 30, 1945.]

Wills—Construction—Bequest of “all my plate”—Whether Sheffield plate and electro-plate included.

By her will dated July 19, 1934, the testatrix gave “all my plate” to be divided between her two nephews. The question to be determined was whether the gift included, in addition to silver plate, some Sheffield plate and electro-plate owned by the testatrix at her death. With a few immaterial exceptions all the articles were owned by the testatrix at the date of her will:

HELD: at the present time the word “plate” was used by the ordinary person in the extended sense attributed to it in the OXFORD ENGLISH DICTIONARY as including plated articles such as electro-plate. Therefore, upon the true construction of the will, the gift of “all my plate” included the Sheffield plate and electro-plate.

Holden v. Ramsbottom (1) not followed.

[EDITORIAL NOTE. This case is an illustration of the manner in which a word in common use may change its meaning. During the seventy years between the decision in *Holden v. Ramsbottom* (1) and the making of the will herein construed, “plate” has clearly been extended to include plated ware in addition to silver, and the court so holds.

Reference may also be made to *Re Lewis* (1909) T.L.R. 145, where the testator used the expression “plate and plated articles.” This was held not to include silver-mounted articles.

AS TO GIFT OF “PLATE,” see HALSBURY, Hailsham Edn., Vol. 34, pp. 261-263, para. 312; and FOR CASES, see DIGEST, Vol. 44, p. 732, Nos. 5861-5864.]

Case referred to:

* (1) *Holden v. Ramsbottom* (1863), 4 Giff. 205; 44 Digest 732, 5863; 1 New Rep. 307, 354; 7 L.T. 735.

ADJOURNED SUMMONS to determine whether the gift of “all my plate,” in the will of the testatrix, was confined to silver plate or included Sheffield plate and electro-plate. The facts are fully set out in the judgment.

J. B. Richardson for the plaintiff.

C. L. Farwell, G. D. Johnston, Pascoe Hayward, Victor Coen, Wilfrid Hunt, W. F. Waite, J. W. Brunyate and E. M. Winterbotham for various defendants.

UTHWATT, J.: The point at issue is whether the gift of “all my plate” contained in cl. 3 of the will of Miss Grimwood, who died in 1941, is confined to silver plate or includes, in addition to silver plate, some Sheffield plate and electro-plate owned by her at her death. The will is dated July 19, 1934, and by it no specific bequests are made other than those contained in cl. 3. By that clause a framed photograph, jewellery and trinkets, a tea service described as “my small silver tea service,” and some water colours by Copley Fielding were given to certain persons and the clause contained also the provision:

To my two nephews Jeffry Grimwood Grimwood and Ralph Vere Grimwood all my plate to be divided between them as equally as may be.

At the date of her death Miss Grimwood’s silver consisted in the main of silver that would find its proper place on the dining-table or the tea-table. The remaining silver consisted of a Georgian candlestick and snuffers, a pen tray, a presentation cup, cigarette box, shaped rose bowl, an ash tray, photograph frames, a trinket box, and a silver-mounted blotter. Her Sheffield plate consisted of entree dishes, salvers, sauce tureens and wine coasters. The electro-plate with the exception of some embossed candlesticks and a presentation cup were again articles which would find their place as utility articles upon the dining table or tea table. The inference I draw from the evidence is that, with immaterial exceptions, all the articles were owned by the testatrix at the date of her will.

To my mind, neither the other parts of the will nor the later testamentary documents executed by the testatrix give any help in determining what meaning is proper to be attributed to the word “plate” in cl. 3. It was argued on the

authority of *Holden v. Ramsbottom* (1) that nothing but silver passed under the description "plate." In that case the testator bequeathed to one E. Holden :

... all the furniture, except plate and pictures, which may be in the said house at my decease.

The testator possessed at his house a plated service and at his bank a solid silver service and other silver articles. It was conceded that, but for the exception, every article of plate would have passed under the description of "furniture," and SIR JOHN STUART, V.-C., decided that only the silver was excepted. He took the view that there was nothing in the context of the will or in the evidence as to the situation of the testator to show that the word "plate" was not used in its proper sense, and that "plate properly so called does not include plated articles." That is the only relevant authority.

Holden v. Ramsbottom (1) was decided in 1863 and, though the "sixties" have been described as the age of stucco and electro-plate, I find myself unable to accept this limitation upon the proper meaning of the word "plate" in a will made in 1934. A reference to the OXFORD ENGLISH DICTIONARY shows the meanings currently attributed to the word. The relevant entry runs as follows :

II. 15. *Collective sing.* Utensils for table and domestic use, ornaments, etc., a. originally of silver or gold . . . b. Extended to plate ware, and to other kinds of metal : usually with distinctive additions, as *pewter plate, British plate, electro-plate*, etc.

This is more a description of the common use of the word than an attempt at a definition of it, and for my purpose, the value of the entry lies in that fact. To my mind, at the present day the ordinary person using the word "plate," or reading the word "plate" as it appears in such a document as that before me, would not have in mind articles composed only of silver or gold and would understand the word "plate" in the extended sense attributed to it by the makers of the OXFORD ENGLISH DICTIONARY as including plated articles. It is not uncommon for a word to change its meaning and in the case of the word "plate" it is clear that this has happened. Reasons may be suggested for this change. Plated ware in many forms has become available to the whole mass of the population ; there is a settled habit of applying to new articles of secondary worth a name which properly belongs to superior articles of the same general character and serving the same purpose as the new articles ; and, lastly, the new articles serving the purpose of a "plate," as formerly understood, are produced by "plating." To some, indeed, the word "plate," if used in ordinary conversation, would suggest electro-plate as distinct from silver or Sheffield plate.

In my opinion, therefore, no article is excluded from the category of "plate" in this will by reason that it is Sheffield plate or electro-plate. As regards the particular articles which are not obviously plate—silver-mounted articles, for instance, are not necessarily plate—I am prepared to pass an opinion on them after seeing them or being given an adequate description of them.

Declaration accordingly.

Solicitors : *Patersons, Snow & Co.*, agents for *Holmes & Hills*, Braintree, for the plaintiff and certain defendants ; *Stanley Attenborough & Co.*, *Sharpe Pritchard & Co.*, agents for *Howard, Gates and Ridge*, Hove, and *Bull & Bull*, for the remaining defendants.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re BATES' WILL TRUSTS, JENKS AND OTHERS v. BATES AND OTHERS.

[CHANCERY DIVISION (Romer, J.), October 15, 25, 1945.]

Wills—Gift of annuity—“Clear of income tax up to but not exceeding 5s. 6d. in the £”—Reliefs and allowances—Principle of Re Pettit applicable—Proportion of repayment to be accounted for—Sums recorded under Finance Act, 1941, s. 7 (1) included—Finance Act, 1941 (c. 30), s. 7 (1).

By his will, dated May 28, 1944, the testator gave three annuities, of £1,000, £500 and £400 per annum respectively, “clear of all death duties and income tax up to but not exceeding 5s. 6d. in the £ but not sur-tax.” It was contended on behalf of the annuitants that the words used by the testator showed that he had intended each of them to retain for her own benefit any repayment of income tax on account of reliefs and allowances to which she was entitled, without having to account for any part thereof to the testator’s estate:—

HELD: (i) upon the true construction of the will, the words “but not exceeding 5s. 6d. in the £” were intended merely to extend a partial indemnity to each of the annuitants, at the expense of the testator’s estate, against the income tax ultimately payable in respect of her annuity. There was no indication that, in using the words “clear of income tax,” the testator had meant “income tax at the standard rate.” The principle of *Re Pettit* (2), therefore, applied, and the annuitant was not entitled to retain for herself the whole of the proportion (referable to the annuities) of reliefs and allowances, to which from time to time she became entitled.

Re Tatham (1) and *Re Williams* (3) applied.

(ii) since the burden of income tax was to be borne in part by the annuitant, and in part by the estate, the annuitant had to account to the estate in respect of so much of the repayments of tax received that bore the same proportion to the total repayments as the tax borne by the estate bore to the total tax payable in respect of the annuity.

(iii) such reliefs and allowances included the amount ascertained and recorded under the Finance Act, 1941, s. 7 (1).

Re Tatham (1) followed.

[EDITORIAL NOTE. The rule in *Re Pettit* (2), according to which an annuitant whose annuity is given free of income tax is bound to account to the estate for reliefs and allowances, does not apply when by express words or inference “income tax” is limited to “income tax at the standard rate.” It is held that no such inference is to be drawn where the testator has given a partial indemnity only, limiting relief to income tax at a specified rate.

AS TO TAX-FREE ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386-388, and Supplement; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to:

- *(1) *Re Tatham, National Bank, Ltd. v. Mackenzie*, [1945] 1 All E.R. 29; [1945] Ch. 34; 114 L.J.Ch. 9; 172 L.T. 14.
- *(2) *Re Pettit, Le Fevre v. Pettit*, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491.
- *(3) *Re Williams, Midland Bank Executor and Trustee Co., Ltd. v. Williams*, [1945] 2 All E.R. 102; [1945] Ch. 320; 173 L.T. 132.

ADJOURNED SUMMONS to determine questions arising under the will of Alfred Charles Cosher Bates. The facts and the relevant clause of the will are fully set out in the judgment.

Lindsay M. Jopling for the trustees.

Wilfrid Hunt for two of the annuitants.

W. F. Waite for one of the annuitants.

C. R. D. Richmond for infants interested under the will.

Victor Coen for the residuary legatees.

Cur. adv. vult.

ROMER, J.: By his will dated May 28, 1944, Alfred Charles Cosher Bates, after appointing executors and bequeathing certain legacies, gave (by cl. 6 of his will) three annuities in the following terms:

I give the following annuities clear of all death duties and income tax up to but not,

exceeding 5s. 6d. in the £ but not sur-tax that is to say : (a) To my wife Florence Maria Bates an annuity of £1,000 per annum during her life ; (b) To the said Gertrude May Bates an annuity of £500 per annum during her life ; (c) To my secretary Mrs. Winifred Stubbs, otherwise known as Winifred Elsie Scott, an annuity of £400 per annum during her life. Such respective annuities shall begin from my death and be payable by quarterly payments, the first payment thereof to be made at the expiration of 3 calendar months from the date of my death.

A The testator then authorised his trustees to make provision for the payment of any of the said annuities by setting apart and appropriating in respect of each such annuity such part or parts of his residuary personal estate as should, in their opinion, be sufficient by the income thereof to pay such annuity and any income tax payable thereon by his estate and the expenses in connection therewith. The testator gave his residuary estate, as to one half thereof, to his son and, as to the other half, on trust for certain of his nephews and nieces and certain charitable objects. The testator died on July 17, 1944, and his will was proved on Sept. 23, 1944. The gross value of his estate amounted to about £546,893.

B The main question raised by the present summons is whether, on the true construction of the said will, each of the said annuitants is entitled to retain for her own benefit any relief or allowances by way of repayment of income tax to which she is entitled, or whether she must account for the same or any (and, if any, which) part thereof to the trustees of the testator's will. The second question is whether, for the purposes of question 1, the said reliefs and allowances include the amounts ascertained and recorded under the Finance Act, 1941, s. 7 (1).

C The main question in issue is of a kind which has not infrequently come before the courts, and the decisions relevant to it were recently reviewed by EVERSHED, J., in *Re Tatham* (1). The salient distinction between the present case and its predecessors is that the testator has qualified or limited the extent to which exoneration from the burden of taxation is to be enjoyed by the three annuitants. Their annuities are given "clear of all . . . income tax up to but not exceeding 5s. 6d. in the £." If this limitation had not been imposed and the annuities had been bequeathed "clear of all income tax" (without qualification), it is, I think, clear that the annuitants would have had to account to the estate for a proper proportion of the reliefs or allowances received by them by way of repayment of income tax in accordance with the principles applied in *Re Pettit* (2). It is said, however, on behalf of the annuitants, that the limitation to which I have referred leads to a different result, and shows that the testator intended to confer on the annuitants a benefit under which they are, and will be, entitled to retain such relief and allowances for themselves, without having to account for the same, or for any part thereof, to the estate.

D E In *Re Tatham* (1) EVERSHED, J., after referring to and commenting upon *Re Pettit* (2) and the other relevant authorities, summarised the position as follows ([1945] 1 All E.R. 29, at p. 33) :

F As I understand it, the reasoning underlying all these decisions involves the result that, in formulae of the kind here in question, there must be found, if the annuitant is to be held not accountable in respect of reliefs and other repayments, a limitation, by express words or necessary inference, of the phrase "income tax" to "income tax at the standard rate," and that, in the absence of express words, the necessary inference will not be lightly drawn.

G In *Re Williams* (3), a still more recent case, UTHWATT, J., said ([1945 2 All E.R. 102, at p. 104), that the question of construction to be determined :

H . . . is in substance whether the reference to income tax is a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will, or whether the provision as to income tax merely indemnifies the annuitant against that part of the annuitant's income tax (other than sur-tax) which is properly referable to the annuity. If construed in the former sense, the actual income tax ultimately suffered by the owner of the annuity does not enter into the picture. Tax at the standard rate is deducted from the gross amount resulting from the calculation and the annuitant receives £x in cash and the income tax referable to the gross amount has been paid for his account.

In my judgment, there is no sufficient indication in the present will that the testator had in mind the former of the two conceptions to which UTHWATT, J., refers. It is, in my opinion, reasonably clear that the testator intended to do no

more than extend a partial indemnity to the annuitants, at the expense of his estate, against the income tax which is found ultimately to be payable in respect of their annuities. With the standard rate of income tax at 10s. in the £ he was unwilling that his estate should be saddled with the heavy burden that a complete indemnity would involve, and that was the reason, and, in my judgment, the sole reason, for the introduction of the limiting words "but not exceeding 5s. 6d. in the £." In my opinion, there is nothing in the language of the gift itself, nor in any other part of the will, to justify an inference that the testator, in using the words "clear of . . . income tax" meant "income tax at the standard rate." I am accordingly of opinion that the principle of *Re Pettit* (2) applies to the present case, and that the annuitants cannot retain for themselves the whole of the proportion (referable to the annuities) of the reliefs and allowances to which from time to time they become entitled.

The question then is: how should such proportion be dealt with? The allowance to an annuitant by the Revenue of relief and repayments postulates that, in the first instance, too much tax had been paid in respect of her annuity and of her other income (if any). Of the tax so paid in respect of the annuity and on the footing of a standard rate of income tax of 10s. in the £, 9/20ths will have been borne by the annuitant by deduction from her annuity, and 11/20ths will have been borne by the estate. In my judgment, any sums received from the Revenue by way of repayment of tax attributable to the annuity must go in relief of the burden in the same proportion as it was originally borne, with the result that (at the existing standard rate) 9/20ths will belong to the annuitant and 11/20ths must be repaid to the estate. I can see no reason for departing from the equality of treatment that will be thus achieved, or for giving to the annuitants a higher proportion of the sums received than the proportion of the burden which they bore in the first instance.

With regard to the second question raised by the summons, I propose to declare that, for the purposes of question 1, the said reliefs and allowances include the amounts ascertained and recorded under the Finance Act, 1941, s. 7 (1). This view accords with that taken by EVERSHERD, J., in *Re Tatham* (1), with which I respectfully agree.

The costs of all parties will be taxed as between solicitor and client and paid out of the estate.

Declaration accordingly.

Solicitors: *Theodore Goddard & Co.* (for the trustees, two of the annuitants and the residuary legatees); *Marcy, Russell Cook & Co.* (for one of the annuitants); *C. W. Emptage* (for the infants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

MEHTA (otherwise KOHN) v. MEHTA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 31, 1945.]

Divorce—Nullity—Petitioner agreeing to be converted to Hindu faith—Ceremony of conversion conducted in Hindustani and in presence of respondent—Conversion ceremony also marriage ceremony—Marriage ceremony a nullity.

Divorce—Jurisdiction—Petitioner wife domiciled in England—Hindu husband—Marriage in India according to rites of Arya Samaj sect—Marriage monogamous in its inception—Hindu husband if becoming orthodox Hindu free to marry second wife—Possibility of husband's subsequent polygamous marriage no bar to relief sought under matrimonial law of England.

The petitioner, who was at all material times domiciled in England, went through a ceremony of marriage in Bombay with the respondent, an Indian. The ceremony was conducted in Hindustani, a language which the petitioner did not understand, and, although it was witnessed by the respondent and some friends, the petitioner thought at the time that the ceremony was for the purpose of her conversion to the Hindu faith only, to which she had previously agreed. After the ceremony the petitioner was informed that she had not only been converted to the Hindu faith, but that she had at the same time, been married to the

respondent according to the rites of a Hindu sect known as the Arya Samaj. It was found that a marriage thus contracted was monogamous in character ; but that after such a marriage a Hindu husband could reject the Arya Samaj faith and become an orthodox Hindu in which case he would be free to marry a second wife. The petitioner asked to have her marriage declared null and void on the ground that she had no intention of marrying the respondent and had been quite unaware that the ceremony of conversion to the Hindu faith was, at the same time, a marriage ceremony. The questions for the determination of the court were : (i) whether the marriage was monogamous, in the Christian sense of the term, so as to entitle the petitioner to the remedies, adjudication, or the relief of the matrimonial law of England ; (ii) if so, whether the marriage ceremony in the circumstances was null and void :—

HELD : (i) since the marriage was clearly monogamous in its inception and came, therefore, within the Christian sense of the term "marriage," the court could adjudicate upon the marriage, enforce rights thereunder and grant relief, notwithstanding the possibility that the respondent, by becoming an orthodox Hindu, could marry a second wife and so convert his monogamous marriage into a polygamous one.

Nachimson v. Nachimson (3) applied.

(ii) on the evidence here, the petitioner had no intention to marry the respondent. The ceremony of marriage the parties went through was a fraud perpetrated upon the petitioner, who was, therefore, entitled to a decree *nisi* of nullity.

Qu. : whether the court has jurisdiction to entertain proceedings for nullity of a marriage which is not a marriage in the Christian sense of the term.

[EDITORIAL NOTE.] This is an interesting case on the construction of the words "for life" in LORD PENZANCE's definition of marriage as understood in Christendom. It was held in *Nachimson v. Nachimson* (3) that a marriage is none the less "for life," within the definition, because the law of the country in which it is entered upon provides machinery for dissolution. It is now held that the possibility of one party entering a different religious faith which permits polygamy equally does not take the marriage out of the definition. The only requisite is that the marriage should be monogamous in its inception. In *Baindail v. Baindail* ([1945] 2 All E.R. 374) the marriage was celebrated according to Hindu rites, and, although the husband had then only one wife, it was nevertheless held to be potentially polygamous. Here the marriage was according to the rites of a Hindu sect practising monogamy and it is held to be monogamous in its inception, notwithstanding expert evidence of the possibility that the husband, by becoming an orthodox Hindu, might marry a second wife.

As the marriage is held to be one which the court can recognise, it becomes unnecessary to decide whether proceedings for nullity are included in the "remedies of the matrimonial law of England" to which the parties to a non-Christian marriage are disentitled, according to the *dictum* of LORD PENZANCE in *Hyde v. Hyde* (1), and this question remains for future determination.

AS TO NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 639, 640, paras. 934-936 ; and FOR CASES, see DIGEST, Vol. 27, p. 39, Nos. 155-160.

AS TO MARRIAGES RECOGNISED BY ENGLISH LAW, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-285, para. 340 ; and FOR CASES, see DIGEST, Vol. 11, pp. 413-415.] Cases referred to :

* (1) *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 ; 11 Digest 413, 800 ; 35 L.J.P. & M. 57 ; 14 L.T. 188.

(2) *Sinha (Peerage) Case* (1939), 171 Lords Journal 350.

* (3) *Nachimson v. Nachimson*, [1930] P. 217 ; Digest Supp. ; 99 L.J.P. 104 ; 143 L.T. 254.

PETITION for nullity on the ground that the petitioner went through a ceremony of marriage, which was induced by a fraud perpetrated upon her by the respondent, while the parties were in India. The facts are fully set out in the judgment.

Noel Middleton, K.C., and H. J. Astell Burt for the petitioner.

BARNARD, J. : In this case, Marjorie Phyllis Irene Mehta (otherwise Kohn) is seeking a decree of nullity in this court, and the respondent, who is Ravindra Maganlal Mehta, has not appeared to her petition. She is asking the court to declare null and void a ceremony of marriage which she went through with the respondent on Feb. 15, 1940, according to Vedic rites, at Arya Samaj Lane, Girgaum Back Road, Bombay, India.

The facts of this case are quite clear, and I have no doubt that the petitioner has told me a perfectly true story. She at all times has been domiciled in England, and apparently she was earning her living as a teacher in London in Sept., 1938, when she met the man who became her husband, he being an Indian at all material times domiciled in India, who was merely in this country for the purpose of studying. In that way they met and apparently they became fond of one another, and there was some talk between them of marriage. But the great obstacle, from the respondent's point of view, was the objection that his parents would be bound to raise as to his marrying—I do not know which they considered it—a Christian or a white woman. A

In due course the respondent returned to India and shortly afterwards the petitioner went out to India with one Sprinz, who was a friend of the parties. She arrived in India just after war had been declared,*and there was a series of meetings between her and the respondent. I am quite satisfied that the respondent was an extremely worried man. He wanted to marry her, but he was afraid of doing so because of the antipathy of his parents to such a marriage. Early in 1940, the respondent suggested that this difficulty might be got over if she became converted to the Hindu religion. At any rate, he thought that that was worth trying in order to placate his parents. The petitioner has told me that she was willing to become a Hindu by religion and that she agreed to become converted to that faith. There was some conversation about this matter, in which the respondent said that this conversion ceremony would take place in a chapel; and apparently for five days before the conversion ceremony the petitioner and the respondent lived together at a hotel in Bombay. On Feb. 15, 1940, as we now know, not only was she converted to the Hindu faith, but she was, at one and the same time, married to the respondent according to the rites of a Hindu sect known as the Arya Samaj. B C

I am not going over all the details of the evidence. The petitioner has given me an account of the ceremony she went through, at which Sprinz, an Indian called Bhatt, and a priest were present. I have read the evidence of Sprinz, which was taken before a commissioner, and I have heard the account of the ceremony from the petitioner herself. During the ceremony both the petitioner and Sprinz were made to repeat certain Hindustani words which neither of them understood. D

The petitioner tells me that, from beginning to end, she thought that she was merely being converted to the Hindu faith; and it was only after the ceremony was over, when Sprinz signed, as a witness, a document which was headed in English "Certificate of Marriage," that he was, as he has told me in his evidence, intensely surprised, and for the moment he thought that possibly the petitioner was deceiving him about the ceremony in which he had been asked to take a part. But he also tells me that, when later he took this document and showed it to the petitioner, she was just as surprised as he was to find that she had gone through an apparently valid ceremony of marriage with the respondent. E F

I have also heard the evidence of SIR ALFRED WORT, who was for some fourteen years a judge of the High Court in British India, and I am quite satisfied, from his evidence, that this ceremony which the petitioner went through with the respondent was a valid marriage according to the law of British India. [I am equally satisfied, from the evidence, that the petitioner never had any intention to contract a valid marriage at the time.] G

Those shortly are the facts. But the case does raise certain difficulties, including the question of jurisdiction. I am not in the least troubled by the fact that this marriage took place outside the jurisdiction of this court; nor am I troubled by the fact that the respondent was at all times domiciled in India. As the law now stands, and as it really always has stood, I think the fact that the petitioner was at all material times domiciled in England gives this court jurisdiction to deal, so far as nullity is concerned, with the marriage she went through with the respondent. But the real difficulty is twofold. First of all, is this a marriage in the Christian sense of the term "marriage"? If it is, then the second difficulty does not arise; but if it is not a marriage in the Christian sense, then can this court, now that its matrimonial jurisdiction is invoked, grant any relief with regard to it? H

Counsel for the petitioner in dealing with that second point, has sought to persuade me that, where a mere declaration that a marriage is null and void

is asked for, it does not come within the limitations imposed by LORD PENZANCE in *Hyde v. Hyde and Woodmansee* (1). In that case LORD PENZANCE, who was being asked by a husband petitioner to dissolve his Mormon marriage on the ground of his wife's adultery, said this (L.R. 1 P. & D. 130, at p. 138) :

All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

- A I find it a little difficult to accede to the argument of counsel for the petitioner that seeking a decree of nullity is not asking for "the relief of the matrimonial law of England," because, quite apart from the relief, if you can call it relief, which this court would of necessity grant in this case if the petitioner succeeded, other consequences might follow. There might be questions of maintenance. There are no children in this case, but there might have been a child or children, and questions of custody might arise ; and I am not at all satisfied that a petition for nullity comes outside what LORD PENZANCE has so clearly indicated. I do not intend to say anything more than I have said with regard to that difficulty; because, as regards the first difficulty, whether this court can recognise this marriage as a marriage in a Christian sense, I feel quite clear.

- This ceremony of marriage was not a marriage according to the orthodox Hindu faith. It was a ceremony of marriage according to the creed of the Arya Samaj sect, which sect is, except for fine distinctions, similar to the Brahma Samaj sect—with which this court has quite recently dealt—and one tenet of their faith they have in common, and that is that a marriage contracted according to that faith must be monogamous. We know that even an orthodox Hindu marriage, which would be polygamous in its inception, can be converted—provided the husband has not married more than one wife in the interval—into a Brahma Samaj marriage and become monogamous, as happened in the *Sinha Peerage Claim* (2). But SIR ALFRED WORT has told me that, in his opinion—he only gave this as his opinion ; it had not been anywhere decided—a husband who had married a woman according to this faith could reject that faith, become an orthodox Hindu and marry a second wife.

- Does that possibility exclude this marriage from being a marriage in the Christian sense and one which this court can adjudicate upon in its matrimonial jurisdiction ? I feel satisfied that all I have to do is to look at the inception of the marriage. It is perfectly clear that this marriage was monogamous in its inception and that monogamy was the essence of the contract into which these two parties entered ; and I do not think that this court can look beyond that. It may well be that such a marriage, according to the laws of different countries, can be either got rid of or altered in accordance with those laws ; all this court must consider is the marriage contract in its inception ; and I am fortified in that view by what ROMER, L.J., said in *Nachimson v. Nachimson* (3) when he was dealing with the description of marriage given in *Hyde v. Hyde and Woodmansee* (1), where LORD PENZANCE had said this (L.R. 1 P. & D. 130, at p. 133) ;

I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

- G Commenting on this ROMER, L.J., says ([1930] P. 217, at p. 238) :

The only words in this definition that create any difficulty are the words "for life." LORD PENZANCE's judgment was given in the year 1866, at a time, therefore, when the Matrimonial Causes Act of 1857 had been in operation for several years, and at a time when in most Christian countries a marriage could be dissolved for various causes. It seems clear, therefore, that in deciding whether any particular union of one man and one woman is for life, the fact that the union is made dissoluble in certain events by the laws of the country where it is entered upon must be disregarded . . .

- H And in that particular case, apparently, the marriage being a Russian marriage, it could be dissolved by either party going to some office and signing a book.

I do not think I can draw any distinction between that case and the present, although in the present case it is not a question of divorce. Here, by the law of the respondent's country—this is not by any means clear : it is merely SIR ALFRED WORT's opinion, which I am assuming for the moment is right—be

could alter his faith and, having altered his faith, then marry a second wife and so convert his monogamous marriage into a polygamous marriage. As I have already said, I do not think that ought to weigh with me at all. All I have to look at is the marriage in its inception, which was quite clearly monogamous. If this marriage is a monogamous marriage, and one which comes within LORD PENZANCE's description of marriage, I think that, whether counsel for the petitioner is right or wrong on his second point about nullity, this court can quite clearly adjudicate upon the marriage, can enforce rights under it, and grant relief. A

Therefore, accepting the petitioner's evidence in its entirety, corroborated as it is by the evidence of two witnesses, I am quite satisfied that she never had any intention to marry this man, that the ceremony she went through was merely a fraud perpetrated upon her by the respondent, and that, therefore, she is entitled to a decree *nisi* of nullity. B

Degree nisi granted.

Solicitors: *Franks, Charlesly & Co.* (for the petitioner).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

ATHEL LINE, LTD. v. THE LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD. C

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Tucker, L.JJ.), November 8, 9, 1945.]

Insurance—Marine insurance—War risks—Warlike operation—Ship stranded while anchored according to instructions from naval authorities before discharging cargo—"Proceeding through the water"—Damage consequence of warlike operations. D

A ship requisitioned by the Government was insured by the appellants against the consequences of hostilities by or against the King's enemies. On Oct. 19, 1940, she left Trinidad in the West Indies with a full cargo of fuel oil on a voyage towards the naval bases of Lochalsh and Scapa Flow for the purpose of there discharging her cargo in accordance with the time charterer's orders. On Nov. 26, 1940, the ship arrived off the base at Lochalsh and anchored according to instructions from the naval authorities. On Nov. 27, 1940, it was noticed that the ship was listing. It was also discovered by soundings that the ship had grounded and was fast on a rock. Subsequently the ship was floated; her oil cargo was emptied and she was ordered for repairs. Though it was admitted that the vessel was engaged on a warlike operation when on the actual voyage from point to point, it was contended on behalf of the appellants (i) that the vessel, while riding at anchor, was not so engaged since one of the essential elements in constituting a warlike operation was "proceeding through the water"; (ii) that the injury was caused by a marine risk, namely a strong wind and a fall in the tide:— E

HELD: (i) the anchoring of the vessel was, in the circumstances, an essential part of the operation on which she was engaged, namely, the conveyance of war stores from one base to another. The warlike nature of the vessel's occupation did, therefore, not cease at the time the injury was sustained. F

(ii) the injury suffered was a direct consequence of the warlike operation of the vessel. G

Decision of ATKINSON, J. ([1945] 2 All E.R. 252) affirmed. H

[EDITORIAL NOTE. The main point of interest in this appeal is the argument raised that a vessel is not on a warlike operation if at the moment when injury is caused she is at anchor, and therefore not "proceeding through the water." The court rejects this distinction, holding that the phrase as used in the earlier cases is not part of the *ratio decidendi*, but a mere reference to what happened to be the facts in those cases, for it is the "general voyage from point to point that constitutes the warlike operation."

AS TO WARLIKE OPERATIONS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 316-318, paras. 441, 442; and FOR CASES, see DIGEST, Vol. 29, pp. 229, 230, Nos. 1854-1861.]

Cases referred to :

* (1) *Larrinaga Steamship Co., Ltd. v. R.*, [1945] 1 All E.R. 329; [1945] A.C. 246; 114 L.J.K.B. 129; 172 L.T. 177; 78 Ll.L.Rep. 167.

* (2) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport, The Corwood*, [1942] 2 All E.R. 6; [1942] A.C. 691; 111 L.J.K.B. 512; 167 L.T. 349.

APPEAL by the insurers, the Liverpool and London War Risks Insurance Association, Ltd., who were the respondents in an arbitration between them and the owners of the motor vessel "Atheltempar," from a decision of ATKINSON, J., dated May 17, 1945, and reported ([1945] 2 All E.R. 252), where the facts are fully set out.

Sir Robert Aske, K.C., and *Patrick Devlin, K.C.*, for the appellants.

H. G. Willmer, K.C., and *A. J. Hodgson* for the respondents.

LORD GREENE, M.R. : The subject-matter of this controversy is one which has been obscured in the past by a good many difficulties, but in my opinion the answer in this case is perfectly simple. The question which we have to decide turns upon the true meaning of those much debated words in a policy of war risk insurance which are expressed to cover the consequences of hostilities or warlike operations by or against the King's enemies. The vessel in this case was unquestionably engaged in a warlike operation in that she was carrying war stores from one base to another base. She was proceeding with a cargo of petrol from Trinidad, I think it was, to Lochalsh, and ultimately to Scapa Flow. That that voyage was a warlike operation is not disputed, but the moment of time at which she encountered the particular peril now in question was a moment of time at which she was riding at anchor. She had arrived at Lochalsh, which was used at the time as a naval harbour—it was an unusual type of anchorage—and, after one unsuccessful attempt to find holding ground, under naval orders, she dropped her anchor in a place where the anchor held. Some time before the actual injury took place the anchor cable was shortened by a considerable length and there was a strong wind which happened to change before the injury took place. In those circumstances, as the tide fell, her hull descended upon a rock, and that was how the injury came about.

The two questions which fall for consideration are these : (i), was the vessel, at the moment when she suffered that injury, engaged in a warlike operation ; (ii) if she was so engaged, or even if she was not so engaged, was the injury that she suffered a consequence of a warlike operation.

The first question is, I apprehend, a mixed question of law and fact as I have stated it. The facts, of course, are found. The question we have to decide is whether the facts as found by the arbitrator support his opinion that a warlike operation was in progress at the moment that the injury took place. I should have no hesitation in answering that question in the affirmative, and I cannot myself see how, on the facts as found by him, he could have come to any other conclusion. The only ground put forward in support of the view that at this particular moment the vessel was not engaged on a warlike operation is the circumstance that she was not moving through the water but was riding at anchor at that time. It is said that that is the crucial test in these cases, and it is said that test has been laid down in the House of Lords as the appropriate test.

There are two things, it seems to me, to be borne in mind, two distinctions which must always be remembered. One is the distinction between the two questions, was a warlike operation in progress and was the injury a consequence of a warlike operation—two quite separate questions—and the other distinction in considering these cases is, I venture to think, the distinction to be drawn between the case where a vessel engaged on an ordinary mercantile voyage suffers a casualty and the case where a vessel engaged on a voyage which in itself is a warlike operation, such as the present case, suffers a casualty.

In the former case something more than the mere character of the voyage is necessary to bring into existence a warlike operation, and that, in ordinary cases, I apprehend, would consist of some manoeuvre that the vessel in question carries out or some impact upon the vessel through some outside source. It requires something more than the mere voyage to bring into existence a warlike operation ; and if a vessel engaged on an ordinary mercantile voyage takes evasive action, for instance, to avoid a submarine and thereby runs on a rock, it may very well be that the mere taking of that evasive action in the circumstances

converts the situation into one of a warlike operation which it was not before. Similarly, if the vessel is hit by a torpedo from a submarine, that does not make her engaged in a warlike operation, but the injury to her would be, I apprehend, the consequence of a warlike operation. But, when the voyage itself is a warlike operation, the importance of a manoeuvre by the vessel to bring about a warlike operation largely disappears.

The anchoring of this vessel at that point in those circumstances at that time was an essential part of the operation on which she was engaged, namely, the conveyance of war stores from one base to another base. It was impossible for her to discharge her cargo at Lochalsh the moment she arrived, and she was bound to anchor as a necessary step in fulfilling her ultimate object, namely, the discharging of her cargo. It seems to me to violate all one's conceptions of common sense to say that the warlike nature of her occupation ceased when she dropped her anchor and was only resumed when she pulled it up again. The riding at anchor, when she did ride at anchor, was an essential part of the carrying out of the object of her voyage. It seems to me to be completely artificial to treat that period of time when she was riding at anchor as something which can be severed from the totality of the operation which began when the vessel was loaded with petrol at Trinidad and ended when she finally discharged it.

I am of opinion, therefore, that that argument fails, but I must say something about the way in which the authorities were presented to us and the arguments based upon them. The high water mark, I think, of the proposition that, in such a case as this, where the voyage is a warlike operation, there must be, at the moment of injury, some movement of the vessel through the water, is to be found in the words of LORD PORTER in the recent case of *Larrinaga Steamship Co., Ltd. v. R.* (1) in which he sums up ([1945] 1 All E.R. 329, at p. 334) what he considers to be the result of some of the earlier authorities :

There is abundance of authority in your Lordships' House that a ship engaged in carrying war stores from one war base to another, or, indeed, in carrying war stores to a war base, is engaged on the warlike operation of proceeding through the water to her appointed discharging port.

We find in earlier cases, where the vessel was in fact proceeding through the water at the relevant time, the same references to "proceeding through the water." Those references, I apprehend, arose from the fact that that happened to be the fact in those particular cases. I cannot read those passages as in any way laying down a proposition which was not under discussion at all, namely, that, if the vessel has halted—whether because she has stopped her engines and come to rest or because she has cast anchor in addition—that circumstance is really the crucial matter of distinction. LORD PORTER, when he used that expression, was only engaged in summarising the effect of what had gone before in cases where, as I say, the vessel was in fact moving through the water ; and I venture to think that VISCOUNT SIMON, L.C., and LORD WRIGHT, who had preceded him, and LORD PORTER himself, would have been surprised to find that in that phrase he was for the first time laying down some fundamental criterion of distinction in these cases, namely, that movement through the water is an essential element in constituting a warlike operation. All that he meant there is that the warlike operation was proceeding from point to point. It is the general voyage from point to point that constitutes the warlike operation. I find myself quite unable to accept the view that any such criterion has been laid down and, speaking for myself, it is one which does not in any way appeal to whatever common sense I may happen to possess.

The other question is the question of consequence. The legal theory of causation has, in the course of years, had a remarkable history, but the point at the moment at which it appears to have come to rest is that which lays it down that this type of question of causation is really a matter for the ordinary common sense and intelligence of the ordinary man ; and in any individual case, in a case where a tribunal of fact such as an arbitrator or a jury has found without misdirection in law that A. is the consequence of B., the question then apparently is—the only question that an appellate tribunal can consider—whether the facts as found are sufficient in law to justify a finding that the one is the consequence of the other.

In so far as it is for me to express my own opinion on the present case, I should have felt not the slightest difficulty in coming to the conclusion—and, indeed, I should have felt myself forced to come to the conclusion—that the injury that took place was a consequence of the warlike operation. That is on the footing that my view is right as to the existence of the warlike operation at the precise moment when the injury took place. That was the view of the arbitrator, it was the view of ATKINSON, J., and in my opinion the facts not only are

A sufficient to support that view but really prevent one from drawing any other conclusion. But it is perhaps desirable also to add this: that, even if the suggested criterion of movement through the water was correct—that at the precise moment when this vessel, riding, as she was, at anchor, suffered injury, she was not engaged on a warlike operation—even if that view were correct, I should still be of opinion that the injury that she suffered was a consequence of her warlike operation, which, on that hypothesis, ended or rather was temporarily suspended at the moment when she cast anchor. Down to the point

B when she cast anchor she was unquestionably engaged in a warlike operation. The casting of the anchor and coming to rest at that point, which turned out to be a point of concealed danger, were, it seems to me, down to that moment on any view a warlike operation. If the point at which she came to rest in execution of the operation happened to be one of concealed danger, the fact that

C that danger only materialised after several hours would not, in my view, make the injury any the less a consequence of the previous act of the vessel in coming up to that point and casting anchor there.

That seems to me to be a perfectly clear conclusion, and in my opinion this appeal fails and must be dismissed with costs.

D MACKINNON, L.J.: If I were free to consider this case as the first one that had ever arisen upon the construction of these words, I should have agreed with the appellants' proposition that this damage would be recoverable against an underwriter as a loss by perils of the sea and that the underwriter could not escape liability by reliance on the clause "free from the consequences of a warlike operation." I should have held that the vessel was engaged in a warlike operation, but that the damage to her by perils of the sea, while she was so engaged, was not a consequence of the warlike operation. I should so have held for

E the reasons that I tried to state in the *Yorkshire Dale* case (2). The House of Lords has made me realise that I was wrong in that view, and, therefore, as I was wrong, and as the House of Lords held that the underwriter, faced with the claim, could successfully plead that that damage to the "Coxwold" was the consequence of a warlike operation, it seems to me to follow that in the present case the underwriter must be entitled to say that the damage to the "Atheltemplar" was the consequence of a warlike operation. As far as I can formulate any principle for the decision in the *Yorkshire Dale* case (2), I think that

F principle must result in the same decision in the case of this ship, the "Atheltemplar," and I, therefore, agree that the appeal must be dismissed.

TUCKER, L.J.: I agree and have nothing to add.

Appeal dismissed with costs.

G Solicitors: *Thomas Cooper & Co.* (for the appellants); *Hill, Dickinson & Co.* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ANDREWS v. HOME FLATS LTD.

[COURT OF APPEAL (Scott and MacKinnon, L.J.J., and Uthwatt, J.),
October 24, 1945.]

Bailment—Service flats—Cabin trunk deposited in general baggage room—Trunk property of tenant's wife—No charge made for storage—No receipt given for deposit—Landlord's liability limited by terms of tenancy agreement—Loss of trunk due to landlord's negligence—Failure to provide a system of control preventing loss.

The respondent was the wife of a tenant living in one of a block of flats owned by the appellant company. A baggage room was provided for the use of tenants living in the flats. In 1942 the respondent's cabin trunk was taken to the baggage room for storage by the servants of the appellant company. No specific charge was made for the use of the room nor was any receipt or ticket given to the respondent for the deposit of her trunk. Under the tenancy agreement between the respondent's husband and the appellant company, there were incorporated certain "conditions of letting" of which condition No. 4 (d) was as follows: "The landlord will use his best endeavours to engage only competent and responsible staff in and about the building but shall be under no responsibility for the acts or defaults of any person employed by the landlord, whether working on the general business of the landlord or rendering services to the tenant either under this agreement or under any other agreement or arrangement between the landlord and tenant or for the loss, delay or non-delivery of any letters, parcels, articles or messages entrusted to the landlord or the staff by or for the tenants." When the trunk was required by the respondent in 1944 it could not be found anywhere in the baggage room. The respondent brought an action in the county court and was awarded damages. On appeal it was contended for the appellants that (i) the cabin trunk was an "article" within the meaning of condition No. 4 (d); (ii) as the respondent was not a tenant, and as no charge was made for the deposit of the trunk, the bailment was gratuitous; (iii) reasonable care was exercised in regard to the custody of the cabin trunk:—

HELD: (i) on a proper construction of the "conditions of letting" the trunk in question was not an "article" entrusted to the landlord or his staff; nor did the "conditions" apply to long term deposits of luggage in the baggage room.

(ii) the appellant company were bailees for reward in respect of such goods belonging to members of a tenant's family which were deposited in their baggage room.

(iii) on the facts the county court judge was right in holding that the appellant company was guilty of negligence in that no system was provided to prevent the possibility of goods deposited in the baggage room being given to the wrong persons.

[EDITORIAL NOTE.] This case is of considerable importance to landlords of service flats. The main point decided, on which there appears to be no previous authority, is that the deposit of baggage for safe custody with the landlord by the tenant's family (and possibly even guests) is within the relationship of landlord and tenant, so as to make it a bailment for reward. The landlord being, therefore, bound to exercise reasonable care in respect of the goods deposited, it is held on the facts that the failure to have in operation an efficient ticket system is a breach of such duty.

AS TO OBLIGATIONS OF A BAILEE, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 748-752, paras. 1232-1236; and FOR CASES, see DIGEST, Vol. 3, pp. 99, 100, 105, 106, Nos. 275-280, 307-313.]

APPEAL by the defendant company from a decision of His Honour JUDGE HARGREAVES, sitting at the West London County Court, in an action brought against them as the landlords for the recovery of the value of a cabin trunk deposited in the baggage room of a block of service flats by the wife of a tenant. The material facts and arguments are fully set out in the judgment of SCOTT, L.J.

Tristram Beresford, K.C., and *S. N. Bernstein* for the appellants.

A. E. Holdsworth for the respondent.

SCOTT, L.J.: This is a claim by the wife of the tenant of one of a block of flats, to recover damages for the loss of her cabin trunk which had been

deposited with the appellant company, the owners of the flats who had let the flat to her husband. The judge who tried the case in the court below came to the conclusion that the appellants had not exercised reasonable care to prevent the trunk being lost and gave judgment for the respondent. That was substantially an issue of fact but the appellants in this court raise a question as to whether the judge had any evidence to justify that decision. Two other questions of law have been raised here, and I assume that they were before the judge. I state them very shortly. In the tenancy agreement between the respondent's husband and the appellant company there was a provision that the landlord and tenant agreed to observe certain "Conditions of Letting" attached to the agreement of tenancy and deemed to be incorporated therein; and also a provision that the tenant should observe the "regulations" which should from time to time be made by the landlord for the proper administration of the building. Copies of the "conditions" and of the regulations were initially by the tenant to identify them. The only condition to which I need refer is No. 4 (d), which ran as follows:

The landlord will use his best endeavours to engage only competent and responsible staff in and about the building but shall be under no responsibility for the acts or defaults of any person employed by the landlord, whether working on the general business of the landlord or rendering services to the tenant either under this agreement or under any other agreement or arrangement between the landlord and tenant or, [and these are the material words] for the loss, delay or non-delivery of any letters, parcels, articles or messages entrusted to the landlord or the staff by or for the tenants.

It is contended by the appellants that the cabin trunk was an "article" within the meaning of that clause. In my view, that clause has no concern with what I may call long term or semi-permanent deposits of luggage in a baggage room, maintained for the convenience of all tenants of the various flats, to enable them to keep bulky things in it for a considerable period of time. In the present case the baggage room was under the porter's office. That condition is addressed to purely temporary things; parcels delivered by tradespeople, letters left by hand, telephone messages, and so on, to various members of the staff: it has nothing to say as to the proper care of baggage deposited in the care of the porter in the baggage room.

A second question of law has been argued, namely, whether the respondent, not being the tenant, is entitled to say that the appellant company were bailees for reward. It is true that the rent was paid by the respondent's husband, and not by the respondent, who made no payment specifically to the company for taking care of her cabin trunk during the time that it was entrusted to them in their baggage room. But in my view, we must treat the relationship between the landlords and at least the families of tenants of their flats, if not also guests, who deposit their belongings in the permanent baggage room as falling within the doctrine of a business arrangement rather than as being a merely gratuitous bailment. I do not think there is any authority on the point but for practical purposes any other view of the relationship between the landlord of a block of flats and the family, at any rate, of tenants would be so contrary to common sense that one ought to regard the law about bailment for reward as sufficiently satisfied by such a relationship as existed between the tenant's wife on the one hand and the landlord on the other in the present case.

There remains the other question, which is essentially, in my opinion, a question of fact: Did the appellants in this case exercise reasonable care in regard to the custody of this cabin trunk? The judge considered the evidence in detail and he came to the conclusion that they did not. I am satisfied that he was right, and, broadly, on this ground. The appellants had no ticket system by which on each deposit into the baggage room a receipt would be given to the depositor, so that when an article from the baggage room was allowed to be taken out either the original ticket or some other written evidence would be produced to the appellants' servant showing that the individual person getting that particular item of baggage was entitled to have it. In the absence of that system, in my view, the appellants took a chance of their porters being able to watch and control the contents of the room. That the porters did not do it successfully in this case is clear. The trunk was lost. Nobody knew how or when it left the baggage room; and how little they knew and how little system they had is shown by the fact that when the respondent asked for her cabin

trunk to be produced (it being a large trunk, high, wide and long) the porter produced a suit case—utterly different. It is clear that nobody knew where they were. In my view, the judgment of the judge that there was want of reasonable care is absolutely unimpeachable. The appeal must be dismissed with costs.

MACKINNON, L.J. : I agree.

UTHWATT, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Theodore Goddard & Co.* (for the appellants) ; *Payne & Co.* (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

FENSTON v. FENSTON.

[COURT OF APPEAL (Lord Greene, M.R., du Parcq and Morton, L.JJ.),
October 12, 22, November 13, 1945.]

Divorce—Procedure—Costs of incidental proceedings after decree—Decree nisi against respondent wife—Co-respondent to pay “costs incurred and to be incurred on behalf of petitioner”—Summons by respondent wife after decree absolute for leave to take infant son out of jurisdiction of court—Summons of petitioner for custody of son—Co-respondent not party to either summons—Jurisdiction of court to award costs against co-respondent in proceedings to which he is not a party—Matrimonial Causes Rules, 1944 (S.R. & O., 1944, No. 389), r. 33.

The husband was granted a decree *nisi*, the co-respondent, who had duly appeared to the petition, being ordered to pay the “costs incurred and to be incurred on behalf of the said petitioner in this cause.” Custody of an infant son of the marriage was given to the wife. After the decree was made absolute, the wife married the co-respondent and asked for leave to take the child out of the jurisdiction of the court. The husband opposed the application and took out a summons asking for custody of the child to be given to him. The co-respondent, who had filed an affidavit in support of the wife’s application, was not a party to either summons. The judge granted the wife’s application and made no order on the husband’s summons : as regards costs he directed, in accordance with the practice of the Divorce Division, that the costs of the wife’s application should be costs in the cause. This had the effect that such costs became payable by the co-respondent. On the husband’s appeal, the order whereby leave was granted to the wife to take the child out of the jurisdiction was set aside and he was given custody of the child. The husband then asked that the costs of the summons for custody should be made costs in the cause and that the co-respondent, although not a party to the appeal, should be ordered to pay the costs of the appeal. Notice of intention to ask the court for such costs against the co-respondent was served, by the husband, on the co-respondent’s solicitors. The question at issue was, therefore, whether the court could properly make such order the effect of which would be to impose a liability on the co-respondent for costs of proceedings to which he was not a party and in which he was not before the court :—

HELD : (i) an order, contained in a decree *nisi*, as to “costs to be incurred” must be construed as covering by its own force such future costs only as the court might consider to be fairly payable by the co-respondent ; such costs might, accordingly, be directed to be costs in the cause.

(ii) the Matrimonial Causes Rules, 1944, r. 33, which provided that a co-respondent who had entered an appearance might be heard on questions of costs referred not only to costs of the petition itself but also to costs of all applications subsequent to the decree. This right to be heard was, however, not conferred upon a co-respondent who had not entered an appearance.

(iii) on the facts here, the co-respondent, who had entered an appearance, was aware of the summonses taken out by both wife and husband, the necessity of the husband’s application arising from the facts disclosed in the

co-respondent's affidavit in support of the wife's summons. Both applications were, as regards costs, to be treated on the same footing and the co-respondent must, in the circumstances, pay the costs of each summons and the costs of the appeal.

Per cur. : provision should be made, if necessary by rule, that any party to an application intending to ask for an order for costs against a co-respondent should give him due notice to that effect; alternatively, in any order for costs made against a co-respondent he should be given the right to apply to discharge it within a limited period after it was served upon him. This protection should, in either case, not be limited to the case of a co-respondent who had entered an appearance.

[EDITORIAL NOTE.] The common form order as to costs in a decree *nisi* condemns the co-respondent in the "costs incurred and to be incurred on behalf of the said petitioner in this cause." The MASTER OF THE ROLLS holds that this is misleading, since it tends to obscure the fact that before future costs can be thrown upon a co-respondent there must be a further order making these "costs in the cause." He accordingly suggests that the order should be amended to read "costs incurred on behalf of the said petitioner in this cause and such further costs to be incurred on behalf of the petitioner as the court shall direct to be costs in the cause." The court has a discretion to award such costs against the co-respondent where it appears just to do so, but as this question ought not to be decided unless the co-respondent has had an opportunity of putting his case to the court, the MASTER OF THE ROLLS suggests the desirability of providing machinery, which does not at present exist, for giving notice of intention to ask for an order for future costs against a co-respondent irrespective of whether he has entered an appearance so as to entitle him to be heard on costs under the Matrimonial Causes Rules, 1944, r. 33.

AS TO ORDERS FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 758-767, paras. 1197-1209; and FOR CASES, see DIGEST, Vol. 27, pp. 532, 538, Nos. 5770, 5856-5858.]

Cases referred to :

- * (1) *Gill v. Gill and Hogg* (1863), 3 Sw. & Tr. 359; 27 Digest 532, 5770; 33 L.J.P.M. & A. 43; 10 L.T. 137.
- * (2) *Stone v. Stone and Brownrigg* (1864), 3 Sw. & Tr. 372; 27 Digest 516, 5551; 33 L.J.P.M. & A. 95; 10 L.T. 140.
- * (3) *Smithe v. Smithe and Roupell* (1868), L.R. 1 P. & D. 587; 27 Digest 530, 5739.
- * (4) *Irwin v. Irwin and Layard* (1890), 59 L.J.P. 53; 27 Digest 538, 5557; 62 L.T. 612.

APPEAL by the petitioner husband from an order of DENNING, J., dated July 22, 1945. By this order leave was granted to the respondent wife to take the infant son of the marriage out of the jurisdiction of the court and it was directed that the costs of the wife's summons should be costs in the cause. On the husband's own summons for custody of the child and on the costs of this summons no order was made. On appeal, the order granting the wife leave to take the child out of the jurisdiction was set aside and custody of the child was given to the husband. The petitioner husband then asked that the costs of his summons for custody should be made costs in the cause and that the co-respondent, although not a party to the appeal, should be ordered to pay the costs of the appeal. The facts and arguments are sufficiently set out in the judgment of the court, delivered by LORD GREENE, M.R.

Gilbert Beyfus, K.C., and *C. A. Marshall-Reynolds* for the appellant.

R. F. Levy, K.C., and *William Latey* for the respondent.

Cur. adv. vult.

LORD GREENE, M.R. [delivering the judgment of the court]: After we had delivered judgment allowing the father's appeals against the orders made on the mother's summons for leave to take the infant out of the jurisdiction and on the father's own summons for custody, a question arose as to the proper order to be made in relation to the costs of the two summonses and of the appeal.

DENNING, J., directed that the costs of the mother's summons should be costs in the cause. The effect of this was to make them payable by the co-respondent, who by the language of the decree *nisi* itself was condemned in the "costs incurred and to be incurred on behalf of the said petitioner in this cause." DENNING, J., made no order as to the costs of the father's summons for custody.

Before us, counsel, on behalf of the successful appellant, asked for an order that the costs of the summons for custody (which in the result was successful) should also be made costs in the cause and that the co-respondent should be ordered to pay the costs of the appeal. The co-respondent was not a party to

either summons, nor, of course, was he a respondent to the appeal. But counsel who appeared for the mother, raised, as *amicus curiae*, the question whether it was proper to make any order the effect of which would be to impose a liability for costs on the co-respondent and, as this question appeared to us to be one of substance, we adjourned it to enable counsel for the appellant to argue as to the propriety of the order for which he was asking. At the invitation of the court, counsel who appeared on behalf of the mother was good enough to promise his assistance as *amicus curiae*.

The first matter for consideration is the form of the order as to costs contained in the decree *nisi*, a form which counsel from their researches informed us had been in use for a great number of years and was the form regularly used. It appears that in practice the order as to costs "to be incurred" is interpreted in the Divorce Division, not as covering by its own force all future costs in the proceedings, but as covering only such future costs as the court may consider to be fairly payable by the co-respondent and may accordingly direct to be costs in the cause. Indeed, if the order on its true interpretation went further than this and by its own force imposed a liability for all future costs on the co-respondent it would, in our opinion, be an improper order. Costs are in the discretion of the court and it is not competent to the court to fetter its discretion as to the costs of future applications in the cause the circumstances of which cannot possibly be known to it at the date of the decree *nisi*. Such future applications may relate to a large variety of questions and may take place over long periods of years and the extent to which, if at all, the co-respondent ought to be made liable for the costs of them must in each case depend on the circumstances. In view of the practice thus observed in regard to the meaning of the common form of decree *nisi* the question arises as to the jurisdiction of the judge to order costs of an application made subsequently to the decree to be borne by a co-respondent who is not a party to it and is not before the court. In the present case the co-respondent (who had duly appeared to the petition) obviously knew of these applications in relation to the infant and he took an active part by swearing an affidavit in support of the mother's case. We thought it our duty, however, to satisfy ourselves that the order was in principle one which could properly be made, and this involved an examination of the larger question.

It seemed to us that cases might well occur where the co-respondent would not necessarily have any knowledge of the application and ought not in justice to be ordered to bear the costs or to be ordered to bear them without having an opportunity of being heard and bringing before the court any facts and considerations which might be relevant to the question of costs. The Matrimonial Causes Rules, 1944, r. 33 (1), provides that after entering an appearance a co-respondent may, without filing an answer, be heard in respect of any question as to costs. This language in some sense suggests that the costs referred to are the costs of the petition itself and do not include costs of applications subsequent to decree. But we accept the view supported by both counsel that the words cannot be so restricted but confer a general right to be heard on any question as to costs whenever it may arise. This interpretation appears to us to be confirmed by the reference to questions as to custody or access which follows immediately; since such questions obviously may, and often do, arise subsequent to decree and during a period of years. If this view is right, we start with the proposition that a right to be heard on the question of the costs of an application, whenever the question may arise, is conferred on a co-respondent who has entered an appearance but not upon a co-respondent who has not done so. But the rules do not appear to contain any provision as to notifying the co-respondent that a question of costs which may affect him is to be raised, or otherwise insuring that the right to be heard conferred by r. 33 is made effective. Applications subsequent to decree appear to fall into two classes (a) "applications for ancillary relief" which are defined in r. 3 (2) and are made by notice—this class does not include applications relating to custody or access—(b) other applications which are made by summons under r. 3 (3). The rules do not in terms provide for making a co-respondent party to an application of either class or for serving him with a copy of the notice or summons or otherwise informing him that the application is being made, notwithstanding that in every case he is in peril of having an order for costs made against him, and notwithstanding that, at any rate, if he has entered an appearance, he has, under r. 33,

a right to be heard. So far as we have been informed it is not the practice in the Division to require that the co-respondent should be made a respondent to an application or that any notice should be given to him. It may be that when the rules were framed it was considered that before making an order which would result in the co-respondent being made liable for costs of an application the court would satisfy itself that he was aware of the fact that the application was being made.

- A In the present case DENNING, J., appears to have followed the practice of the Division in ordering the co-respondent to pay the costs of the mother's application. Upon the facts it was clear that the co-respondent was aware of the application and was indeed actively supporting it. We think, therefore, that in view of the present position under the rules his order can be supported. Similarly, the husband's application for custody having succeeded before us, we think that the costs of that application should also be paid by the co-respondent. The necessity for the husband's application arose from the facts disclosed in the evidence filed in support of the mother's application and it is not really possible to disentangle the two applications so as to treat the costs in different ways. The co-respondent must also pay the costs of the appeal. We may remark that during the period of the adjournment the father took the precaution of serving the solicitors for the co-respondent with a notice of his intention to ask for costs against the co-respondent. But although we think that we can, without injustice and in accordance with the rules, as they at present exist, dispose of the question in this actual case, we think it right to call attention to one or two considerations which make the present position, in our view, unsatisfactory.
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- The principle upon which costs of applications subsequent to decree may be awarded against a co-respondent is an intelligible one for, broadly speaking, it is the co-respondent's conduct which has caused such costs to be incurred. But it does not appear to be the practice, nor is it suggested that it should be the practice, to award such costs against the co-respondent in every case. The court exercises its discretion and only awards such costs against the co-respondent where it is satisfied that it is just to do so. But surely the question whether it is just or not ought not to be decided against the co-respondent unless he has a real opportunity of placing the facts before the court and presenting such arguments as he may think appropriate. Otherwise the court may well make its order in ignorance of relevant facts which would have shown that an order for costs against the co-respondent would be unjust. The applications in question which may be made are many and various: in the matter of infants in particular applications may be made year after year. In some cases it may be just to order the co-respondent to pay the costs even after a long time has elapsed since the decree: in others it may be unjust to award costs against him even where a short time has elapsed since decree. Every case must depend on its own facts. R. 33 provides that he shall be entitled to be heard on questions of costs provided he has entered an appearance. It would, in our opinion, be right and convenient that provision should be made, if necessary by rule, for making this right effective, by providing that any party to an application who intends to ask for an order for costs against the co-respondent should give him due notice to that effect or possibly by providing that in any order for costs made against a co-respondent in his absence he should be given the right to apply to discharge it within a limited period after it is served upon him. We see no reason why the right to this measure of protection should be limited to the case of a co-respondent who has entered an appearance.
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- There is a certain amount of authority on the subject. In *Gill v. Gill and Hogg* (1) the costs of the wife of an application by the husband for a variation of a settlement were ordered to be paid by the husband. The co-respondent was no party to this application. When the husband's costs of the petition came to be taxed against the co-respondent, the registrar allowed the husband's costs of the application to vary including the wife's costs which the husband had been ordered to pay. It was held that the registrar had acted rightly and that the co-respondent was liable for these costs. This decision is not really helpful for present purposes since it was only on taxation that these costs were cast upon the co-respondent and on the taxation he naturally appeared and was heard. In *Stone v. Stone and Brownrigg* (2) the costs of a husband's applica-
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tion to vary, in so far as it was successful, were ordered to be paid by the co-respondent who was no party to the application. The question of his right to be heard on the matter of costs was not raised, but, as he had married the respondent, the court perhaps assumed that he had notice of the application. *Smithe v. Smithe and Roupell* (3) was also a case of variation. Here, too, the respondent and the co-respondent had married. The costs of the applicant and of the trustees were ordered to be paid by the co-respondent. In *Irwin v. Irwin and Layard* (4) the co-respondent was ordered to pay the costs of appor-
tioning and settling the damages which had been awarded against him. The
order was made on a motion asking that these costs should be paid by the co-respondent. He was the respondent to the motion and was heard in opposition
to it. It may be noticed that in this case BUTT, J., observed (59 L.J.P. 53,
at p. 54), that the costs in question :

... come within the usual order made at the trial where a co-respondent was
condemned in the costs of the suit.

This appears to mean that they were covered by the words "to be incurred" contained in the decree. This may very well be correct since the costs of appor-
tioning and settling damages are merely consequential on, and incidental to,
the award of damages itself. But the co-respondent obviously had a right to
be heard upon that question.

These authorities do not appear to us to do more than establish the self-
evident proposition that the court has full power to order the costs of applica-
tions subsequent to decree to be borne by the co-respondent. They do not
in our view support the view that any such costs automatically and without
further order fall on the co-respondent by force of the language of the decree :
or the view that the court has power to make an order against the co-respondent
in his absence without his having an opportunity of being heard. Once it is
conceded, as it must be, that the costs of such applications are in the discretion
of the court and that the discretion must be exercised in the light of the particular
facts, it appears to us to follow of necessity that the court ought not to make an
order against a co-respondent unless it is satisfied that the co-respondent has
had notice of the application. It is, we think, correct to say that by the
language of the decree the co-respondent must at the least be taken to be warned
that future costs may be awarded against him and if with knowledge that an
application is being made he chooses not to take any steps to obtain a hearing
he cannot complain.

This last observation as to the warning given by the language of the decree
suggests a criticism of the common form of order. As we have pointed out,
the effect of the order is not what on its face it would appear, at least to an un-
instructed person, to mean, for it does not mean that the co-respondent will
have to bear future costs in any event : before they can be thrown upon him a
further order is required by which the costs in question are made costs in the
cause. And it is just because such a further order is required that the co-
respondent should have the opportunity of objecting to it. But the form
of the decree is, in our opinion, misleading and might well induce a co-respondent
who did not have the advantage of skilled advice as to its meaning to under-
stand that he would have to pay all future costs in any event and so cause him
to refrain from taking any steps to protect himself. The order should, in
our opinion, be altered so as to run as follows :

... condemned the co-respondent in the costs incurred on behalf of the said
petitioner in this cause and such further costs to be incurred on behalf of the petitioner
as the court shall direct to be costs in the cause.

Order accordingly.

Solicitors : *Spiro & Steele* (for the appellant (petitioner)) ; *Gordon Gardiner,*
Carpenter & Co., agents for *J. R. C. Miller,* Portsmouth (for the respondent).
[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BREWSTER v. DRENNAN.

[COURT OF APPEAL (Scott and MacKinnon, L.JJ., and Uthwatt, J.), October 23, 1945.]

Inns and Innkeepers—Loss of guest's property—Bedroom door without lock—Fur cape left by guest in bedroom—Liability of landlord.

A The appellant was a guest at a small hotel owned and managed by the respondent. The door of the room she occupied was not fitted with a lock and could not be secured. On mentioning this matter to the respondent, she was assured that it would be quite safe for her to leave her belongings in the bedroom. While the appellant was absent, her valuable fur cape which she had left in the bedroom, was stolen. The county court judge who tried the action found for the landlord holding that an obviously valuable fur cape should have been deposited with the landlord for safe custody instead of being left in the bedroom. On appeal :—

B HELD : in the circumstances of the case the loss of the fur cape was not due to the appellant's failure to take the ordinary care which a prudent person would take, and the appellant was entitled to recover damages for her loss.

Shacklock v. Ethorpe, Ltd. (1) applied.

C [EDITORIAL NOTE. It is not, *per se*, negligence for a guest at an hotel to omit to lock his bedroom door, in the case of a small hotel where everyone is under the observation of the staff. Equally it is not negligence, when no locks are provided on the doors, to leave valuable goods in the bedroom of such an hotel, relying upon the assurance of the landlord that the goods would be safe. What is or is not prudent in such circumstances depends, in the words of MONTAGUE SMITH, J., in *Oppenheim v. White Lion Hotel Co.* (1871) L.R. 6 C.P. 515, at p. 522) upon the state "of society at the time and place" of the theft.

D AS TO DUTY OF INNKEEPERS IN RESPECT OF GUESTS' PROPERTY, see HALSBURY, Hailsham Edn., Vol. 18, pp. 150-159, paras. 208-218; and FOR CASES, see DIGEST, Vol. 29, pp. 13-15, Nos. 170-187.]

Case referred to :

*(1) *Shacklock v. Ethorpe, Ltd.*, [1939] 3 All E.R. 372; Digest Supp.

E APPEAL by the plaintiff from a decision of His Honour JUDGE SCOBELL ARMSTRONG sitting at Truro and Falmouth County Court, dated June 11, 1945. The relevant facts are set out in the judgment of SCOTT, L.J.

S. R. Edgedale for the appellant.

H. M. Pratt for the respondent.

SCOTT, L.J. : In this case I think that the appeal must be allowed. It is a claim by the appellant against an inn-keeper for the loss of her fur cape. F The inn in question was a small one on the front facing the docks in Falmouth, where the chief trade was from people who came in from the ships and otherwise for drinks, and so on. There were a few bedrooms on the first floor, and the appellant was staying in a bedroom at the end of a passage (which did not go beyond her bedroom) turning right from the staircase from down below. Turning left from the staircase, at the other end of the passage there was a ladies' w.c. There was not brought to her attention any notice with regard G to an inn-keeper's liability. The fur cape was, with other things, left by the appellant on Christmas Day on a peg at the back of the door in her bedroom, and was stolen by somebody.

The material facts of the case are these. That room, and apparently other rooms, had no lock and could not be locked. She asked the inn-keeper about that, and, in effect, he said : "Do not worry; nobody will steal here." Those are the real circumstances of the case.

H Can it be said that the loss of the cape was due to the guest's negligence, within the law as laid down in the House of Lords in the opinion of LORD MACMILLAN in *Shacklock v. Ethorpe, Ltd. (1)* ? In my view the decision of the judge, who held that the appellant was to blame for the loss by reason of her own negligence, was erroneous. At a small hotel like that, where a guest would be entitled to assume, without anything being said by the inn-keeper, that an eye would be kept upon people going upstairs who had no business to go there at all, I cannot see that the mere fact of leaving it on the door of the hotel room in those circumstances would necessarily be negligence. But, having regard

to the conversation which took place between her and the inn-keeper, I think it is quite impossible to say that she was guilty of any negligence.

For these reasons, judgment must be entered for the appellant for the amount claimed, £177 10s. 0d. as damages, with costs here and below.

MACKINNON, L.J. : I agree.

UTHWATT, J. : I agree.

Appeal allowed with costs. Judgment for the plaintiff (appellant) for £177 10s 0d. as damages.

Solicitors : *Peake & Co.*, agents for *Ratcliffe, Son & Henderson*, Falmouth (for the appellant) ; *A. J. Adams & Adams*, agents for *Coulter Hancock & Co.*, Truro (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

PERRINS v. SMITH.

[KING'S BENCH DIVISION (Humphreys and Lynskey, JJ.), November 8, 1945.]

Food and Drugs—Licensing of slaughter-houses—Cow slaughtered in unlicensed shippen—Shippen not “premises used in connection with the business of slaughtering animals”—Shippen not used as “slaughter-house”—“Premises”—“Slaughter-house”—Food and Drugs Act, 1938 (c. 56), ss. 57 (1), 100 (1).

A butcher had permission from a farmer to keep his cow in a shippen which was in the occupation of the farmer. The butcher killed his cow in the shippen with the intention of selling the flesh for human consumption. He was charged with an offence under the Food and Drugs Act, 1938, s. 57 (1) (b), in that he had used the premises as a slaughter-house without the occupier of the premises holding a licence to use those premises as a slaughter-house. By sect. 100 (1) of the Act, “premises” were defined as including “messuages, buildings, land, easements and hereditaments of any tenure,” and “slaughter-house” as “any premises used in connection with the business of slaughtering animals, the flesh of which is intended for sale for human consumption.” The farmer was not a slaughterer of animals, and the shippen had never been used in connection with the business of slaughtering animals ; in fact, no animals had been slaughtered there before. It was contended by the prosecution that, even though the premises themselves did not come within the definition of “slaughter-house,” by killing the cow there the butcher had used them as a “slaughter-house” :—

HELD : since the shippen was not a “slaughter-house” within the definition in sect. 100 (1) of the 1938 Act, by killing his cow there the butcher had not used it as a “slaughter-house” within the meaning of the Act, and he had not, therefore, committed an offence under sect. 57 (1) (b) of the Act.

[EDITORIAL NOTE.] This case decides that premises which are not within the definition of a slaughter-house do not necessarily become such by reason only of the slaughter thereon of an animal, the flesh of which is intended for human consumption. Conversely, it was decided in *Hides v. Littlejohn* ((1896) 74 L.T. 24), that premises on which animals are kept for slaughter are as much a slaughter-house as the place where they are actually killed.

AS TO SLAUGHTER-HOUSES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 499-506, paras. 1059-1071, and Supplement ; and FOR CASES, see DIGEST, Vol. 38, pp. 222-224, Nos. 544-556.

FOR THE FOOD AND DRUGS ACT, 1938, ss. 57 (1) and 100 (1), see HALSBURY'S STATUTES, Vol. 31, pp. 287 and 313.]

APPEAL by way of case stated from a decision of magistrates dismissing an information under the Food and Drugs Act, 1938, s. 57. The facts are fully set out in the judgment of HUMPHREYS, J.

A. E. Baucher for the appellant.

H. P. J. Milmo for the respondent.

HUMPHREYS, J. : This is a case stated by justices who dismissed an information against the respondent charging him with an offence under the Food and

Drugs Act, 1938, s. 57 (1) (b), in that he on Nov. 28 unlawfully did use certain premises as a slaughter-house, the occupier himself not then holding a licence under that section granted by the local authority authorising him to keep those premises as a slaughter-house.

The facts were apparently uncontradicted and are very well stated in the case. The respondent is a butcher. He had permission from the occupier of a shippen to use that shippen to shelter his cow and to keep some poultry. In fact, on

A Nov. 28, he slaughtered his cow in the shippen, and it is found that the flesh of that cow was intended for sale for human consumption. It is further stated in the case that the occupier of the premises in question, the shippen, is not a slaughterer of animals; he is said to be a farmer, and the shippen in question is not used in connection with the business of slaughtering animals; previously no animal had been slaughtered there. In those circumstances, the justices came to the conclusion that there was no proved use, on Nov. 28, of that shippen as a slaughter-house, and their decision might well have been challenged if it had not been for the definition of "slaughter-house" which is to be found in sect. 100 (1) of the Act. In that section "premises" are defined as including "messuages, buildings, land, easements and hereditaments of any tenure"—the widest possible definition; and "slaughter-house" is defined in this way:

C "Slaughter-house" means any premises used in connection with the business of slaughtering animals, the flesh of which is intended for sale for human consumption.

The question, therefore, which arises may be put in a sentence as being this: Did the respondent use these premises as a slaughter-house? It has been contended on behalf of the appellant, who is the town clerk of the borough which was responsible for the prosecution in this case, that although it may be said that the premises themselves do not come within the definition of "slaughter-house," they were being used as a slaughter-house. That would imply, I think, D that the killing upon those premises of any animal [the flesh of which was intended for human consumption] would be the use of the premises as a slaughter-house. If Parliament had intended to prohibit the killing of any animal in any place which was not a licensed slaughter-house, it would have been very easy to say so. Our attention has been drawn to the fact that during the war certain restrictions were created, one of which is the Livestock (Restriction on Slaughtering) (No. 2) Order, 1940, (S.R. & O., 1940, No. 1856) which provides:

E 2 (1) Except under the terms and conditions of a licence granted . . . under the authority of the Minister, no person shall slaughter or cause to be slaughtered for human consumption any livestock [which means any animal].

That is not what was provided by the Food and Drugs Act, 1938, and in my opinion such absurd consequences would follow from our holding that these premises, although not—as they clearly are not—within the definition of

F "slaughter-house," yet were used as a slaughter-house, that I think the justices came to a right conclusion; at all events, I am not prepared to differ from the conclusion at which they arrived. It has been said with perfect truth by counsel for the respondent that, if we were to hold otherwise, it would mean that any person who killed any animal which he intended to sell for human food—if he shot a rabbit, for instance, in his own field—would be guilty of the offence of using that field (which comes within the definition of the word "premises") G as a slaughter-house; and, as nobody could ever hope to obtain a licence to use as a slaughter-house the whole of his property upon which he had the right of shooting, it would mean that everybody who shot anything (other than birds) which was intended for sale for human food would be guilty of an offence.

For these reasons, I think the justices came to a right conclusion here, and I think this appeal should be dismissed.

H LYNKEY, J.: I agree, and I have nothing to add.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. Edgar Perrins*, Town Clerk, Southport (for the appellant); *Pritchard, Englefield & Co.*, agents for *Brighthouse Jones & Co.*, Southport (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

KLOSSER v. KLOSSER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Hodson, J.), October 17, 18, 1945.]

Husband and Wife—Proceedings by wife before justices for desertion—Parties resident in England—Husband domiciled in South Africa—Husband's application for leave to commence divorce proceedings in South Africa—Wife served with notice before determination of proceedings before justices—Justices refusing to entertain wife's summons for want of jurisdiction—Appeal by wife—Jurisdiction of justices' court not dependent on domicile of parties—Determination of proceedings within the discretion of justices. A

On June 6, 1945, the husband, whose domicile of origin was South Africa, presented an *ex parte* petition in the appropriate court in South Africa for leave to sue his wife for restitution of conjugal rights or for a decree of divorce on the ground of her desertion. This was followed by a document known as an "intendit" which set out that the husband had presented a preliminary application for divorce proceedings to be instituted in South Africa, and, for this purpose, a summons was accordingly issued to the wife on July 10, 1945. The wife, without being aware that such proceedings were pending, took out, in England, a summons on June 8, 1945, under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, on the ground that her husband had unlawfully deserted her. On July 26, 1945, the wife was served with documents relating to the South African proceedings. At the hearing before the justices, on July 27, 1945, at which the husband did not appear, the wife drew the attention of the court to the existence of the suit pending in South Africa. The justices thereupon refused to make any order on the ground that they had no jurisdiction to entertain the summons. The wife appealed:— B C D

HELD: (i) as the statutory jurisdiction given by the Summary Jurisdiction (Married Woman) Act, 1895-1925, did not depend upon the domicile of the parties, who were actually residing within the jurisdiction, the justices could properly entertain the summons. The principle in *Higgs v. Higgs* (3) and *Knott v. Knott* (4) that where proceedings arising out of the same subject-matter in a justices' court overlapped with a petition pending in the High Court, the proceedings in the inferior court should be stayed, did not indicate that the justices could not exercise a discretion in determining the matter before them according to the convenience of the proceedings. E

(ii) there being no reason to suppose that the petition was filed in South Africa with a view to obstructing any proceedings here, the justices, before deciding the matter raised in the wife, should insure that the parties realise the consequences resulting from such determination. F

(iii) in the circumstances the decision of the justices must be reversed and the wife's summons restored.

[EDITORIAL NOTE.] The magistrates apparently took the view that the principle in *Thornton v. Thornton* (1), that a wife's suit in England will not be stayed because of foreign proceedings by the husband, does not apply where the English proceedings are in a court of summary jurisdiction, especially where the husband has, *prima facie*, a foreign domicile. They are held, however, to have jurisdiction to entertain the summons, since no decision affecting status can be pronounced by the justices, and their procedure is a matter for their discretion. As a decision of a competent English court would necessarily have a strong influence on the course of the proceedings in the foreign court the PRESIDENT reminds the justices, to whom the case is sent back, that every means should be taken to warn the husband of the consequences of ignoring the English proceedings. G

AS TO CONCURRENT JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 6, pp. 357-360, paras. 414, 415; and FOR CASES, see DIGEST Supp., Husband and Wife, Nos. 6089a, 6089b.] H

Cases referred to:

- (1) *Thornton v. Thornton* (1886), 11 P.D. 176; 11 Digest 478, 1321; 55 L.J.P. 40; 54 L.T. 774.
- (2) *Von Eckhardstein (Baroness) v. Von Eckhardstein (Baron)* (1907), 23 T.L.R. 593; 11 Digest 427, 920.
- * (3) *Higgs v. Higgs*, [1935] P. 28; Digest Supp.; 104 L.J.P. 1; 152 L.T. 24.

- * (4) *Knott v. Knott*, [1935] P. 158; Digest Supp.; 104 L.J.P. 50; 153 L.T. 256.
(5) *Harriman v. Harriman*, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557.

APPEAL by the wife from a decision of the Lancashire justices for the Kirkdale Division, dated July 27, 1945, dismissing an application made by her under the Summary Jurisdiction (Married Women) Acts, 1895-1925, on the ground of her husband's desertion.

A *A. M. Hamilton* for the appellant.

Cur. adv. vult.

LORD MERRIMAN, P.: This is an appeal from the Lancashire Justices, sitting in the Kirkdale Division. It has just been pointed out to us that this appeal is out of time, but having regard to the nature of the determination and the consequences involved, and it being quite clear upon the notice of appeal that the extension was to be asked for, we think that it is right to extend the time, the respondent not having chosen to appear to deal with any part of this appeal.

The case raises a rather difficult and awkward point, which I think can best be illustrated by stating quite shortly the relevant dates. It is clear that in 1945, the husband was, and, I believe, still is serving under the jurisdiction of the Admiralty in this country, but it is also apparently common ground that his domicile of origin is in the Union of South Africa—I believe in the Cape Province. About any change of domicile which may have occurred later, I say no more than that the wife is evidently intending to establish, if she can, that such a change has occurred.

On June, 6, 1945, the husband presented a petition *ex parte*, in accordance with the rules of the court, for leave to sue in the appropriate court in South Africa for restitution of conjugal rights or a decree of divorce on the ground of desertion. That was followed the next day by a document known as an "intendit," which sets out that he had presented this preliminary application, and that, in turn, was followed up, on July 10, by a summons to the wife returnable on some date in Aug., 1945, and the appropriate procedure for setting down the case. I gather that the wife had not, at any rate in June, 1945, had any intimation that these proceedings were pending. In complete ignorance of this fact, she took out on June 8, 1945, a summons returnable on July 6, 1945, based upon desertion, the decision upon which is the subject of this appeal. I ought to have added that it is admitted that on July 26, she was served with the South African proceedings, and it was on the day after, namely, July 27, that her summons finally came on for determination before the justices. Meanwhile she had, through her solicitors, obtained these various documents and, quite rightly, called the attention of the justices to the existence of the suit and its state at the moment. I ought to say the husband never appeared; he completely ignored the proceedings, and the justices decided that they had no jurisdiction. I will read what they say, though that in itself is not conclusive. They say:

The point raised by Mr. Munro [that is the wife's solicitor] is extremely interesting and difficult, and we have listened to his argument with great interest. The bench have considered the cases of *Thornton v. Thornton* (1) and *Von Eckhardstein* (2), which at first sight appear to give this court jurisdiction to adjudicate upon this case. In these cases, however, the English proceedings were in the High Court, but in the present case a magistrate's court should, we consider, hesitate before interfering in any proceedings instituted in a superior court.

I understand that in addition to the two cases mentioned, the decisions in *Higgs v. Higgs* (3), and in *Knott v. Knott* (4), were brought to the knowledge of the justices. It does not clearly appear from the statement of their reasons that they challenged jurisdiction, and it might be that they merely thought it best not to proceed; but I think that the point has been cleared up, though we have not the original letter before us, by a letter from the justices' clerk quoted in a letter which counsel has read to us, to the effect that the justices drew up no order because they held that they had no jurisdiction.

In that respect I think they were wrong, and I think that the wife is clearly entitled to have it declared that the justices have jurisdiction. As I understand it, the statutory jurisdiction to deal with these matrimonial disputes which is given by the Summary Jurisdiction (Married Women) Acts does not depend

upon domicile. No decision affecting a final change of status can be pronounced by the justices, and it is for that reason, no doubt, that the question of domicile does not come into it. If the parties are residing in the jurisdiction, that has always been held to be sufficient to give the justices jurisdiction to exercise the powers conferred upon them under these Acts, and, indeed, it is plainly indicated both in *Higgs v. Higgs* (3), and in *Knott v. Knott* (4), that the procedure which this court recommended, where there is an overlap between a petition pending in the High Court and proceedings arising out of the same subject-matter in the justices' court, is not obligatory in the sense that it depends upon any qualification in the Act itself but is rather a matter for the discretion of the justices to be exercised according to the manifest convenience and decency of the proceedings. A

I find it impossible to uphold the decision that the justices had no jurisdiction, and that must be reversed. The real difficulty in this case is what should be done after the restoration of the matter to the cognisance of the justices. That is a much more difficult question. I do not propose here and now to make an order, which will either compel the justices to hear or not to hear the summons. I propose to leave it to their discretion and good sense, with such guidance as is to be obtained from the observations I am about to make, and I am quite sure that they will take care that nothing is done until they are satisfied that both sides are fully aware of the possible consequences either of the case proceeding to a determination or of its not proceeding to a determination. Counsel for the appellant has undertaken that the fullest possible information will be given to the husband to enable him to come to a considered decision whether he does or does not take any part either in resisting the continuance of the proceedings or of promoting the hearing. B C

The point as I see it is this: I have no reason—and it is not suggested that there is a reason—to suppose that these proceedings in South Africa were merely obstructive. The dates lend no colour to the suggestion—and I have not heard anything to suggest—that they were instituted with a view to blocking any proceedings which might be taken in this country by the wife. I am assuming that. It has not been discussed, but there appears at the moment to be no ground for any such supposition; and in these proceedings he is asserting that the wife is a deserter. D

I am not going to attempt to lay down, because I have no material for doing so, what the South African law is, but it is at least possible that the court in South Africa might find itself embarrassed, if not bound, by a decision of a court of competent jurisdiction in this country, in the sense exactly opposite to that which the petitioner before the court in South Africa was maintaining. On the other hand the husband might find himself very much strengthened and reinforced by having a decision of a court of competent jurisdiction in this country in support of the allegations which he was putting forward. I say no more than this, that all the considerations to which we alluded in *Higgs v. Higgs* (3) and *Knott v. Knott* (4) should be very much in the mind of the justices before deciding to proceed with the summons for the time being: if we were right in considering the inconvenience which might arise when the two proceedings were pending in this country, and, notwithstanding the fact that short of a decision of a Divisional Court confirming it, a decision of the justices would not be binding in the rival suit in the Divorce Court, *a fortiori* do these considerations apply when the court in this country is the court of competent jurisdiction. We do not know whether any qualifications have been introduced regarding the efficacy of a decision of such a court by any case in South Africa corresponding with *Harriman v. Harriman* (5). The point is that before the justices decide to go on, I think that they ought to take, and the wife through her advisers ought to take, every means to insure that the husband has a full opportunity of considering what may be the more than usually serious consequences of a decision against him or the advantage of a decision in his favour. E F G

Provided full consideration is given to these matters I am prepared to leave the disposal of this question to the good sense of the justices, and all that is necessary formally to do is to reverse their decision that they have no jurisdiction and to restore the wife's summons before them. H

HODSON, J. : In so far as the justices have decided, as they appear to have

done, that they have no jurisdiction to entertain this summons, they were wrong, and, therefore, their decision must be reversed. I agree that it does not involve that they are directed to hear the summons at once or even to hear it at all. The discretion to hear or not to hear the summons is theirs, and that will be exercised in accordance with the principles which have been laid down to-day. It may be, of course, that the husband will not prosecute his proceedings for divorce in South Africa with diligence or at all, but that is a matter which can be ascertained; and it may be that unless care is taken he may be prejudiced, by a decision in this country, in the proceedings which he is taking in South Africa, and that can be avoided if the necessary steps which have been indicated are taken to warn him of the possible consequences of taking no notice of this summons, which he appears hitherto to have done.

Appeal allowed. Summons by the wife to be restored before the justices.

Solicitors: Hyman Isaacs, Lewis & Mills, agents for Herbert J. Davis, Berthen & Munro, Liverpool (for the appellant).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Re TRUSTS OF HOBOURN AERO COMPONENTS, LTD.'S AIR-RAID DISTRESS FUND, RYAN AND OTHERS v. FORREST AND OTHERS.

[CHANCERY DIVISION (Cohen J.), October 25, 26, November 7, 1945.]

Charities—Charitable purposes—Fund raised by employees of a company to provide grants for ex-employees in the Forces and for contributors in respect of air-raid damage—No means test applied in considering claims—Claims by non-contributors not considered—Gift not for general public purposes nor within “poor relations” cases—Fund not subject to valid charitable trusts.

Trusts and Trustees—Administration of trust—Fund raised by employees of company to provide grants for ex-employees in the Forces and for contributors in respect of air-raid damage—Non-charitable purposes—Fund to be distributed amongst contributors in proportion to amount contributed—Amounts received by way of grant to be brought into hotchpot.

H.A.C., Ltd., was engaged in the manufacture of aeroplane parts. Before the war it had one factory at Coventry and 400 to 500 employees. During the war, it operated 3 factories, in different parts of the country, and the number of its employees was 1,300. Before the war, the employees of the company had, of their own accord, established a benevolent fund, from voluntary contributions from their wages, to provide sickness allowances for the contributors thereto. The company took no part in the administration of the fund which was managed by a committee elected by the employees and some of whom were trustees of the fund. After the outbreak of the war, the employees made voluntary contributions for sending parcels to former employees then serving with the Forces. At a meeting of the benevolent fund committee held on Aug. 27, 1940, it was decided that the benevolent fund should be kept separate from the war emergency fund and separate accounts were opened. The latter fund, which afterwards became the Air-Raid Distress Fund, was originally called the War Emergency Fund and was intended to provide soldiers' parcels and leave grants, and grants to employees “in dire distress as the result of enemy action.” No rules or regulations in regard to this fund were made, but in Nov., 1940, all employees of the company were asked to contribute to the fund by way of deduction of 2d. a week in the £ from their wages. Of the then employees all but 5 agreed to the deduction and of the new employees all but 1 agreed. Except for these 6 employees from whom no deductions were made, all the employees of the company were willing contributors to the fund, which was used for payments of (i) £1 a week to former employees serving with the Forces and grants to those returning on leave, and (ii) grants in respect of air-raid distress. The committee refused to recognise claims by any employees who did not contribute to the fund, and no means test was applied when a claim was being considered. On Jan. 15, 1944, the committee re-

solved to discontinue grants to former employees serving with the Forces and to continue the fund solely as an air-raid distress fund for employees or former employees serving with the Forces. In Sept., 1944, it was decided to stop contributions to the fund. The total amount of the fund expended was £2,574 6s., of which £2,102 17s. 6d. was in grants to former employees with the Forces, and £471 8s. 6d. was in air-raid damage relief. The balance of the fund amounted to £5,886 11s. 7d. The questions to be determined were (i) whether the fund was subject to a valid charitable trust and if so whether, in the events which had happened, it should be administered *cy-pres*; (ii) if the fund was not subject to a valid charitable trust, how it should be distributed amongst the contributories thereto (since the Crown did not claim the fund as *bona vacantia*); (iii) if the fund was to be distributed, whether a contributor who had received benefit from the fund was bound to bring the amount of that benefit into hotchpot. It was contended on behalf of the contributors to the fund that the purposes of the fund were not charitable because (i) poverty was not a necessary qualification for participation in benefits; (ii) the fund was not for the benefit of the community or a section of the community and, therefore, even if its purpose was in essence charitable, the law would not recognise it as charitable. It was contended for the Attorney-General that the fact that poverty was not a necessary qualification for participation in benefits did not prevent the fund being for charitable purposes:—

HELD: (i) the fact that poverty was not a necessary qualification for participation in benefits did not prevent the purposes of a fund from being charitable. Relief of air-raid distress was clearly a charitable purpose within the fourth head in *Inland Revenue Comrs. v. Pemsel* (1).

(ii) the purposes of the fund were not of a public character, because the fund was for the benefit of the employees of a particular concern and, therefore, it was not a trust directed to the benefit of the community or a section of the community.

Re Drummond (8) followed. *Re Compton* (5) applied.

(iii) since (a) the purposes of the fund were not of a public character and (b) the case did not fall within the exception class of cases known as the "poor relations" cases (poverty not being a necessary qualification in the recipients of benefit from the fund), the fund was not subject to a valid charitable trust.

Re Compton (5) applied.

(iv) the fund available for distribution should be distributed amongst all the persons who had contributed to the fund in proportion to the total amount contributed by them respectively, each such person bringing into hotchpot any amount received by him by way of benefit out of the fund.

Re British Red Cross Balkan Fund (10) applied. *Re Printers and Transferrers Amalgamated Trades Protection Society* (11) and *Re Lead Co.'s Workmen's Fund Society* (12) distinguished.

[EDITORIAL NOTE. The principle underlying this decision is that expressed by LORD GREENE, M.R., in *Re Compton* (5), when he says that a charitable gift is deprived of its necessary public character when the claimants have to assert and prove that "they stand in some specified relationship to the individuals A.B., C.D., and E.F., such as children or employees." Accordingly, an air-raid distress fund for the benefit of the employees of a company is, although charitable, not a public charity and, therefore, not a valid charitable trust.

AS TO ASSOCIATIONS FOR BENEFIT OF MEMBERS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 130, 131, para. 172; and FOR CASES, see DIGEST, Vol. 8, pp. 261—263, Nos. 240-252.

AS TO APPLICATION OF SURPLUS ON TERMINATION OF PURPOSE OF SUBSCRIBED FUND, see HALSBURY, Hailsham Edn., Vol. 33, pp. 147, 148, para. 247; and FOR CASES, see DIGEST, Vol. 43, pp. 657, 658, Nos. 904-910.]

Cases referred to:

* (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 8 Digest 241, 1; 61 L.J.Q.B. 265; 65 L.T. 621.

* (2) *Re De Carteret, Forster v. De Carteret*, [1933] 1 Ch. 103; Digest Supp.; 102 L.J.Ch. 52; 148 L.T. 188.

* (3) *Re Chaplin, Neame v. A.-G.*, [1933] Ch. 115; Digest Supp.; 102 L.J.Ch. 56; 148 L.T. 190.

- (4) *Re Good, Harington v. Watts*, [1905] 2 Ch. 60; 8 Digest 258, 197; 74 L.J.Ch. 512; 92 L.T. 796.
- * (5) *Re Compton, Powell v. Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158.
- (6) *Re Monk, Giffen v. Wedd*, [1927] 2 Ch. 197; Digest Supp.; 96 L.J.Ch. 296; 137 L.T. 4.
- (7) *Re Christchurch Inclosure Act* (1888), 38 Ch.D. 520; 8 Digest 289, 658; 57 L.J.Ch. 564; 58 L.T. 827.
- A * (8) *Re Drummond, Ashworth v. Drummond*, [1914] 2 Ch. 90; 8 Digest 244, 28; 83 L.J.Ch. 817; 111 L.T. 156.
- (9) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mær. 529, 572; 12 Digest 483, 3961.
- * (10) *Re British Red Cross Balkan Fund, British Red Cross Society v. Johnson*, [1914] 2 Ch. 419; 43 Digest 657, 906; 84 L.J.Ch. 79; 111 L.T. 1069.
- * (11) *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; 43 Digest 109, 1142; sub nom. *Re Printers and Transferrers Society, Challinor v. Maskery*, 68 L.J.Ch. 537.
- B * (12) *Re Lead Co.'s Workmen's Fund Society, Lowes v. Smelting Down Lead with Pit and Sea Coal (Governor & Co.)*, [1904] 2 Ch. 196; 25 Digest 341, 419; 73 L.J.Ch. 628; 91 L.T. 433.

ADJOURNED SUMMONS, under the Trustee Act, 1925, to determine (i) whether the Air-Raid Distress Fund of Holbourn Aero Components, Ltd., was a valid charitable trust and if so whether, in the events which had happened, the fund should be applied *cy-pres*; (ii) if the fund was not a valid charitable trust, how it ought to be distributed amongst the contributories thereto. The first four defendants were contributors to the fund and represented different classes of contributors. The facts are fully set out in the judgment.

J. G. Strangman for the plaintiffs, members of the committee of the fund.

Harold Christie, K.C., and *Hector Hillaby* for the first defendant.

D. L. Oliver for the second defendant.

I. J. Lindner for the third defendant.

D. S. Chetwood for the fourth defendant.

H. O. Danckwerts for the fifth defendant, the Attorney-General.

Cur. adv. vult.

COHEN, J.: Hobourn Aero Components, Ltd., formerly called Pattison & Hobourn, Ltd., carry on business in the manufacture of aeroplane parts. Before the war their only factory was at Coventry, but during the war, under the dispersal arrangements, they took over two shadow factories, one at Kettering and one at Market Harborough. When all three factories were open, the number of their employees was 1,300, of whom 700 were at Coventry, 300 at Kettering, and 300 at Market Harborough. The employees of the company were both provident and generous. Prior to the outbreak of the present war, the employees of the company (then only some 400 to 500 in number) had established a voluntary fund called the "benevolent fund" into which they paid 1d. per week each from their wages. This fund was used to provide sickness allowances for the contributors. In addition, they made voluntary contributions effected by deductions from wages and which were used and distributed partly in subscriptions to hospitals, so as to provide more favourable terms for such of them as might be attending such hospitals, and partly in donations to St. Dunstan's, Dr. Barnardo's and the Red Cross. All these contributions were voluntary and the company itself took no part in the administration or affairs of the funds, which were managed by a committee elected by the employees, the moneys being in the hands of some of them as trustees.

By the end of 1939 certain of the employees had joined the Forces, and some had proceeded overseas. Thereupon the employees started making weekly hat contributions among themselves at the factory for the purposes of forming a fund from which there could be provided and sent to former employees serving in the Forces parcels of food, clothing and cigarettes. Such parcels were provided and sent to former employees serving in the Forces whether they had themselves contributed to such collections or not, and also out of such collections there were paid from time to time to such former employees when on leave small sums of money in the nature of leave grants.

On Aug. 27, 1940, a meeting of the benevolent fund committee at the statute which it was decided that the old benevolent fund ought to be knition in *Inland* the war emergency fund, and separate accounts were oysons administering being described as (a) The Pattison & Hobourn Benevole to the recipients of

Pattison & Hobourn War Emergency Fund. The latter was intended to cover soldiers' parcels, soldiers' leave grants and grants to employees who were awkwardly placed owing to air raids or other damage. The second-mentioned account was that which afterwards became the account of the Air-Raid Distress Fund. No rules or regulations in regard to this Air-Raid Distress Fund were ever made, but in Nov., 1940, about the time of the first big raid on Coventry, a printed form was issued to all the employees of the company, inviting them to contribute to the fund by way of deduction of wages. The first two paragraphs of the printed form read as follows:

The purpose of this fund is to help any employee who is in dire distress as the result of enemy action. It does not aim at replacing all losses incurred, but to give a helping hand at a time when you most need it. Claims made on this fund should be made in writing, and a claims form is to be completed.

It then says how the forms are to be filled in, and it goes on:

It is necessary for a committee of five to be formed to deal with claims arising, and your vote is requested on one only of the two suggestions below.

In fact, however, no set form for claims ever appears to have been prepared. Finally, after dealing with two methods of administration, it goes on:

Further, it is suggested that the Saturday collection be discontinued, and instead a sum of 2d. in the £ per week be deducted from your wage. Are you in agreement that 2d. in the £ be deducted each week for the Distress Fund for Pattison & Hobourn, Ltd.?

All the then employees except five signed this form. Nothing appears to have been done to secure similar consents from new employees until some date in 1942, when a printed form was pasted on the back of the engagement cards and new employees were asked to sign this form. The printed form on the back of the engagement card reads:

I am agreeable to have the contributions for charities, etc., deducted from my wages.

"Charities, etc.," is a vague term, but pay slips which were exhibited show that, in addition to health and unemployment insurance and income tax, deductions were made under the heading "Hosp." and "Red X." I was told that "Hosp." referred to deductions for the Benevolent Fund, and that the deductions for the Air-Raid Distress Fund were lumped with the 1d. a week for Red Cross under the heading "Red X." No deductions were made from the pay of the five persons who refused to sign the original form or of one new employee who objected to such deductions. With these exceptions, deductions were made in every case, and I think it may be taken that, with these six exceptions, all the employees were willing contributors to the fund.

Expenditure from the fund fell under two headings: (i) payments to former employees serving in His Majesty's Forces, and (ii) payments in respect of air-raid distress. Payments to those serving in His Majesty's Forces fell into two categories: (i) a *per capita* payment of £1 per month which was sent to each man so serving or, if so requested by any man, invested on his behalf in national savings certificates, and (ii) payments to men returning on leave. Payments in respect of air-raid distress were mainly grants for clothing and the like urgently required by victims of the air raids on Coventry, but there was evidence of payments to employees at the factories whose homes in London had been damaged by air-raid action, to cover their expenses in going to London to ascertain their position. I must add, first, that the committee refused to recognise claims by any employees who did not contribute to the fund, and, secondly, that in considering a claim no means test was applied. The total aggregate amount expended on both classes of expenditure was £2,574 6s., of which £2,102 17s. 6d. was expended on grants to soldiers and £471 8s. 6d. on air-raid damage relief.

On Jan. 15, 1944, the committee resolved:

... that as from Jan. 31, 1944, grants to ex-members serving with the Forces should be discontinued, and that the fund be continued solely as an air-raid distress fund to assist employees or ex-employees with the Forces who have suffered the loss

61 or contents by enemy action.

* (2) *Re De Carte*,

52; 148 L.T. exception of a few payments for expenses of the character

* (3) *Re Chaplin*, *Noted*, no payments were made out of the fund either to 148 L.T. 190. in His Majesty's Forces or for air-raid distress relief.

In Sept., 1944, it was decided to stop deductions, and on Sept. 7, 1944, the following resolution was passed :

Motion by Mr. Essam that the fund be liquidated immediately and that the proper percentage due be given back to all subscribers to the fund and that a sick and benevolent fund be started from scratch at the cessation of hostilities was seconded by Mr. Wilson. On being put to the vote Mr. Essam's motion was carried by an overwhelming majority.

A Subsequent resolutions were proposed purporting to vary that resolution. None of such resolutions was put into effect, and finally the summons now before me was issued to obtain the decision of the court as to the proper disposal of the balance of the fund, which amounts to £5,886 11s. 7d.

The first question raised by the summons is :

Whether the fund is now subject to a valid charitable trust and if so whether in the events which have happened the fund ought to be applied *cy-pres*.

B Counsel for the first defendant, a contributor to the fund, argued that the purposes of this fund were not charitable (a) because poverty was not a necessary qualification for participation in benefits, and (b) because, even if the purpose was in essence charitable, it was not such a purpose as the law would recognise as charitable, since it was not directed to the benefit of the community or a section of the community. As to the first point, it is clear that poverty was not a
C necessary qualification, but I agree with counsel for the Attorney-General that this does not dispose of the matter and that, apart from the second point raised by counsel for the first defendant, the bequest with which I have to deal would be a valid charitable bequest.

That, popularly speaking, the objects of the fund are charitable is, I think, beyond doubt. I would refer in this connection to the observations of LORD
D HERSHELL, in *Inland Revenue Comrs. v. Pemsel* (1), where he says ([1891] A.C. 531, at pp. 571, 572) :

I am unable to agree with the view that the sense in which "charities" and "charitable purpose" are popularly used is so restricted as this. [That is referring to the restriction of poverty.] I certainly cannot think that they are limited to the relief of wants occasioned by lack of pecuniary means. Many examples may, I think, be given of endowments for the relief of human necessities, which would be as generally termed charities as hospitals or almshouses, where, nevertheless, the necessities to be
E relieved do not result from poverty in its limited sense of the lack of money. Take, for example, an institution for saving the lives of shipwrecked mariners. Its object is to render assistance to those in dire want of it, to meet a form of human need which appeals to the benevolent feelings of mankind, but not one which has its origin in the lack of money. Nevertheless, I do not believe that any one would hesitate to call it a charity, or to say that money expended in rescuing drowning men was applied to a charitable purpose. Or again, what of a society founded for the protection of children of tender years from cruelty? Would not this be commonly described as a charitable
F purpose? And yet it is not pecuniary destitution that creates the necessity which such a society is designed to relieve. It is the helplessness of those who are the objects of its care which evokes the assistance of the benevolent. I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

G The relief of air-raid distress is clearly a charitable purpose within this definition, and if it were necessary for the decision of this case to decide the point, I should be inclined to hold that in relation to air-raid distress relief, the law does not lag behind popular opinion.

In *Re De Carteret* (2), MAUGHAM, J., said ([1933] 1 Ch. 103, at p. 108) :

I am, I think, justified, according to existing authorities, in saying that objects
H analogous to those mentioned in the statute [*i.e.*, 43 Eliz. c. 4] are in certain circumstances admitted to be charities, and the precise words contained in the preamble to the statute are not final in coming to a conclusion as to whether a particular trust is charitable in the legal sense.

If the fund now in question had been established for the relief of air-raid distress in Coventry, I do not think the court would hesitate to hold that such a purpose was of a public nature analogous to the cases mentioned in the statute and within the fourth head of LORD MACNAGHTEN's classic definition in *Inland Revenue Comrs. v. Pemsel* (1), notwithstanding that the persons administering the fund were under no obligation to apply the means test to the recipients of

bounty. Compare *Re Chaplin* (3), where MAUGHAM, J., upheld a gift for the provision of a Home of Rest notwithstanding that, as the judge held, the testator's object was not merely to provide for the relief of poverty and the objects must be justified on grounds other than the relief of poverty.

So far as the presents to soldiers are concerned, assistance can, I think, be derived from authority: see *Re Good* (4). As MR. J. W. BRUNYATE says in an interesting article in the *LAW QUARTERLY REVIEW*, Vol. 61, 268, at p. 277, that was "an extreme case" but it contains a useful statement of principle. In that case:

A testator gave his residuary personalty upon trust for the officers' mess of his regiment, to be invested and the income to be applied in maintaining a library for the officers' mess for ever, any surplus to be expended in the purchase of plate for the mess.

FARWELL, J., in upholding the gift, said ([1905] 2 Ch. 60, at p. 67):

I am not of course suggesting for a moment that the officers are objects of charity. It is the public, not the officers, that are benefited by better means being put at the disposal of the officers to enable them to make themselves efficient servants of the King for the defence of their country.

So it might be argued that a fund for supplementing the pay of the Army would tend to make them more efficient servants of the King, by removing complaints as to the discrepancy between the rates of pay of our Army and the rates of pay of the soldiers of some of our Dominions and Allies.

I turn, therefore, to the second point taken by counsel for the first defendant. The law on this point is stated in *TUDOR ON CHARITIES*, 5th Edn., p. 11, in the following terms:

In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community.

In *Re Compton* (5) this statement of the law was approved as correct by the Court of Appeal ([1945] 1 All E.R. 198, at p. 200). The question, therefore, which I have to decide is whether or not the employees of the company who contributed to the Air-Raid Distress Fund are a section of the community. I think I am bound by authority to answer this question in the negative, although it seems at first sight strange that the inhabitants of a small village or of a few ancient cottages of a manor may be the objects of a valid charitable trust (see *Re Monk* (6) and *Re Christchurch Inclosure Act* (7)), whereas a trust for the benefit of the employees of a large concern is not a trust directed to the benefit of a section of the community and is, therefore, not a valid charitable trust. The authorities which, in my view, compel me so to hold are *Re Drummond* (8) and *Re Compton* (5). In *Re Drummond* (8) a testator by his will:

... bequeathed certain shares to his trustees upon trust to pay the income therefrom to the directors of a commercial company "for the purpose of contribution to the holiday expenses of the workpeople employed in the spinning department of the said company in such manner as a majority of the directors should in their absolute discretion think fit," the directors having power to "divide the same equally or unequally between such workpeople."

The judge came to the conclusion:

... that the workpeople in question could not properly be regarded as poor people, within the statute of Elizabeth; and, further, that the trust was not one for general public purposes, but a trust for private individuals, and not being charitable was void as infringing the rule against perpetuities.

In the course of his judgment EVE, J., said ([1914] 2 Ch. 90, at p. 96):

Then it is said, even if that be so [i.e., even if it is not a trust for the relief of poverty] the gift may still be a good charitable gift in that it is a gift for general public purposes, to be applied for the benefit of a particular section of the public, and is within the principles underlying that class of case in which a good charitable trust has been held to be created, not for all the inhabitants of any particular town, village, or borough, but for a particular, and very often a small, section of those inhabitants, such, for example, as a trust for the benefit of those possessing certain qualifications (freemen of the borough), or residing in certain tenements, or constituting a particular class, such as widows, or aged persons. I confess if I could have seen my way to uphold the gift on that line of authority I should have been pleased to do so, because, undoubtedly, the dividing line is a very fine one. [Counsel for the Attorney-General] argues that the trust is really a trust for public purposes, the securing of a holiday

A for a large body of the inhabitants of this particular city, and the benefiting thereby of the general health of the community; that it only differs from the cases on which he relied in that it fixes the qualification, not with reference to any particular place of residence, or to the possession of any particular franchise, but with reference to employment in a particular business, and a particular department in that business, and he contends that, if a public trust can be created for the occupiers for the time being of a few small cottages in a Hampshire village, a similar trust can certainly be created for the large aggregation of persons constituting for the time being the employees in some of these great industrial undertakings. I think the answer to that argument has been supplied by [counsel for the testator's heir-at-law] in the course of his reply. This is not a trust for general public purposes; it is a trust for private individuals, a fluctuating body of private individuals it is true, but still private individuals, and that being so it is outside the line of authorities cited, and not being for public purposes it is not charitable, but is void as infringing the rule against perpetuities.

B This decision was approved by the Court of Appeal in *Re Compton* (5). The facts in *Re Compton* (5) have no relation to the point before me, but LORD GREENE, M.R., in giving the judgment of the court, laid down certain general principles. He said ([1945] 1 All E.R. 198, at p. 201):

C No definition of what is meant by a section of the public has, so far as I am aware, been laid down and I certainly do not propose to be the first to make the attempt to define it. In the case of many charitable gifts it is possible to identify the individuals who are to benefit or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character. Thus if there is a gift to relieve the poor inhabitants of a parish the class to benefit is readily ascertainable. But they do not enjoy the benefit when they receive it by virtue of their character as individuals, but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others and that is something

D into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are A.B., C.D., and E.F., but because they are poor inhabitants of the parish. If in asserting their claim it were necessary for them to establish the fact that they were the individuals A.B., C.D., and E.F., I cannot help thinking that on principle the gift ought not to be held to be a charitable gift since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character. It seems to me that the same principle ought to apply when the claimants, in order to establish their

E status, have to assert and prove, not that they themselves are A.B., C.D., and E.F., but that they stand in some specified relationship to the individuals A.B., C.D., and E.F., such as that of children or employees. In such a case too, a purely personal element enters into and is an essential part of the qualification which is defined by reference to something, i.e., a personal relationship to individuals or an individual which is in its essence non-public. An example of this class of case is to be found in *Re Drummond* (8).

F Then LORD GREENE, M.R., stated the facts in *Re Drummond* (8), read a portion of the extract from the judgment of EVE, J., which I have already read, and concluded, so far as this point is concerned, with these words ([1945] 1 All E.R. 198, at p. 202):

G The fact that in cases where a personal element forms an essential part of the qualifications the numbers involved may be large does not appear to me to make any difference to the principle to be applied. Once that element is present numbers can make no difference. The gift is in such a case a personal gift. It may, of course, fail for uncertainty, but that is neither here nor there. As a personal gift it will be obnoxious to the rule against perpetuities; but it would not have been affected by the Statute of Mortmain. I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named *propositus* cannot on principle be a valid charitable gift.

H It seems to me quite clear, from the fact that LORD GREENE, M.R., cited and approved *Re Drummond* (8), that employment by a particular company is a "purely personal relationship" to a named *propositus* within the principle as laid down by LORD GREENE, M.R., and, as I have already said, poverty is not a necessary qualification in the recipients of benefit from the Air-Raid Distress Fund. The case does not, therefore, fall within the exceptional class of cases known as the "poor relations" cases which are explained by LORD GREENE, M.R., in *Re Compton* (5) where he says ([1945] 1 All E.R., 198, at p. 206):

There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded . . .

I cannot, therefore, uphold the trust of the Air-Raid Distress Fund as a valid charitable trust, having regard to the principles laid down by the Court of Appeal in *Re Compton* (5). Accordingly, I must answer the first question in the negative and declare that the fund is not now subject to a valid charitable trust. A

I therefore turn to the second question raised by the summons. The Crown does not claim the fund as *bona vacantia*, and the question is as to how it ought to be distributed amongst the contributories thereto. The form of the question suggests that persons who had ceased to contribute before Sept. 9, 1944, the date on which contributions ceased, might be excluded, but counsel whose interest it was to support this argument admitted that there was no valid ground for any such limitation. In my opinion, he was right in making this admission, since the basis on which the contributions are returned is that each donor retained an interest in the amount of his contributions except so far as they are applied for the purposes for which they were subscribed. Moreover, the rule in *Clayton's case* (9) is not applicable in such a case: see *Re British Red Cross Balkan Fund* (10). B

The question was also raised as to whether a subscriber who received benefit from the fund was bound to bring the amount of that benefit into hotchpot for the purposes of the distribution. My attention was called to *Re Printers and Transferrers Amalgamated Trades Protection Society* (11), and *Re Lead Co.'s Workmen's Fund. Society* (12), in which orders had been made for distribution of the fund without regard to such benefits. But in both those cases the decision to this effect was based on the difficulty and the expense involved in ascertaining the amount of the respective benefits and the persons to whom they were paid. In the present case, I was told that, while considerable labour would be involved, there would be no difficulty in ascertaining the amounts of the benefits or the recipients, and I have come to the conclusion that I should not be justified in deviating from the general principle, that a person seeking to participate in the distribution of a fund must bring into hotchpot anything he had already received therefrom. C

Accordingly, I propose to declare that the fund now available for distribution ought to be distributed amongst all the persons who during their employment by Hobourn Aero Components, Ltd., contributed to the fund at any time after Dec. 12, 1940, in proportion to the total amount contributed by them respectively to the fund, each such person bringing into hotchpot any amount received by him by way of benefit out of the fund. Questions may arise in the working out of this order, and it may be found necessary to appoint trustees of the fund, but I see no reason for doing so at this moment. It will be sufficient to give liberty to apply. Costs of all parties of this application must be taxed as between solicitor and client and paid out of the fund. D

Declaration accordingly. E

Solicitors: *Edward & Childs* (for the plaintiffs); *Crawley & de Reya* (for the first defendant); *Holman, Fenwick & Willan* (for the second defendant); *Arthur E. Kaufmann* (for the third defendant); *Coldham, Birkett & Fleuret* (for the fourth defendant); *Treasury Solicitor* (for the Attorney-General). F

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] G

GREENHALGH v. ARDERNE CINEMAS, LTD. AND MALLARD.

[CHANCERY DIVISION (Vaisey, J.), October 30, 31, November 1, 1945.]
Company—Alteration of rights of a class of shareholders—
10s. ordinary shares already issued, subdivided into 2s.
Ranking pari passu for all purposes with other 2s. ordinary
shares already issued—Rights of original holders of 2s. shares affected but not
"varied"—Companies Act, 1929 (c. 23), Sched. I, Table A, art. 3.

A The defendant company, A.C., Ltd., was a private company, formed in 1936, with a nominal capital of £26,000, originally divided into 21,000 preference shares of 10s. each and 31,000 ordinary shares of 10s. each. By Mar., 1941, 26,295 of the ordinary shares had been issued. In Mar., 1941, the company was in financial difficulties and an agreement was entered into with G., the plaintiff, whereby debentures were to be issued to G. for the sum of £11,000 advanced by him to the company. The agreement further provided that the company was to subdivide the whole of the unissued ordinary shares of 10s. each into ordinary shares of 2s. each ranking *pari passu* with the issued ordinary shares for all purposes; the new subdivided shares (called the 1941 2s. shares) were to be allotted as to 19,213 shares to G., and as to 4,312 shares to certain directors of the company; and G. was to be appointed an additional director. In order further to protect his interests during the continuance of the debenture debt, G. entered into a collateral agreement with the three directors to whom the new shares were issued. By this agreement, it was provided that these three directors should vote with and support G., as and when required by him, and that G. would use his votes to re-elect them as directors upon their retirement by rotation. In Nov., 1941, however, each of the three directors transferred his 2s. shares and some of his 10s. ordinary shares to other members of the company, and it was held, in an action brought at the time by G., that the transferees held the shares free from any obligation arising under the collateral agreement. As a result, G. lost to a certain extent the protection which he had endeavoured to secure under the two agreements. On Mar. 12, 1943, at an extraordinary general meeting of the company, it was resolved, by a small majority, that the existing 10s. ordinary shares should be subdivided into 2s. shares ranking so as to form one class of shares with the 1941 2s. shares and carrying the same voting rights, etc. The effect of this was that G. was no longer able to enforce any control whatever over the affairs of the company. It was contended on behalf of G. that this resolution for subdivision was void because (i) it varied the rights attaching to the 1941 2s. ordinary shares without the consent which the holders of those shares, regarded as a class, were entitled to give or withhold under the provisions of Table A, art. 3, which had been adopted by the company; (ii) it amounted to a breach of the contract under which G. had advanced the £11,000, because, although the agreements contained no express term to that effect, it was obviously the intention of the parties that G.'s control should not be taken away during the continuance of the debenture debt. On behalf of the defendants it was contended that although the rights of the holders of the 1941 2s. shares had been affected by the subdivision, they had not been "varied" thereby:—

HELD: (i) although the 10s. ordinary shares and the 1941 2s. ordinary shares might be one class of shares for some purposes, they were two distinct classes of shares as regards voting and similar rights. (*Sovereign Life Assurance Co. v. Dodd* (2), and *Re United Provident Assurance Co., Ltd.* (3) applied.) The 1943 subdivision, although materially affecting the rights attached to the 1941 2s. ordinary shares, did not vary them; rights of one class of shares were not "varied" by operations effected upon other classes of shares. The subdivision of the remaining 10s. ordinary shares was not, therefore, vitiated by the provisions of Table A, art. 3.

(ii) since there was no express term in the agreements which had been infringed, the subdivision did not amount to a breach of contract.

[EDITORIAL NOTE. The word "class" is a vague and non-technical term which, in the case of gifts, refers to "all those who shall come within a certain category or description defined by a general or collective formula" (*per* LORD SELBORNE, L.C., in *Pearks v. Moseley* (1880) 5 App. Cas. 714, at p. 723), but in relation to company

matters "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest" (*per* BOWEN, L.J., in *Sovereign Life Assurance Co. v. Dodd* (2)). Applying this test, it is held that a subdivision of some 10s. shares into 2s. shares will result in the creation of distinct classes for the purpose of voting, although the 10s. and 2s. shares may remain one class for other purposes.

It is, further, held that the rights attached to a class of shares are not "varied" within the meaning of that term in Table A, r. 3, if they are merely affected by operations upon other classes of shares.

As to SUBDIVISION OF SHARES, see HALSBURY, Hailsham Edn., Vol. 5, p. 168, para. 300, and p. 290, para. 499.

As to VARIATION OF RIGHTS ATTACHED TO CLASSES OF SHARES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 156, 157, para. 281; and FOR CASES, see DIGEST, Vol. 10, pp. 776-780, Nos. 4857-4882, and Supplement.]

Cases referred to :

* (1) *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234.

* (2) *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573; 10 Digest 1090, 7626; 62 L.J.Q.B. 19; 67 L.T. 396.

* (3) *Re United Provident Assurance Co., Ltd.*, [1910] 2 Ch. 477; 10 Digest 1058, 7406; 79 L.J.Ch. 639; 103 L.T. 531.

ACTION by a shareholder for (i) a declaration that a resolution passed at an extraordinary general meeting of the defendant company, on Mar. 12, 1943, was void and of no effect; (ii) ancillary relief. The facts are fully set out in the judgment.

Gerald Upjohn, K.C., and *I. J. Lindner* for the plaintiff.

Valentine Holmes, K.C., and *J. Pennycuik* for the defendant company.

G. Russell Vick, K.C., and *H. O. Danckwerts* for the second defendant.

VAISEY, J. : Since the association between the plaintiff and the defendant company began in the early part of 1941, there has been trouble between them, and there have been three previous actions to which I shall have to refer, this one being the fourth.

The defendant company was incorporated in 1936 as a private company, and its shares were of two classes, *viz.*, preference and ordinary shares. The total nominal capital was £26,000, originally divided into 21,000 preference shares of 10s. each and 31,000 ordinary shares of 10s. each. At the time when the plaintiff and the defendant company first came into contact, *i.e.*, in Mar. 1941, 10,020 of the preference shares had been issued and 26,295 of the ordinary shares, leaving unissued 10,980 of the preference shares and 4,705 of the ordinary shares. The preference shares do not come into this story at all, and I think it will be unnecessary for me to refer to them again.

At the time which I have mentioned, the company was in temporary financial embarrassment. It was indebted to its bankers, to whom it had incurred a substantial debt by way of overdraft, and that was secured by a first mortgage on the company's cinema-theatre. It was also indebted to one Brooke, who had lent to the company a sum approximating to £11,000 which amount was secured by a second mortgage on the theatre and also by a debenture. At that time the relations between Brooke and the directors of the defendant company were unsatisfactory, and, through the medium of the company's solicitor, the plaintiff was induced to consider advancing money to pay off Brooke and to put the company once more on its feet. There were considerable negotiations, in which the secretary of the company took part, and ultimately arrangements were come to which were reduced into writing. The terms of the agreement so written out are printed in para. 4 of the statement of claim in this action, and are divided into 11 paragraphs or heads. There is no doubt, in my judgment, that this was an agreement made between the plaintiff and the defendant company. At one time it was alleged that the parties to the agreement were the plaintiff and certain directors of the defendant company so that the company itself was no party to the agreement. That has not been pressed, and indeed, I think, it is not capable of being sustained.

The arrangement, putting it quite shortly, was that a series of debentures should be issued to the plaintiff, carrying interest at 8 per cent. per annum, for a total nominal sum of £11,000, and the plaintiff was to take up the whole of those debentures, paying cash for them, which was to be utilised in repaying Brooke his debt, including the costs of certain proceedings which he had instituted to enforce that debt. The next head of the agreement was that the

company was to subdivide the whole of the ordinary shares of 10s. each then unissued into ordinary shares of 2s. each ranking *pari passu* with the issued ordinary shares for all purposes, and an extraordinary general meeting of the defendant company was to be called for the purpose of carrying out that operation. The new shares, *i.e.*, the subdivided shares, were to be allotted as to 19,213 to Greenhalgh, the plaintiff, and 4,312 shares to certain directors of the company in such proportions as should be agreed between them. The total

A of those two amounts of shares is the number of shares into which the 4,705 unissued 10s. ordinary shares would have been sub-divided when the operation of subdivision into 2s. shares had been carried out. Greenhalgh, the plaintiff was to be appointed an additional director, and there are other provisions to which I think it unnecessary for me to refer. But it is important to refer, for the purpose of the narration of the history of this matter, to what was called a collateral agreement whereby three persons, namely, Mrs. Quinlan, Hallam B and Joseph Mallard, agreed that they would, as and when required by the plaintiff, vote with and support the plaintiff, and there was a corresponding obligation laid upon the plaintiff to use his votes in favour of the persons I have named, for the purpose of re-electing them to the board of directors upon their retirement in the ordinary course of rotation.

C At first all went well. The 4,705 unissued ordinary shares of 10s. each were subdivided into 23,525 ordinary shares of 2s. each, and they are referred to conveniently in the statement of claim as "the 1941 2s. ordinary shares." The plaintiff became a director and, I think, the chairman of the board of directors, and the subdivided shares were issued, as to 19,213 to the plaintiff and the balance of 4,312 to Mrs. Quinlan, Joseph Mallard and Hallam in equal proportions, with, I think, one odd share going to one of them—to which it does not matter. There can be no doubt that one of the objects, and possibly the sole D object, of subdividing the unissued 10s. shares and issuing them in the form of 2s. shares to the plaintiff was to give him a substantial voting power. I think that that must have been the purpose, and while that remained *in statu* and no change took place of a material kind, the plaintiff had that measure of control, partly from the 2s. shares issued to himself and partly from the 2s. shares issued to the three signatories to the collateral agreement, which bound them, as will be remembered, to vote with and support the plaintiff when E required. As the only other issued ordinary shares were 26,295 ordinary shares, the total votes carried by the 10s. ordinary shares and the 1941 2s. ordinary shares amounted to 49,820, and of those the plaintiff, partly by virtue of his own holding and partly by virtue of the collateral agreement, controlled 35,275 votes, which gave him a clear majority of over 20,000.

F The first of the actions was begun on July 1, 1941. It came before MORTON, J., and judgment was given on Oct. 3, 1941. The necessity for that action arose by reason of the denial by the three signatories to the collateral agreement that it bound them. It is not necessary for me to go into the arguments which were adduced in support of their proposition, but one of the points was that as the obligation to vote with the plaintiff was perfectly general, and extended both to directors' meetings and to shareholders' meetings, it was as to the former void, and that the obligation could not be divided, so that the whole of it was invalid, G and in the result the three signatories could ignore it altogether. MORTON, J., however, made an order declaring that the three persons in question were bound and were under a duty to the plaintiff as and when required by him to exercise all rights of voting exercisable by them or any of them in respect of any shares held by them in the company in such manner as the plaintiff might from time to time require, and certain ancillary relief was granted. So that the collateral agreement was construed as binding the signatories as shareholders, but not, H of course, as binding them in regard to the casting of their votes at meetings of the directors.

The next step or move on the part of the shareholders and directors other than the plaintiff was to transfer the 1941 2s. shares and some of the 10s. ordinary shares which they held to other members of the company, and the question then arose as to whether the transferees of the shares were or were not bound by the provisions of the collateral agreement; or, to put it in another way, the question was whether the obligation did or did not run with the shares. That action was started on Nov. 17, 1941, and judgment was given by UTHWATT,

J., on Jan. 28, 1943, holding, in effect, that the obligation did not run with the shares and that the transferees held those shares free from any obligation arising under the collateral agreement. That case was taken to the Court of Appeal, which held, upholding UTHWATT, J., that the obligation under the collateral agreement was only an obligation to vote in respect of whatever shares the three signatories might have from time to time acquired and came to an end when the shares were sold : see *Greenhalgh v. Mallard* (1).

Up to this point it will be observed that the plaintiff had established his rights under the collateral agreement as against the original signatories, but had failed to establish his rights under the collateral agreement as against the transferees from those signatories, and in that regard and to that extent the protection for which he had stipulated under the combined effect of the main agreement and the collateral agreement had failed him, although one may assume with reasonable certainty that the plaintiff never contemplated that that part of the protection which he had obtained could or would be so quickly taken away from him. The third action was to enforce specific performance of the obligation on the part of the company to issue the debenture, and that was necessitated not by any general refusal of the company to carry out its duty in that regard, but rather by disputes as to the precise form of the debenture, it being one of the more glaring defects of this very unsatisfactory document that the usual and common form provision, for the precise drafting of the debenture to be entrusted to some expert, was omitted.

We now come to the matters complained of in this action. The defendant Mrs. Mallard, who is the other defendant in addition to the defendant company, served on the company a requisition for the calling of an extraordinary general meeting of the company for the purpose of passing a resolution subdividing the rest of the existing 10s. ordinary shares into 2s. shares ranking so as to form one class of shares with the 1941 2s. ordinary shares, and carrying the same dividend rights and voting rights and rights in a winding up. At a directors' meeting held shortly after the service of that requisition, it was resolved to convene an extraordinary general meeting for Nov. 25, 1941, to deal with the matters mentioned in the requisition notice, and such meeting was in fact convened, but owing to the pendency of the second action, and as a result of a certain undertaking being given, the meeting was adjourned for 18 months and was ultimately held on Mar. 12, 1943, when it was resolved that the operation of subdivision should be effected and that the 131,475 ordinary shares of 2s. each resulting from this last operation of subdivision should be added to the 1941 2s. ordinary shares so as to form one single class. There was a poll taken at that meeting and the resolution was carried by a small majority. The effect of that was to take away from the plaintiff the remaining prop which supported the control which had been given him by the agreement of Mar., 1941, because it was perfectly obvious that the votes carried by the 1941 2s. ordinary shares would be completely swamped by the very much larger number of votes carried by the 1943 2s. ordinary shares.

It is suggested that that resolution for subdivision was void on two separate grounds : (i) on the ground that it amounts to a breach of the contract under which the plaintiff put up his money ; and (ii) on a more technical ground—that it altered the rights attaching to the 1941 2s. ordinary shares without the consent which the holders of those shares, regarded as a class of shares, were entitled to give or withhold under the provisions of art. 3 of Table A, which formed the relevant provision of the defendant company's constitution.

The writ in this action was issued on May 22, 1944, and shortly previous to that another requisition had been served and acted upon for increasing the capital of the defendant company. I think it is agreed that those resolutions passed at the meeting convened in consequence of that requisition are probably invalid if this action succeeds. There was a motion on May 23, 1944, for interlocutory relief, and that motion was dismissed with costs on June 13, 1944, by COHEN, J., there being undertakings until that date by the defendants to adjourn the extraordinary general meeting (which I think was the one for the increase of the capital) ; but after that motion had been disposed of the meeting was held and a resolution was carried, and it was carried by votes being cast upon the assumption and footing that the later subdivision was valid and justified. The plaintiff was at that meeting, and the plaintiff at that meeting

was, of course, hopelessly outvoted by the holders of the new 2s. ordinary shares, and that is really the subject-matter of the present action. This action as originally framed charged something in the nature of a fraudulent conspiracy, but that part of it has been withdrawn or otherwise disposed of, and all I have to consider is (putting the points in the reverse order to that in which I have previously mentioned them): (i) is this operation of subdivision vitiated by reason of the failure to comply with art. 3 of Table A; and (ii) if it is not so invalidated, does it amount to a breach of the contract of Mar., 1941?

A A good deal of discussion and argument was directed to the question whether, after the first subdivision of shares into the original 10s. ordinary shares and the 1941 2s. ordinary shares, at that time and upon that operation taking effect, there came into existence two classes of shares. I am not sure whether the question is really relevant to what I have to decide in this action. It was, I think, agreed by counsel on both sides that it may well be that shares may form one class for some purposes but constitute two or more classes for other purposes.

B For some purposes I think that the 10s. ordinary shares and the 2s. ordinary shares, both being ordinary shares, formed but one class, but I am disposed to think (though, as I say, I am not sure that it is necessary for my decision in this case) that in any question which arose as to voting rights or anything of that kind, the 10s. shares formed one class and the 1941 2s. ordinary shares formed another class. I am fortified, I think, in taking that view, first by the decision of the Court of Appeal in *Sovereign Life Assurance Co. v. Dodd* (2) in which LORD ESHER, M.R., and BOWEN, L.J., point out that, although the word "class" is not a word of technical art, you cannot put people, whether they be shareholders or policyholders, into the same class if their claims or rights "are not capable of being ascertained by" a "common system of valuation." BOWEN, L.J., used these words ([1892] 2 Q.B. 573, at p. 583):

D "... class ... must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

LORD ESHER, M.R., had previously said ([1892] 2 Q.B. 573, at p. 580):

... if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

E Something to the same effect is the decision of SWINFEN EADY, J., in *Re United Provident Assurance Co., Ltd.* (3), where it was held that the holders of fully-paid £1 ordinary shares formed a different class to holders of £1 ordinary shares with 10s. paid up and another 10s. paid in advance of calls under a particular article, the latter amount carrying 5 per cent. per annum interest.

I think I am justified in saying that in this case the 10s. ordinary shares and the 1941 2s. ordinary shares may be one class of shares for some purposes and two distinct classes of shares for other purposes, and I incline to the view that they are two distinct classes of shares for the purpose for which I am now considering them. But now I have to look at art. 3 of Table A, which deals with the variation of the rights of particular classes of shares in the company. That clause provides:

G If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of 3/4ths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class.

In order to bring the case within that clause, it has to be established not only that the 1941 2s. ordinary shares constitute a class of shares, but that their rights have been or have been purported to be varied.

H It is admitted by counsel for the company that the subdivision of the other 10s. shares, the 1943 subdivision, has most materially affected the rights attached to the 1941 2s. ordinary shares, but he says they are being affected but not being varied. He says that you do not vary the rights of a class of shares by the operations effected upon other classes of shares; and so, for instance, if you have an equal number of preference and ordinary shares in a company, with equal voting rights, assuming each class to have one vote per share, you would not vary the rights of the preference shareholders by issuing additional ordinary shares; in substance you would materially affect those rights, but you would not vary them. In my judgment, that argument must prevail. It is true that in

the present case the way in which the rights of the 2s. shares are affected is somewhat striking, but one has to remember that it is part of the constitution of this company, first, that it should have the right to subdivide its shares, and, secondly (disregarding and not referring now to the preference shares) that in regard to voting, each share should carry one vote. It seems to me that there are so many ways in which the voting rights of the 1941 2s. ordinary shares might have been affected, that I cannot say that this particular method of affecting them varies the rights within the meaning of this clause. I confess that the point does not seem to me to be without some difficulty; at the same time, if I were to read cl. 3 of Table A as extending to anything which might affect the rights of a class of shares, it would amount to my holding that the company could do hardly anything at all; because even the issue of two or three additional shares would affect, and possibly affect materially, the voting powers of a particular group; and I have come to the conclusion that the subdivision of the remaining 10s. ordinary shares, purported to be effected by the resolution in 1943, is not vitiated by the provision of art. 3 of Table A.

In regard to the other point, which may be summarised by saying that it is to the effect that the subdivision really amounts to a breach of contract, I am faced with the difficulty that there is no express term of the written document which can be pointed to as that which is infringed by what has been done. Counsel for the plaintiff put it rather in this way: that it was so obviously the intention of the parties that the control should not be undermined or taken away, at any rate during the continuance of the debenture debt, that I must assume, looking at the agreement as a whole, that it contains implicitly and fundamentally an obligation on the part of the company not to take away what it had given to the plaintiff as security, and that, on that ground, the subdivision of these further shares, which had completed the frustration, from the plaintiff's point of view, of the arrangements under which he put up his money, is something which is so inconsistent with the obvious intention of the parties that the court ought to interfere to prevent it, and that that frustration is something which I ought not to allow.

There again, I find myself in this difficulty that, if this particular method of frustration were to be held invalid, there are obviously many other ways in which the highly precarious position of the plaintiff might be undermined. He no doubt ought to have stipulated from his point of view for some permanence of control—a matter which would not have been beyond the skill of a resourceful draftsman. If he had stipulated for the permanence of that measure of control, there would no doubt have been prolonged discussions between him and the company or their respective advisers as to the means by which that measure of control was to be perpetuated. Unfortunately, the matter never seems to have occurred to anybody, and I should rather guess that it was all done in an optimistic spirit and with the optimistic idea that the parties would continue to be on amicable terms—an idea which was certainly contradicted within a few weeks or even less of the conclusion of this bargain. The fact remains that no such stipulation was made. I have no doubt that the plaintiff thought that he had permanently attached to the signatories to the collateral agreement an obligation to support him by their votes. I have no doubt that he thought that the 1941 2s. ordinary shares would give him a permanent or sufficiently permanent measure of control of the affairs of this company. He was wrong on the first assumption, and I am not without regret in finding, though I do find, that he was wrong in the second.

I made some remarks in the course of the hearing as to the defects in the document which has already, in the short space of four years, produced four Chancery suits. It is to me surprising that the plaintiff should not have taken the trouble to have that document perused by independent and competent legal advisers, but I cannot help that; his incaution has landed him in four actions, each of which was instituted by himself. This action, in my judgment, fails, and I have no alternative but to dismiss it.

Action dismissed: the plaintiff ordered to pay 5/6ths of the taxed costs.

Solicitors: S. A. Bailey & Co. (for the plaintiff); Pritchard, Englefield & Co., agents for Field, Cunningham & Co., Manchester (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

END OF VOLUME TWO.



